









**THE  
CODE OF CIVIL PROCEDURE  
(ACT V OF 1908.)**

**BY**

**NRISINHADAS BASU, B.L. ADVOCATE.**

*Author of the Indian Succession Act, The Indian Evidence Act, Subject-noted Index of Cases, The Principles and Practice of Injunctions, The Law and Practice relating to Receivers, etc., etc.*

**SECOND EDITION**

**EASTERN LAW HOUSE  
LAW BOOK-SELLERS AND PUBLISHERS.**

*15, College Square, Calcutta.*

**1937**

Published by B. C. De,  
of Eastern Law House,  
15, College Square, Calcutta.

## BY THE SAME AUTHOR.

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## PREFACE TO THE SECOND EDITION

I am extremely thankful to the members of the Bench and the Bar for the encouraging reception they have accorded to the first edition of this book. The first edition was exhausted within two years from its publication. In this edition I have incorporated in the body of the book the various amendments made by the Imperial Acts XXXV of 1935, XXI of 1936, VIII of 1937, IX of 1937 and XVI of 1935 as well as the amendments made by the Government of India (Adaptation of Indian Laws) Order, 1937. For the convenience of practitioners practising in British Burma, I have also given the amendments made by the Government of Burma (Adaptation of Indian Laws) Order, 1937. More than sixty sections and rules are affected by G. I. Order and G. B. Order. In this edition many portions of the book have been re written and nearly 200 pages of new matter have been added. All the cases whether reported in official or non-official reports up to the end of June, 1937, have been incorporated. To avoid confusion at the time of referring a rule, I have given all the rules framed by the different High Courts, Chief Courts and Judicial Commissioner's Courts not in the body of the book but in the Appendix. I shall deem my labour amply rewarded if it finds ready reception like its predecessor.

Konnagar  
The 15th August, 1937.

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N. D. B.



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## **ADDENDA**

### **Section 60 of the Code of Civil Procedure.**

*N. B.*—The amendments made to section 60 by Act IX of 1937 shall not have effect in respect of any proceedings arising out of any suit instituted before the first day of June, nineteen hundred and thirty seven.—*Vide Act IX of 1937, s. 3.*

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### **Amendments made by the Madras High Court**

#### **Order XIII.**

Rule 9—Substitute the following for the existing sub-rule (3) and re-number the existing sub-rule (4) as sub-rule (5) :—

(3) Every application for return of a document under the first proviso to sub-rule (1) shall be made by a verified petition and shall set forth facts justifying the immediate return of the original.

(4) The Court may make such order as it thinks fit for the costs of any or all the parties to any application under sub-rule (1). The Court may further direct that any costs incurred in complying with or paid on application under sub-rule (1) or incurred in complying with the provisions of rule 5 of this order, shall be included as costs in the cause.

#### **ORDER XXI.**

Rule 11—(1) Add the following to sub-rule (2) (j) :—

"In an execution petition praying for relief by way of attachment of a decree of the nature specified in sub-rule (1) of rule 53 of this order there shall not be included any other relief mentioned in this clause".

(2) Add the following proviso at the end of sub-rule (2) :—

"Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application".

Rule 17—(1) Substitute the following for sub-rule (1) :—

"(1) On receiving an application for the execution of a decree as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with ; and if they have not been complied with, the Court may reject the application if the defect is not remedied within a time to be fixed by it".

(2) Add the following proviso at the end of the rule :—

"Provided that where an execution application is returned on account of inaccuracy in the particulars required under rule 11 (2) (g), the endorsement of return shall state what in the opinion of the returning officer is the correct amount".

Rule 22—Substitute the following for sub rule (1) :—

"(1) Where an application for execution is made—

- (a) more than two years after the date of the decree, or
- (b) against the legal representative of a party to the decree, or
- (c) where the party to the decree has been declared insolvent, against the

Assignee or Receiver in Insolvency, the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than two years having elapsed between the date of the decree and the application for execution, if the application is made within two years from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him."

(2) Add the following proviso to sub-rule (2) of rule 22 :—

"Provided that no order for execution of a decree shall be invalid owing to the omission of the Court to record its reasons unless the judgment-debtor has sustained substantial injury as the result of such omission."

Rule 24—Substitute the following for sub-rule (3) :—

"(3) In every such process a day shall be specified on or before which it shall be executed and a day shall be specified on or before which it shall be returned to Court."

Rule 31—(1) Substitute the following for sub-rule (3) :—

"(2) Where any attachment under sub-rule (1) has remained in force for three months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold and out of the proceeds the Court may award to the decree-holder in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property, such amount, and, in other cases such compensation as it thinks fit, and shall pay the balance (if any), to the judgment-debtor on his application.

"(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing it which he is bound to pay, or where, at the end of three months from the date of the attachment, no application to have the property sold has been made or, if made, has been refused, the attachment shall cease".

(2) Add the following as sub-rule (4) :—

"(4) The Court may on application extend the period of three months mentioned in sub-rules (2) and (3) to such period not exceeding six months on the whole as it may think fit".

Rule 32—Substitute the following for sub-rules (3) and (4) :—

"(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for three months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree holder such compensation as it thinks fit, and shall pay the balance (if any), to the judgment-debtor on his application. The Court may on application extend the period three months mentioned herein to such period not exceeding one year on the whole as it may think fit.

"(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing it which he is bound to pay, or where, at the end of three months from the date of the attachment or of such extended period which the Court may order under sub-rule (3), no application to have the property sold has been made, or if made has been refused, the attachment shall cease."

Rule 45—Substitute the following for sub-rule (1):—

"Where agriculture produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient, and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing

crop shall specify the time at which it is likely to be fit to be cut or gathered ; and the applicant shall deposit in Court within a date to be fixed by Court, such sum as the Court may deem sufficient to defray the cost of watching and tending the crop till such time."

Rule 53—Substitute the following for sub-rule (1) (b) (ii) :—

"(ii) the holder of the decree sought to be executed or his judgment-debtor if he has obtained the consent in writing of the decree-holder or the permission of the attaching Court, applies to the Court receiving such notice to execute the attached decree."

Rule 54—Add the following as sub-rule (3) :—

"(3) The order of attachment shall be deemed to have been made as against transferees without consideration from the judgment-debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-rule (2) whichever is the earlier."

Rule 57—Substitute the following for rule 57 :—

"57. (1) Where any property has been attached in execution of a decree and the Court hearing the execution application either dismisses it or adjourns the proceedings to a further date, it shall state whether the attachment continues or ceases, provided that when the Court dismisses such an application by reason of the decree-holder's default the order shall state that the attachment do cease.

(2) Where the property attached is a decree of the nature mentioned in sub-rule (1) of rule 53, and the Court executing the attached decree, it shall report to the Court which attached the decree the fact of such dismissal. Upon the receipt of such report the Court attaching the decree shall proceed under the provisions of sub-rule (1) and communicate its decision to the Court whose decree is attached."

Rule 66—Rename the existing clause (e) to sub-rule (2) as (f) and add the following as clause (e) :—

"The value of the property as stated (i) by the decree-holder and (ii) by the judgment-debtor."

Rule 67—Add the following as sub-rule (4) :—

"(4) Unless the Court so directs it shall not be necessary to send a copy of the proclamation to the judgment-debtor."

Rule 69—Substitute the following for sub-rule (2) :—

"(2) Where a sale is adjourned under sub-rule (1) for a longer period than thirty days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it."

Rule 75—Substitute the following for the existing rule :—

"75 (1) Where the property to be sold is a growing crop and the crop from its nature admits of being stored but has not yet been stored, unless the Court decides to proceed under the provisions of sub-rule (2) hereunder, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

(2) Where the crop from its nature does not admit of being stored, or can be sold to greater advantage in an unripe state, it may be sold before it is cut and gathered or in such unripe state, and the purchaser shall be entitled to enter on the land, and do all that is necessary for the purpose of tending and cutting or gathering it."

Rule 85.—Substitute the following for the existing rule :—

The full amount of purchase money payable and the amount required for the Time for payment in full of general stamp for the certificate under rule 94 shall purchase money and value of be paid by the purchaser into Court before the stamp for certificate of sale. Court closes on the fifteenth day from the sale of the property.

Provided that in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

Rule 87.—Substitute the following for the existing :—

Every re-sale of immovable property, in default of the payment of the amounts mentioned in rule 85 within the period allowed for Notification on re-sale. such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

Rule 88.—Substitute the following for sub-rule (1) :—

“(1) Where immovable property have been sold in execution of a decree the judgment-debtor, or any person deriving title from the judgment-debtor, or any person holding an interest in the property may apply to have the sale set aside on his depositing in Court—

(a) for payment to the purchaser, a sum equal to 5 per cent of the purchase money, and

(b) for payment to the decree-holder, the amount specified in proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of that proclamation of sale, have been received by the decree-holder :

Provided that where the immovable property sold is liable to discharge a portion of the decree debt the payment under clause (d) of this sub-rule need not exceed such amount as under the decree the owner of the property said is liable to pay.

Rule 90.—Substitute the following for the existing rule :—

“90. Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets or whose interests are affected the sale, may apply to the Court to set the sale aside on the ground of a material irregularity or fraud in publishing or conducting it :

Provided that the Court may, before admitting the application, call upon the applicant either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realized by the sale, whichever is less or to deposit such amount in Court ;

Provided also that the security furnished or the deposit made as aforesaid, shall be liable to be proceeded against only to the extent of the deficit on a re-sale of the property already brought to sale.

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.”

Rule 99.—Substitute the following for the existing rule—

“99 Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than those mentioned in rule 98) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.”

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# THE CODE OF CIVIL PROCEDURE

## (ACT V OF 1908.)

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*The FIFTH SCHEDULE.—Repealed.*

## ACT NO. V OF 1908.\*

RECEIVED THE G. G.'S ASSENT ON THE 21ST MARCH, 1908.

*An Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature.*

WHEREAS it is expedient to consolidate and amend the laws relating to the procedure of the Courts of the Civil Judicature ; It is hereby enacted as follows :—

**Interpretation of amending and consolidating Act.**—The present Code like the previous ones of 1882 and 1877, is also a consolidating and amending Act. In interpreting the codifying portion of such an Act the observation

\* For Statement of Objects and Reasons, see the *Gazette of India*, 1907, Pt. V, p. 179 ; for Report of Select Committee ; see *Ibid.* 1908, Pt. V, p. 35 and for Proceedings in Council, see *Ibid.* 1907, Pt. VI, p. 135, *Ibid.* 1908, pp. 8, 12 and 212.

For portion of the Civil Procedure Code extended to the Presidency Small Cause Court, Calcutta, see Calcutta Gazette, 1910, Pt. I, p. 814, Schedule A to Rules of practice.



of *Lord Chancellor, Lord Halsbury* in *Vagliano v. Bank of England*, 60 L. J. Q. B. 145=64 L. T. 353=39 W. R. 657=(1891) A. C. 102 at p. 107, must be borne in mind. There he observed: "I am wholly unable to adopt the view that, where a statute is expressly said to codify the law, you are at liberty to go outside the Code, so created, because before the existence of that Code another law prevailed." In the same case at p. 144, *Lord Herschell* also observed: "The proper course is in the first instance to examine the language of the statute and to ask, what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with enquiry how the law previously stood and then assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a Code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost destroyed and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over

The Act has been extended by notification under ss. 5 and 5A of the Scheduled Districts Act, 1874 (14 of 1874), to the following Scheduled Districts:—

- (1) The Districts of Jalpaiguri, Cachar (excluding the North Cachar Hills), Sylhet, Goalpara (including the Eastern Duars), Kamrup, Darrang, Nowgong (excluding the Mikir Hill Tracts), Sibsagar (excluding the Mikir Hill Tracts) and Lakhimpur (excluding the Dibrugar Frontier Tracts). *Gazette of India*, 1909, Pt. I, p. 5. *Gazette of India*, 1914 Pt. I, p. 1690.
- (2) Upper Burma (except the Shan States). *Gazette of India*, 1909, Pt. I, p. 5.
- (3) The Province of Sindh. Bombay Government Gazette, Extraordinary, 1909, Pt. I, *Gazette of India*, 1909, Pt. I, p. 32.
- (4) The Districts of Darjeeling and Districts of Hazaribagh, Ranchi, Palamau and Manbhum in Chota Nagpur. Calcutta Gazette, 1909 Pt. I, p. 25. *Gazette of India*, 1909, Pt. I, p. 33.
- (5) The Province of Kumaun and Garwal and the Tarai Parganas with modifications. United Provinces Gazette, 1909, Pt. I, p. 3. *Gazette of India*, 1909, Pt. I, p. 31.
- (6) The Pargana of Janswar, Bawar in Dehra-Dun and the Scheduled portion of the Mirzapur District. United Provinces Gazette, 1909, Pt. I, p. 4 and *Gazette of India*, 1909, Pt. I, p. 32.
- (7) Coorg. *Gazette of India*, 1909, Pt. I, p. 32.
- (8) Scheduled Districts in Punjab. *Gazette of India*, 1909, Pt. I, p. 33.
- (9) The Districts of Peshawar, Hazara, Kohat, Bannu, Dera Ismail Khan composing the North-West Frontier Province. *Gazette of India*, 1909, Pt. II, p. 80.
- (10) Sections 36 to 43 to all the Scheduled Districts in Madras, *Gazette of India*, 1909, Pt. I, p. 152.
- (11) To the Scheduled Districts of the Central Provinces, except so much as is already in force and so much as authorizes the attachment and sale of immovable property in execution of a decree not being a decree directing the sale of such property. *Gazette of India*, 1909, Pt. I, p. 239.
- (12) To Ajmer-Merwara, except sections 1 and 155 to 158. *Gazette of India*, 1909, Pt. II, p. 480.
- (13) To pargana Dhalbhum, the municipality of Chaibassa in the Kolhan and the Porahat estate in the district of Singhbhum. Calcutta Gazette, 1909, Pt. I, p. 453; *Gazette of India*, 1909, Pt. I, p. 443.

Under section 3 (3a) of the Santhal Parganas Settlement Regulation (3 of 1872), ss. 38 to 42 and 156 and Rules 4 to 9 in Order XXI in the first Schedule have been declared in force in the Santhal Parganas and the rest of the Code for the trial of suits referred to in section 10 of the Santhal Parganas Justice Regulation, 1893, (5 of 1893). Calcutta Gazette, 1909, Pt. I, p. 45 and the whole Code in the Angul District under s. 3 of the Angul Laws Regulation, 1913 (3 of 1913), B. & O. Code.

This Act has been declared in force in British Baluchistan under s. 3 of the Baluchistan Laws Regulation, 1913 (2 of 1913). Bal Code. Sections 38, 39, 41 and 42, 45 and 46 Order IX, Rules 1 and 2, Order XXI, Rules 1—9 have been declared in force in the Arakan Hill District by Regulation I of 1916, s. 2, *see* Supplement to Burma Code.

a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate....." See also A. I. R. 1928 B. 35=30 Bom. L. R. 1 ; 23 C. 563=23 I. A. 18=6 M. L. J. 71 ; 14 A. 145 ; 22 B. 112 ; 29 C. 707=29 I. A. 196=6 C. W. N. 825.

In construing an Act of Parliament which is a consolidating Act and does not profess to amend or alter the provisions of the Acts, consolidated, *prima facie* the same effect ought to be given to its provisions as was given to those of the Act for which it was substituted. *Mitchel v. Simpson*, 25 Q. B. D. 183. In *Bedgett, Cooper v. Adams*, (1894) 2 Ch. 557 at p. 561. *Chitty J.* said : "I referred yesterday to the Lord Chancellor's observations in *Bank of England v. Vogliono* (1891) A. C. 144, with reference to the Bills of Exchange Act, codifying the law, the proper rule of interpretation is to read the Act and to interpret its provisions without reference to previous decisions or to previous legislation, that being a *prima facie* rule only to which there would be reasonable exceptions. As the *Lord Chancellor* said : "I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the Code." Then he gives some examples, which I need not cite at length. But I have here to deal, not with an Act of Parliament codifying the law, but with an Act *to amend and to consolidate the law*, and therefore it is I say those observations do not apply, and I think it is legitimate in the interpretation of the sections in this amending and consolidating Act to refer to the previous state of the law for the purpose of ascertaining the intention of the Legislature."

**Construction Imposed by statutes.**—When a clause in an Act which has received a judicial interpretation is re-enacted in the same terms, the Legislature is deemed to have adopted that interpretation. *Campbell, Ex parte In re*, 5 L. R. Ch. 703=23 L. T. 233=18 W. R. 1056 ; *Balmukund Dube, In the goods of* A. I. R. 1930 All. 82=126 Ind. Cas. 357. The Legislature must be presumed to have known the interpretation put by the Courts and others on the terms of a statute and when a provision of an earlier statute is re-enacted in practically the same language in a latter statute, it is legislative recognition of the correctness of the earlier interpretation. *Pormesher v. Emperor*, 3 Pat. L. J. 537=19 Cr. L. J. 281=4 Pat. L. W. 152 ; *Nogendia v. Peary*, 21 C. L. J. 605=20 C. W. N. 312. "When construction placed upon the provisions of the Code has been reproduced by the Legislature is successive Codes without alteration, the inference is that this constitutes a legislative affirmation of the construction adopted by the Courts." *Partab v. Sarat*, 33 C. L. J. 201=25 C. W. N. 544 ; see also *Kalimuddin v. Sahibuddin*, 24 C. W. N. 4 (14) (F. B.) ; *Monchar v. Sheo Saran*, 25 A. L. J. 545=A. I. R. 1927 All. 369 ; *Ishan v. Safatulla*, 29 C. W. N. 103=35 C. W. N. 36 ; *Jones v. Mersey Docks*, 11 H. L. Cas. 480 ; *Barlow v. Zeal*, 15 Q. B. D. 405 ; *Avery v. Wood*, (1891) 3 Ch. 118.

**Retrospective Operation of Code**—Every statute which takes away and impairs vested rights must not be presumed to have a retrospective operation, unless the language clearly supports a contrary construction. 36 C. L. J. 132 ; 47 C. 1108=24 C. W. N. 1011=58 Ind. Cas. 327. This rule is based on the maxim *Novus Constitutio futuris formam imponere debet non praeteritis* (A new rule ought to be prospective, not retrospective, in its operation) *Moon v. Durdan*, 2 Ex. Ch. 22. But the general principle, indeed, seems to be that alterations in the procedure are always retrospective, unless there be some good reason against it. *Gardner v. Lucas*, 3 App. Cas. 603 ; *Kimbray v. Draper*, L. R. 3 Q. B. 160 ; *Costa Rica v. Erlanger*, 3 Ch. D. 67 ; *Turnbull v. Forman*, 15 Q. B. D. 238. *Wright v. Hale*, 6 H. & N. 227. "No rule of construction is more firmly established than this : that a retrospective operation is not to be given to a statute as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless their effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only." *Per Wright J.* in *Athlamney. In re* (1898) 2 Q. B. 551. But enactments dealing with procedure have an immediate effect and must unless the contrary is expressed apply to all actions whether commenced before or after the passing of the Act. A party has no vested right ; is mere procedure. A. I.

R. 1927 All. 657 ; see also 17 C. L. J. 316=17 C. W. N. 980 ; 30 C. W. N. 18. The general principle, indeed, seems to be that alterations in the procedure are always retrospective, unless there be some good reason against it. *Per Lord Blackburn in Gardner v. Lucas*, 3 App. Cas. 603 ; *Kimbray v. Draper* L. R. 3 Q. B. 160. But a new procedure would be presumably inapplicable, when its application would prejudice rights established under the old. *Phoenix Bessemer Co.*, Ex. p. 45 L. J. Ch. 11. A statute which affects only the procedure would apply to pending actions. *Jaga Mohan v. Behari*, 39 C. W. N. 1006. The general rule is well-established that an amendment of an Act during the currency of a suit does not affect pending actions. The rights of parties are governed by the Act as it existed at the time the suit was started. 37 Bom. L. R. 372=A. I. R. 1935 Bom. 257. But it can not be laid down that a litigant has a vested right to the continuance of the tribunal before which he originally seeks his relief. When an Act or Regulation giving a special jurisdiction is repealed, parties cannot claim as of right that that jurisdiction must continue under the new Act or Regulation. 1935 A. L. J. 18.

**Preamble.**—The preamble is undoubtedly a part of the Act. *Salked v. Johnson*, 2 Ex. 283. The meaning and effect of a preamble of a Code must be understood to overlie the whole Act, giving colour to and controlling its provisions, and by showing the intention of the Legislature supplying *pro tanto* the rule for interpretation of these provisions. 2 A 74 (99).

**Other Rules of interpretation**—It is not allowable, says *Vattel*, to interpret what has no need of interpretation. (Law of N. S. 23). *Absoluta sententia expositore no indiget* (2 Inst. 533). The Legislature must be intended to mean what it has plainly expressed, and consequently there is no room for construction. *Per Parke J.* in *R. v. Banbury*, A. & E. 142. So a Court is bound to construe a section in a statute according to the plain meaning of the language used, unless it finds, either in the section itself or in any part of the statute, anything that will either modify, or qualify or alter the statutory language even if the result of such construction leads to anomalies or be productive even by absurdity. 27 C. 11=3 C. W. N. 660. If the language admits of no doubt or secondary meaning, it is to be obeyed. 32 C. W. N. 1136=A. I. R. 1929 Cal. 141. Where there is a positive enactment of the Indian Legislature the proper course is to examine the language of statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it is founded. A. I. R. 1928 P. C. 2 ; A. I. R. 1928 Lah. 361.

## PRELIMINARY.

Short title, commencement and extent.

1. [S. 1.] (1) This Act may be cited as the Code of Civil Procedure, 1908.

(2) It shall come into force on the first day of January, 1909.

(3) This section and sections 155 to 158 extend to the whole of British India : the rest of the Code extends to the whole of British India, except the Scheduled Districts.

**Amendment in Burma**—Sub-section (3) has been omitted in Burma by Government of Burma order.

**British India**—For the meaning of the expression, *vide* the General Clauses Act, s. 3, clause (7). Native States do not come within the term of British India. 29 C. 400=6 C. W. N. 573 ; 191 P. R. 1888 ; 33 I. A. 1=10 C. W. N. 361. As regards Berar, *vide* 88 Ind. Cas. 430.

**Scheduled Districts.**—*Vide* Schedule I to the Scheduled Districts Act XIV of 1874. Where property is in Scheduled Districts an order for sale under mortgage-decree is without jurisdiction. 51 Ind. Cas. 185=A. I. R. 1919 P. C. 150.

**Foreigners.**—Foreigners are not excepted from the jurisdiction of British Indian Courts. 49 A. 669=A. I. R. 1927 All. 413. Court will not pass a decree against a foreign subject as it cannot enforce it. A. I. R. 1927 Sind 160=238 L. R. 356 ; see also 48 M. L. J. 680=88 Ind. Cas. 430.

**Applicability of Code to proceedings in Revenue Courts.**—Revenue Courts are, in matters arising under the Land Revenue Act, undoubtedly Courts of Civil jurisdiction within the meaning of the Code of Civil Procedure and the procedure of such Courts are governed by the C. P. Code. 155 Ind. Cas. 557=A. I. R. 1935 Nag. 125.

**Code whether exhaustive.**—The Code of Civil Procedure is not exhaustive, 39 Ind. Cas. 763=2 P. L. J. 361.

**Definitions.**

2. [S. 2.] In this Act, unless there is anything repugnant in the subject or context,—

(1) "Code" includes rules :

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47, or section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

*Explanation.*—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final :

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made :

(4) "district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinafter called a "District Court"), and includes the local limits of the ordinary original civil jurisdiction of a High Court :

(5) "foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the "Central Government or the Crown Representative" :\*

(6) "foreign judgment" means the judgment of a foreign Court :

(7) "Government Pleader" includes any officer appointed by the "Provincial Government"\* to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader :

(8) "Judge" means the presiding officer of a Civil Court :

(9) "Judgment" means the statement given by the Judge of the grounds of a decree or order :

(10) "judgment-debtor" means any person against whom a decree has been passed or an order capable of execution has been made :

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued :

(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession :

(13) "movable property" includes growing crops :

(14) "order" means the formal expression of any decision of a Civil Court which is not a decree :

(15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, [a vakil and an attorney] of a High Court :

(16) "prescribed" means prescribed by rules :

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\* Substituted by the Government of India (Adaptations of Indian Laws) Order, 1937. In British Burma read "Governor" for the words within quotations.—*Vide* G. B. order of 1937.

(17) "public officer" means a person falling under any of the following descriptions, namely :—

- (a) every Judge ;
- (b) every member of the Indian Civil Service ;
- (c) every commissioned or gazetted officer in the military or "naval or air"\* forces of His Majesty, while serving "under 'the Crown'"† ;
- (d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorised by a Court of Justice to perform any of such duties ;
- (e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;
- (f) every officer, of "the Crown"‡ whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience ;
- (g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of "the Crown,"‡ or to make any survey, assessment or contract on behalf of "the Crown,"‡ or to execute any revenue-process, or to investigate or to report on, any matter affecting the pecuniary interests of "the Crown,"‡ or to make, authenticate or keep any document relating to the pecuniary interests of "the Crown,"‡ or to prevent the infraction of any law for the protection of the pecuniary interests of "the Crown,"‡ ; and
- (h) every officer in the service or pay of "the Crown,"‡ or remunerated by fees or commission for the performance of any public duty :

(18) "rules" means rules and forms contained in the First Schedule or made under section 122 [or section 125] :

(19) "share in a corporation" shall be deemed to include stock, debenture-stock, debentures or bonds : and

(20) "signed" save in the case of a judgment or decree, includes stamped.

**Amendments in Burma.**—In Clause (15) omit the words "a Vakil and an Attorney."

In Clause 17 in Sub-clause (b) add at the end of the clause "or of the Burma Civil Service (Class I.)"

In clause (18) omit in British Burma the words "or section 125."—*Vide* G. B. Order 1937.

**Code.**—The method of construction properly applicable to an Act divided into sections and rules, as the C. P. Code is, that the sections lay down general principles and the rules provide the means by which they can be applied, and they cannot be otherwise applied, the result is that the rules restrict the provisions contained in the sections. 20 Ind. Cas. 39=18 C. L. J. 613. The body of the Code is fundamental and is unalterable except by the Legislature ; the rules are concerned with details and machinery and can be more readily altered. The body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in more general terms but it has to be read in conjunction with the more particular provisions of the Rules. 43 C. 148 = 33 Ind. Cas. 329 ; see also 44 C. 929=21 C. W. N. 877=41 Ind. Cas. 598. If there is a conflict between a general provision as contained in the order and a rule under the First Schedule the general provision must prevail. *Basavayya v. Mittapalli*, A. I. R. 1926 Mad. 676=1926 M. W. N. 341=51 M. L. J. 90=95 Ind. Cas. 439. Where there is a contradiction between the Schedule and the enacting portion, "it would be quite contrary to the recognized principles upon which the Courts of law construe Acts.....to enlarge the conditions of enactment and there-

\* Substituted by Act XXXV of 1934.

† For the words "under the Crown" substitute in Burma "in Burma."—*Vide* G. B. Order 1937.

‡ Substituted by G. I. Order. But in British Burma read "the Government" for words within quotations.

by restrain its operation by any reference to the words of a mere form given for convenience sake in a Schedule." *Per Lord Penance in Dean v. Grecon*, (1882) 8 P. D. 89; see also *Allen v. Flicker*, 10 A. & E. 640.

**Decree.**—Final decree means decree which settles all disputed questions between parties. A decree modified in a review must be considered as the final decree. A. I. R. 1931 Cal. 323=131 Ind. Cas. 258. Decision finally determining rights of parties, not finally drawn up is still a decree. 26 N. L. R. 24=127 Ind. Cas. 887=Ind. Rul. (1930) Nag. 359. To be appealable an order under s. 47 must be of such a nature as to come within the word "decree" as defined by s. 2 (2). A. I. R. 1927 All. 208=99 Ind. Cas. 455. Where a Court, before deciding a case finally order the names of a certain defendants to be struck off from the record on the ground that the plaintiff made out no cause of action against them, such order is tantamount to a dismissal of the case against those defendants, and the plaintiff can treat the order as a decree. 8 Ind. Cas. 409. An order in a partition suit declaring the specific right of the parties and the property to be partitioned is a decree. 23 C. 279. The definition of decree is not intended to include an interlocutory decision in ordinary suit upon each and every point in controversy between the parties, even in those cases, where the decision upon any such question is embodied in a separate and distinct order passed during the pendency of the proceedings. An order cannot be regarded as a decree unless it is formally drawn up as such or at all events, unless it could be so drawn up. A 'preliminary decree' properly understood is passed only in those cases in which the Court has first to adjudicate upon the rights of the parties and has then to stay its hand for the time being until it is in a position to pass a final decree in the suit. 115 P. L. R. 1911; see also 82 P. R. 1911. "Decree" includes Revenue Court decree. A. I. R. 1925 All. 264=85 Ind. Cas. 660. Decision delivered in default of plaintiff is not a decree. 85 Ind. Cas. 393=A. I. R. 1925 Oudh 485=28 O. C. 124.

The question whether an adjudication is an order or decree to be tested not by general principles but by the expressions of the Code and these words are to be construed in their plain and obvious sense; only such orders of dismissal for default as are treated as such by the Code itself are excluded from the definition. 39 C. L. J. 399=51 C. 715=28 C. W. N. 795=83 Ind. Cas. 220. If an order rejecting the claim of a person to be the legal representative of a deceased plaintiff is to have the character of a decree it must conclusively determined the right of the parties to the suit. A. I. R. 1924 Mad. 813=47 M. L. J. 370=1924 M. W. N. 763=80 Ind. Cas. 942.

**Matters in Controversy.**—"Matters in controversy" in the suit may also come to arise, at a subsequent stage of the suit. A. I. R. 1928 Oudh 362=5 O. W. N. 633=3 Luck. 628. This term must not be understood as relating solely to the merits of the case. It would cover any question relating to the character and status of the party suing, to the jurisdiction of the Court, to the maintainability of the suit and to other matters preliminary, which necessitate an adjudication before a suit is enquired into, in fact all questions concerning a pending suit. It does not include an order passed on an application preliminary to the institution of suit itself, such as application for leave to sue. 2 L. W. 519=17 M. L. T. 447=29 Ind. Cas. 393.

**What are decrees.**—An order of the Court appointing a committee to draw up a scheme of management with regard to *wakf* is a decree. A. I. R. 1930 Cal. 476=31 P. L. R. 220=121 Ind. Cas. 74. The Revenue officer's judgment as to the liability of the lands to assessment or otherwise in manner directed by s. 20, Regulation II of 1819, has the force and effect of a decree. A. I. R. 1930 Cal. 411=51 C. L. J. 297=126 Ind. Cas. 769. Where an appeal against preliminary decree is withdrawn and dismissed, such order of dismissal is decree within s. 2. 143 Ind. Cas. 412=1933 M. W. N. 623=64 M. L. J. 695=A. I. R. 1933 Mad. 444. Where lower Courts decree contains adjudication on several points, each such adjudication is a decree. A. I. R. 1933 All. 473. Order refusing to allow interest *pendente lite* is appealable. 143 Ind. Cas. 43=14 P. L. T. 133=A. I. R. 1933 Pat. 207. An order dismissing an application for a final decree in a mortgage suit is a decree. A. I. R. 1932 Lah. 214. Order dismissing a cross-objection is a decree. A. I. R. 1933 Lah. 661. An order of abatement of a suit is a decree and should not be made *ex parte* without notice to plaintiff. 33 M. L. J. 486=44 I. A. 218 (P. C.)=22 C. W. N. 169=15 A. L. J. 777=19 Bom. L. R. 865=42 Ind. Cas. 43 (P. C.); 38 M. L. J. 266=54 Ind. Cas. 565.

A decree passed on the admission of the defendant is appealable by a person aggrieved thereby. 56 Ind. Cas. 845. Order striking out name of a defendant

and dismissing the suit against him is a decree. 42 M. 219=35 M. L. J. 169=9 L. W. 329=49 Ind. Cas. 835. An order dismissing an application for final decree for sale in a mortgage suit is decree and is appealable as such. 48 Ind. Cas. 298=42 M. 52=35 M. L. J. 552. An order refusing to make a decree under Order 34, rule 6, is a decree. 47 Ind. Cas. 561=40 A. 553=16 A. L. J. 488. An order rejecting Memorandum of Appeal for deficit Court-fee is appealable 67 Ind. Cas. 225=A. I. R. 1922 Nag. 62=18 N. L. R. 15. An order declaring the defendants not liable for *mesne profits*, amounts to a decree. 67 Ind. Cas. 93=A. I. R. 1923 Cal. 308; 22 O. C. 289=54 Ind. Cas. 733; 67 Ind. Cas. 901=3 L. L. J. 237.

Order defining mode and period of taking account is a decree. A. I. R. 1923 Pat. 514=4 P. L. T. 405. An order directing the decree-holder purchaser to pay *mesne profits* on setting aside the sale is a decree. A. I. R. 1930 Cal. 89=56 C. 550=120 Ind. Cas. 807. Decision in reference under s. 30, Land Acquisition Act, being one on rights of contending parties, is a decree within s. 2 (2). A. I. R. 1929 Mad. 223=56 M. L. J. 387=115 Ind. Cas. 345. An order limiting the right of the decree-holder to recover *mesne profits* for a certain period is of the nature of a final decree. 115 Ind. Cas. 591=A. I. R. 1928 Cal. 804. When a Court refuses to ascertain *mesne profits* and holds that the claim is time-barred, that decision operates as a decree. 109 Ind. Cas. 734=A. I. R. 1928 Bom. 236=52 B. 360=30 Bom. L. R. 503. The decree subsequently made on review, even if it does not modify the decree originally passed, is a new decree and therefore no appeal can lie for the original decree. A. I. R. 1928 Cal. 418=107 Ind. Cas. 751. Refusal of adjournment and dismissal of suit in consequence is decree. A. I. R. 1927 Rang. 148=6 Bur. L. J. 77=101 Ind. Cas. 618.

Refusal to record adjustment of a decree is a decree. A. I. R. 1927 Lah. 809=26 P. L. R. 237=105 Ind. Cas. 724. The dismissal of an appeal under Order XXI, r. 11 by High Court is a decree. A. I. R. 1926 Cal. 638=30 C. W. N. 334=93 Ind. Cas. 909. Order in proceedings under s. 47 is decree only if it determines a question which parties ask Court to decide as to their rights or liabilities and not if it decides merely incidental question of procedure. A. I. R. 1924 Pat. 683=2 Pat. L. R. 222=84 Ind. Cas. 576; see also A. I. R. 1936 Mad. 623=71 M. L. J. 256=164 Ind. Cas. 217. The rejection of a Memorandum of Appeal on the ground that the deficit Court-fee has not been paid is not a decree. 163 Ind. Cas. 402=A. I. R. 1936 Pesh. 140. An order rejecting a prayer for restitution under s. 144 on the ground of limitation amounts to a decree. A. I. R. 1936 Cal. 812. All findings conclusively determining rights are not necessarily decrees. A. I. R. 1934 Pat. 92. Order allowing petition for passing of final decree is neither decree nor appealable. A. I. R. 1934 Mad. 198. Order of remand setting aside a decree is not necessarily a decree. A. I. R. 1934 Pat. 97. Every order in execution is not decree. Only such orders as conclusively determine a question between the parties to the suit relating to the execution of the decree are decrees. A. I. R. 1935 Rang. 500. An order passed under s. 144 is a decree within the meaning of s. 2. 158 Ind. Cas. 908=1935 A. L. J. 995=A. I. R. 1935 All. 873. A suit was dismissed. On appeal an application for postponement of the appeal was made by the appellant's pleader on the ground that for some reasons he could not prepare the appeal and therefore he was not able to argue. The Court rejected the application and dismissed the appeal for want of prosecution: *Held* that the disposal of the appeal amounted to a decree as defined in the C. P. Code and a second appeal therefore was maintainable. A. I. R. 1937 All. 284.

**What are not decrees.**—Order refusing to stay execution is not decree. A. I. R. 1930 All. 121=122 Ind. Cas. 182. An order passed under Order XXI, r. 22 for arrest, not being a final order is not a decree. A. I. R. 1929 Mad. 718=30 L. W. 230=(1929) M. W. N. 74=119 Ind. Cas. 43. *Ex parte* order granting leave to apply for execution is not a decree. A. I. R. 1929 All. 390=(1929) A. L. J. 553=115 Ind. Cas. 865. Decision of the Court under Chapter VII of the Presidency Small Cause Courts Act is not a decree under s. 2 (2). A. I. R. 1929 Mad. 69=56 M. L. J. 199=29 L. W. 537=115 Ind. Cas. 504. Order striking off objection of judgment-debtor for default is not appealable. 112 Ind. Cas. 380. An order permitting the withdrawal of a suit or appeal is not a decree. A. I. R. 1928 Mad. 416=51 M. 664=55 M. L. J. 345. An order for security to stay execution is neither an order under s. 47 nor it is a decree. 106 Ind. Cas. 890. No appeal lies from an order accepting security concerning sufficiencies thereof. 106 Ind. Cas. 866. Where appellate Court frames additional issues and remands a case, the order of remand is not a decree. A. I. R. 1927 Pat. 297=6 Pat. 380. An order under Order 1, rule 10 (2) is not a decree. A. I.

R. 1926 Nag. 75=89 Ind. Cas. 331. Order simply refusing to official referee to take accounts is not a decree. A. I. R. 1924 Mad. 406=73 Ind. Cas. 903. In a partnership suit an order referring suit to Commissioner for determining shares, is not a decree. A. I. R. 1924 Mad. 406=73 Ind. Cas. 903. Order striking out names of parties under Order I, rule 10 is not a decree. A. I. R. 1922 Mad. 332=45 M. 194=32 M. L. J. 97=69 Ind. Cas. 961. Where after this passing of preliminary decree the Court directs the Commissioner to take a valuation of certain property, the order is an interlocutory order. 65 Ind. Cas. 983=24 O. C. 306. Order of abatement of appeal is not a decree. 55 Ind. Cas. 838=A. I. R. 1922 All. 113=20 A. L. J. 214. An order granting permission to plaintiff to withdraw a suit under Order XXIII, rule 1, is not a decree. A. I. R. 1922 Lah. 267=65 Ind. Cas. 719. Order rejecting husband's claim to be legal representative is not a decree. 62 Ind. Cas. 303. An order under Order XXI, r. 66 is not a decree. 18 L. T. 647=59 Ind. Cas. 282. A party cannot prefer an appeal from an order disallowing interrogatories which is not a decree, nor can apply for revision. 58 Ind. Cas. 721=14 S. L. R. 28. A decision on a question of the valuation to be inserted in a sale proclamation is merely an interlocutory order and therefore is not appealable A. I. R. 1920 Pat. 227=5 Pat. L. J. 270=56 Ind. Cas. 452. Every order in execution proceeding is not a decree. 115 P. L. R. 1920=56 Ind. Cas. 173. The decision of a Court on an application to file a private award, part of it being on a matter outside the scope of the declaration is an order. 31 Ind. Cas. 80=66 P. R. 1915. An order extending time for payment of mortgage money under a decree is not a decree. 39 M. 876=29 M. L. J. 708=31 Ind. Cas. 240. An order overruling a plea against the maintainability of a suit is not a decree. 33 Ind. Cas. 664=9 Bur. L. T. 195. An order absolute under Order XXXIV, rule 5 is an order and is not a decree. 33 Ind. Cas. 749=18 Bom. L. R. 38=40 B. 321. A purely formal order recognising the abatement is not a decree. But an order of abatement resulting from the adjudication upon rights of parties is a decree. 34 Ind. Cas. 822=128 P. R. 1916 (F. B.)=146 P. L. R. 1916.

An order rejecting a Memorandum of Appeal is not a decree. 59 Ind. Cas. 388=A. I. R. 1932 Cal. 482=138 Ind. Cas. 643. An order under s. 52 of the Provincial Insolvency Act, 1920, is not a decree, nor an order under s. 47 and is not appealable. A. I. R. 1933 Mad. 152=64 M. L. J. 119=141 Ind. Cas. 817. Order of District Judge under s. 84 (2), Madras Hindu Religious Endowments Act, on application to set aside decision of Board under s. 84 (1) is not a decree. A. I. R. 1934 Mad. 103. Order granting stay of execution is not a decree. A. I. R. 1924 All. 808=46 A. 733=22 A. L. J. 706=83 Ind. Cas. 1035; 124 Ind. Cas. 349=A. I. R. 1930 Lah. 187. The dismissal of a suit against some defendants on account of non-representation for which plaintiffs are not to blame is not a decree. 33 C. W. N. 742=124 Ind. Cas. 75=A. I. R. 1929 Cal. 669. An order passed on an application under Order 21, rule 90 is not a decree. 165 Ind. Cas. 654=1936 A. L. J. 959=A. I. R. 1936 All. 763. An order passed under s. 144 is a decree. A. I. R. 1935 All. 873=1935 A. L. J. 995=158 Ind. Cas. 908. Neither an order of the Court of first instance returning a plaintiff under Order 7, rule 10, C. P. Code, nor adjudication of an appellate Court on appeal from such an order is a decree. 158 Ind. Cas. 252=A. I. R. 1935 Mad. 574. Rejection of plaint does not amount to decree when such rejection is not authorized by some provisions of the Code. A. I. R. 1937 All. 280.

**Order under s. 47.**—An order under section 73 is not an order under s. 47. 57 Ind. Cas. 421=A. I. R. 1921 Pat. 401=1 P. L. T. 296. In order to be appealable an order in execution must fall within the definition. A. I. R. 1926 All. 401=94 Ind. Cas. 1. Where on a mortgage decree being put in execution an objection was raised that execution could proceed only after payment of additional amount of Court-fee, but was negatived: *Held* an appeal lay. 70 Ind. Cas. 483=A. I. R. 1922 Pat. 59=3 P. L. T. 146.

**Dismissal for default.**—Rejection of appeal for failure to pay deficit Court-fee is a decree and is not dismissal for default. 63 Ind. Cas. 99=A. I. R. 1922 Pat. 281=3 P. L. T. 117=6 P. L. J. 625. An order dismissing an appeal for default is not a decree. 47 Ind. Cas. 125. An 'order of dismissal for default' includes an order of the execution Court dismissing an objection for default. A. I. R. 1926 All. 401=94 Ind. Cas. 1.

**Preliminary decree.**—A preliminary decree must define the rights of the parties, though it does not necessarily lead to a final and complete disposal of the case. 62 Ind. Cas. 462=A. I. R. 1921 Nag. 108=17 N. L. R. 66. A decree in a suit for specific performance of a contract, though conditional in form, is not a prelimi-



nary decree. 51 Ind. Cas. 442. Decision on a preliminary issue merely enabling the plaintiff to go on with the suit, is not a preliminary decree. 9 Bur. L. T. 119=36 Ind. Cas. 431. A preliminary decree is not extinguished by the passing of the final decree but is given effect to by the final one. 21 C. W. N. 1174=1 Pat. L. J. 406=36 Ind. Cas. 873. An order rejecting a plaint as being void is a preliminary decree and a second appeal lies against it. 39 Ind. Cas. 791=1 P. L. W. 499. The decree dissolving partnership is final as regards matters finally decided and preliminary as regards matters still undisposed of. 131 Ind. Cas. 160=A. I. R. 1930 Mad. 528=53 M. 378. Mere use by Court of form for final decree for partition does not make it a final decree. A. I. R. 1930 Nag. 206=13 N. L. J. 83=26 N. L. R. 166=122 Ind. Cas. 441. Where in a suit by a mortgagee for a final decree debarring the mortgagor from redeeming the mortgaged land the Court merely refuses to pass a final decree in terms of the preliminary decree, it is doubtful whether it is final order against which an appeal can lie. A. I. R. 1928 Lah. 355=10 Lah. L. J. 198=110 Ind. Cas. 81.

**Decree holder.**—It is not necessary that a decree-holder in a decree for the sale of immovable property should necessarily have been the plaintiff in the case. A. I. R. 1929 Lah. 492=116 Ind. Cas. 212. Decree-holder does not include an attaching creditor. 80 Ind. Cas. 947=A. I. R. 1925 All. 123. Plaintiff got decree for specific performance of agreement to sell against defendant but did not want to execute the decree. Defendants were also decree-holders within this clause and as such could execute the decree. 67 Ind. Cas. 667; see also 59 C. 501=A. I. R. 1932 Cal. 579=36 C. W. N. 172. A decree-holder need not be a party to a decree. It is enough if the decree confers some right enforceable under the decree upon some person mentioned in it. 61 M. L. J. 904=A. I. R. 1932 Mad. 193=35 L. W. 22.

**District Court.**—It is not legitimate in every instance to construe the words "District Court" wherever they appear to mean and include a High Court in its Ordinary Original Civil Jurisdiction. 100 Ind. Cas. 331=45 C. L. J. 71=A. I. R. 1927 Cal. 290.

**Foreign Court.**—Definition of foreign Court is not applicable to Provincial Insolvency Act. 123 Ind. Cas. 20=A. I. R. 1929 Mad. 900=57 M. L. J. 393.

**Foreign judgment.**—Judgment in the expression "foreign judgment" as used in s. 2 (6) has the English meaning and not the meaning (as regards the word "judgment") given by s. 2 (9) of C. P. Code. 62 M. L. J. 566=35 L. W. 763=138 Ind. Cas. 648=A. I. R. 1932 Mad. 661.

**Judgment.**—The decision of the trial Court on preliminary issue is a judgment. 97 Ind. Cas. 780=27 S. L. R. 701=8 Lah. L. J. 361=A. I. R. 1926 Lah. 638. Short-hand notes dictated by, but never approved by the Judge, cannot be considered as part of his actual judgement. 29 Bom. L. R. 126=A. I. R. 1927 Bom. 113=51 Bom. 167=100 Ind. Cas. 941.

**Judgment debtor.**—A defendant who is exempted and against whom no decree is passed is not a judgment debtor within s. 2 (10). A. I. R. 1933 All. 57=54 A. 1031. An assignee of a J. D. is not J. D. 13 Ind. Cas. 659.

**Legal representatives.**—A person who is entitled to the possession of the assets of the deceased becomes legal representative irrespective of whether he is actually in possession or not. For the purpose of the suit it is sufficient if he is a person on whom the estate would devolve. The question whether he is in actual possession or not can be determined in execution proceeding. 27 N. L. R. 247=A. I. R. 1931 Nag. 173=134 Ind. Cas. 862. A son taking by survivorship is a legal representative. A. I. R. 1931 Bom. 484=134 Ind. Cas. 961=33 Bom. L. R. 1144=5 B. 709. Donee of a deceased legatee is a legal representative. 35 C. W. N. 1028. By this definition the Mahomedan Law has not been changed. The heirs of a deceased Mahomedan are liable for the debt due to the estate proportionately to the share inherited by them. 138 Ind. Cas. 746=1932 A. L. J. 727=A. I. R. 1932 All. 591. Where there are two rival claimants to the estate of the deceased it is open to decree-holder to choose as the legal representative the one who appears to have *paima facie* title. A. I. R. 1929 Mad. 482=120 Ind. Cas. 65=30 L. W. 778. Heirs of intestate Parsee who intermeddle with his estate are his legal representatives. A. I. R. 1927 Bom. 474=51 B. 771=29 Bom. L. R. 900=51 B. 771. Executor *de son tort* need not be added, when there is other legal representative. 30 C. W. N. 565=A. I. R. 1926 Cal. 825=96 Ind. Cas. 695. A suit against a legal representative should not be dismissed for want of assets. 40 Ind. Cas. 407. Person in

possession of deceased's estate can validly represent him. 31 M. L. J. 222=1916 M. W. N. 233=35 Ind. Cas. 124. Legal representative does not necessarily mean beneficial owner. 42 M. 76=35 M. L. J. 632=1918 M. W. N. 107=49 Ind. Cas. 11. Decree obtained in good faith against wrong legal representative binds the real heir. 36 M. L. J. 106=52 Ind. Cas. 509; 40 Ind. Cas. 57=4 O. L. J. 463; 99 Ind. Cas. 865=A. I. R. 1927 Pat. 114=8 P. L. T. 287; 56 Ind. Cas. 963=A. I. R. 1926 Nag. 476=9 N. L. J. 183; 120 Ind. Cas. 65=1929 Mad. 1025=30 L. W. 778. A decree-holder has right to select among the claimants, persons appearing to have *prima facie* the best title as legal representatives. 29 M. L. J. 698=31 Ind. Cas. 920. Person in possession of property of a deceased judgment-debtor is legal representative of a deceased. 69 Ind. Cas. 179=A. I. R. 1924 Cal. 362. In case of decree for injunction against father in joint Hindu family, sons are not legal representatives for the purpose of execution against them. 42 B. 504=20 Bom. L. R. 560=46 Ind. Cas. 745. An intermeddler with the property of the deceased is liable to the extent of the property taken by him. 42 Ind. Cas. 122=3 P. L. W. 302=1918 Pat. 86. Surviving co-parceners in a joint Hindu-family are not legal representatives. 61 Ind. Cas. 628=3 Lah. L. J. 349=A. I. R. 1921 Lah. 34=2 Lah. 114=73 P. L. R. 1921; 42 B. 504. An intermeddler is not a representative for the purposes of succession to the deceased's property. 75 Ind. Cas. 114=A. I. R. 1924 All. 717. Trustees are not legal representatives of their predecessors in office. A. I. R. 1926 Mad. 540=92 Ind. Cas. 520. Heirs of deceased mortgagor whose equity of redemption has already been sold are not his legal representatives relating to that property but the proper representatives are the purchasers of the equity of redemption. 95 Ind. Cas. 974=(1926) M. W. N. 276.

Suit against legal representatives, of a deceased should not be dismissed merely on the ground that they are not in possession of any assets of the deceased. A. I. R. 1926 Nag. 170=89 Ind. Cas. 236. Where a father and a son are co-parceners and whereafter the son's undivided share is attached in execution of a decree against him alone son dies, father is legal representative of his deceased son and decree can be executed against him. A. I. R. 1926 All. 157=48 A. 4=23 A. L. J. 877=L. R. 6A. 511 Civ. Where ostensible sole heirs is brought on record, decree binds the whole estate including the interest of those heirs not brought on record and not served with notice. A. I. R. 1925 Oudh 330=12 O. L. J. 37=2 O. W. N. 34=28 O. C. 177=87 Ind. Cas. 892. Where a managing member sues and the suit refers to joint-family estate, it is really a suit in a representative character for all the members of the family. When he dies, the next managing member can come in as the legal representative. A. I. R. 1925 Mad. 456=21 L. W. 21=86 Ind. Cas. 178. A decree for removal of the defendant as *mohant* of shrine on the ground of mismanagement cannot be executed against the succeeding *mohant* who was on the death of the first in *defacto* possession but who claimed to be appointed by the *bhakt* since the successors could not in any sense be treated as the legal representative of the deceased. 77 Ind. Cas. 585=A. I. R. 1924 Lah. 251=5 Lah. L. J. 459. Where on an application to substitute the brother of the deceased judgment-debtor as his legal representative, he pleads that he is not liable to satisfy decree, the objection must be decided by the executing Court before an order substituting him as legal representative is made. A. I. R. (1923) Pat. 149=3 P. L. T. 106=82 Ind. Cas. 803. To become legal representative it is necessary that a person should possess properties with intention of representing estate. 37 C. W. N. 758. Court of Wards represents no particular ward in administration of estate but administers estate on its own authority and being person who in law represents estate of deceased is legal representative. 29 N. L. R. 118=A. I. R. 1933 Nag. 85. Decree obtained against mother as legal representative of a tenant binds daughter. 29 N. L. R. 89=A. I. R. 1933 Nag. 73. The definition of the term "legal representative" is not exhaustive and this definition should be qualified by s. 53 of the Code. 36 Bom. L. R. 977=A. I. R. 1936 Bom. 456. Hindu sons are not legal representatives of their fathers under s. 2(11). 14 Pat. 752=157 Ind. Cas. 53=16 Pat. L. T. 393=A. I. R. 1935 Pat. 275 (F. B.). The term legal representative includes an universal legatee. A. I. R. 1235 Oudh 1031. Brothers of a deceased co-parcener are legal representatives in respect of their separate estate. A. I. R. 1935 All. 390=1935 P. L. J. 293. Official Assignee or Receiver is not legal representative. 58 M. 403=154 Ind. Cas. 934=A. I. R. 1935 Mad. 151=68 M. L. J. 78.

**Mesne profits.**—The statutory definition of *mesne profits* includes interest. A. I. R. 1930 Cal. 525=52 C. L. J. 173=126 Ind. Cas. 717; 55 M. 975 (981)=63 M. L. J. 845=1932 M. W. N. 949=A. I. R. 1932 M. 722=139 Ind. Cas. 457=A. I. R. 1932 M. 1365. Assessment of *mesne profits* must be made on the basis of plaintiff's

loss by exclusion and not what defendant made or might with reasonable diligence have made by his wrongful possession. 59 C. 859=55 C. L. J. 205=138 Ind. Cas. 852=A. I. R. 1932 Cal. 600=A. L. R. 1932 C. 474 ; see also 35 C. W. N. 367. In the case of a claim for *mesne profits* against several trespassers in wrongful possession two courses are left open to the Court. A decree for *mesne profits* may be passed jointly and severally against all the trespassers who may have jointly kept the plaintiffs out of possession for any particular period, leaving them to have their respective rights adjusted in a separate suit for contribution ; or the respective liabilities of such trespassers may be ascertained in the plaintiff's suit against them, and a decree on the basis of such several liabilities may be passed as against the respective trespassers in plaintiff's favour. 59 C. 859=55 C. L. J. 205=A. I. R. 1932 Cal. 600 ; see also 53 Cal. 992 P. C.

Ordinarily interest on *mesne profits* is allowed but such interest may be disallowed on special grounds. A. I. R. 1931 Mad. 513=131 Ind. Cas. 833. In computing the *mesne profits* the expenses of management or collection are to be deducted. 1931 M. W. N. 813. Interest on *mesne profits* is in the discretion of the Court. 44 C. L. J. 182=A. I. R. 1926 Cal. 1233=98 Ind. Cas. 198. Where decree is silent as to interest on profits the Executing Court cannot award the interest. A. I. R. 1926 Mad. 952=50 M. L. J. 563=96 Ind. Cas. 697. *Mesne profits* are in the nature of damages for being deprived of the benefit which the person in possession derives from the property. 157 Ind. Cas. 96=37 P. L. R. 50=A. I. R. 1935 Lah. 379 ; see also A. I. R. 1935 Pat. 80. Profits always means the difference between the amount realised and the expenses incurred in realising it and this rule applies even to cases of *mesne profits*. In India 10 per cent. is the customary allowance for *mesne profits* and it is unnecessary for defendant to adduce evidence on this. *Secretary of State v. Saroj Kumar*, 62 C. 499=62 I. A. 53=A. L. R. 1935 P. C. 14=41 L. W. 284=1935 O. W. N. 261=1935 A. L. J. 438=1935 M. W. N. 165=37 Bom. L. R. 327=39 C. W. N. 405=A. I. R. 1935 P. C. 49=68 M. L. J. 580 (P. C.). In the absence of special circumstances 6 per cent. is a fair rate of interest, a sufficient compensation to the decree-holder for having been deprived of the rents and profits of the suit lands. *Ibid.* "*Mesne profits*" means the amount that might have been collected less the collection charges ; damages resulting from non-payment on becoming due or loss of interest year by year is not included therein. 8 C. 332 (P. C.)

**Order.**—Order by District Judge, to guardian of minor step mother, to pay money to guardian of step-daughter for her marriage, is not contemplated by the section and cannot be executed against ward, who in meanwhile attained majority. 41 Ind. Cas. 341=41 M. 241.

**Pleader.**—Barrister in Burma not filing power of attorney from client cannot bind client by compromise entered into without his express consent. A. I. R. 1930 Rang. 313=127 Ind. Cas. 604. An Advocate of the High Court has, when briefed on behalf of a party in a Subordinate Court, the implied authority of his client to settle the suit. A. I. R. 1930 Pat. 158=34 C. W. N. 453=1930 A. L. J. 489=58 M. L. J. 551=32 Bom. L. R. 645=51 C. L. J. 309=Ind. Rul. (1933) P. C. 177.

**Public officer.**—A receiver appointed under Order XL of the Code is a public officer and he is entitled to notice as prescribed by s. 80, C. P. Code. 35 C. W. N. 161=57 C. 1127=A. I. R. 1931 Cal. 61 ; but see 53 C. L. J. 31=A. I. R. 1931 Cal. 175. Village Sanitation Panchayat is not a public officer within the meaning of s. 80 of the C. P. Code. A. I. R. 1929 Nag. 70=114 Ind. Cas. 288. A Municipal Councillor is not an officer of the Government. A. I. R. 1930 Mad. 844=(1930) M. W. N. 821=128 Ind. Cas. 161. The Sheriff of Bombay is a "public officer". A. I. R. 1927 B. 521=51 B. 749=29 Bom. L. R. 1071=104 Ind. Cas. 685. Official Assignee is a public officer. A. I. R. 1925 Bom. 344=49 B. 638=27 Bom. L. R. 545=87 Ind. Cas. 1011. An Official Receiver appointed under the Provincial Insolvency Act is a public officer within the meaning of s. 2. A. I. R. 1925 All. 241=47 A. 291=22 A. L. J. 1116=84 Ind. Cas. 739. A village headman is a public officer within the meaning of s. 2. A. I. R. 1923 Rang. 250=2 Bur. L. J. 29=79 Ind. Cas. 818. Person paid a fixed salary by Government out of commission charged to private person for services is a public servant. A. I. R. 1928 Sind 76=22 S. L. R. 63=105 Ind. Cas. 729. So also a common manager appointed under the Transfer of Property Act, s. 95 is a public officer. 24 C. W. N. 138=30 C. L. J. 279=53 Ind. Cas. 747. But a manager of Court of Wards is not a public servant therefore not entitled to notice under s. 80. 55 Ind. Cas. 515. A British officer in Indian Army is a public officer. 50 Ind. Cas. 683. A surveyor employed by Collector in the *khas mohal* department is a public officer. 26 C. 158 ; so also is an official Assignee of the Insolvent Court. 26 B.

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809=4 Bom. L. R. 929 ; 12 M. 250 ; 7 C. 499. A Collector is a public officer even when he is appointed to take charge of the estate of a minor. 3 A. 20 (F. B.) ; 1 B. 318 ; 13 B. 343 (346).

**Signed.**—Use of stamp bearing the name of the party is sufficient even in cases where he is able to sign. 107 Ind. Cas. 840=54 M. L. J. 65=51 M. 242=A. I. R. 1928 Mad. 175. The expression signing does not include a mark. 11 C. 429 ; see also 25 C. 911 (915, 916)

**3. [S. 2.]** For the purposes of this Code, the District Court is subordinate to the High Court, and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.

**Notes.**—For matters covered by the Code, Court cannot go beyond the Code. A. I. R. 1926 Cal 568=44 C. L. J. 399=30 C. W. N. 415=94 Ind. Cas. 235. The Collector though he may be acting judicially when exercising his functions under s. 18 of the Land Acquisition Act and though he may be even called a Court, is certainly not a Court subordinate to the High Court. A. I. R. 1930 Nag. 271=123 Ind. Cas. 911. A Court can be said to be subordinate to another Court only if the latter Court has appellate or revisional jurisdiction or power of superintendence given to it by some statutory provision over the former Court. The mere authority to decide a reference does not necessarily make the Court making the reference subordinate to the Court deciding the same. 1932 A. L. J. 816=140 Ind. Cas. 123=A. I. R. 1932 All. 651=A. L. R. 1932 A. 1083. Enumeration of Subordinate Courts in this section is not exhaustive. *Ibid.*

**4. [S. 4.]** (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a land-holder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land.

**Notes.**—In view of s. 4, C. P. Code the law applicable to soldiers is defined in s. 93 of the Army Act (1881) and it overrides s. 60 of the C. P. Code. 43 B. 368=21 Bom. L. R. 137=50 Ind. Cas. 427. Under s. 4 (1) the general provisions in respect of the procedure of appeal to His Majesty in Council enacted in s. 109 must give place to any special jurisdiction or power conferred or any special form of procedure prescribed by or under any other law for the time being in force. S. 12 of the Oudh Courts Act (IV of 1925) prescribes such special jurisdiction and as such abrogates the provisions of s. 109. 8 O. W. N. 1207 ; see also A. I. R. 1931 Oudh 185=132 Ind. Cas. 270=8 O. W. N. 635. A Local Act overrides the provision of the Civil Procedure Code, whenever there is a special provision in the Act. [*Vide* 17 M. 298 ; 9 M. 332 (as regards Madras Rent Recovery Act of 1865) ; 27 C. 508 (F. B.) =4 C. W. N. 333 (as regards Chota Nagpur Landlord and Tenant Procedure Code B. C. Act I of 1879)]

**5. [S. 4A.]** (1) Where any Revenue Courts are governed by the provisions of this Code in those matters of procedure upon which any special enactment applicable to them is silent, the "Provincial Government,"\*† may, by notification in the "official Gazette,"† declare that any portions of those provisions which are not expressly made applicable by this Code shall not apply to those Courts, or shall only apply to them with such modifications as the Provincial Government,\*† may prescribe.

\* The words "with the previous sanction of the Governor-General in Council" and the words "with the sanction aforesaid" were omitted by s. 2 and Sch. I, Part I, of the Devolution Act, 1920 (38 of 1920).

† Substituted by G. I. Order s. 4 (1). In British Burma for "Provincial Government" read "Governor" and for "official Gazette" read "Gazette"—*Vide* G. B. order of 1937.

(2) "Revenue Court" in sub-section (1) means a Court having jurisdiction under any local law to entertain suits or other proceedings relating to the rent, revenue or profits of land used for agricultural purposes, but does not include a Civil Court having original jurisdiction under this Code to try such suits or proceedings as being suits or proceedings of a civil nature.

**Notes.**—This section clearly contemplates Revenue Courts being governed by the provisions of the Code of Civil Procedure. 26 M. 518 (520).

6. [S. 6.] Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court Pecuniary jurisdiction. jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction.

**Notes.**—Order of remand cannot confer jurisdiction. A. I. R. 1929 Lah. 534=30 P. L. R. 244=116 Ind. Cas. 324. The proceedings before the President of the Calcutta Improvement Tribunal is not a suit, and s. 6 does not apply to an order passed in such proceedings. 31 C. W. N. 142=A. I. R. 1926 Cal. 853=94 Ind. Cas. 170. Where the Court sends a decree *suo motu* to another Subordinate Court, the latter must be a Court of competent jurisdiction. The competence cannot be determined irrespective of its pecuniary jurisdiction. 67 Ind. Cas. 538=A. I. R. 1922 Pat. 188=3 P. L. T. 422. Court's jurisdiction is not ousted where *mesne profits* allowable under Order XX, rule 12 (2), Civil Procedure Code exceed its jurisdiction. A. I. R. 1925 Cal. 1076=53 C. 14=42 C. L. J. 49=29 C. W. N. 869=89 Ind. Cas. 726.

7. [S. 5.] The following provisions shall not extend to Courts constituted under the Provincial Small Causes Courts Act, 1887,\* or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,—

- (a) so much of the body of the Code as relates to—
  - (i) suits excepted from the cognizance of a Court of Small Causes ;
  - (ii) the execution of decrees in such suits ;
  - (iii) the execution of decrees against immovable property ; and
- (b) the following sections, that is to say,—
  - section 9,
  - sections 91 and 92,
  - sections 94 and 95 [so far as they authorise or relate to—
    - (i) orders for the attachment of immovable property,
    - (ii) injunctions,
    - (iii) the appointment of a receiver of immovable property, or
    - (iv) the interlocutory orders referred to in clause (e) of section 94] †
  - and sections 96 to 112 and 115.

**Notes**—Small Cause Court has power to attach movables before judgment. 46 C. 717=31 C. L. J. 179=53 Ind. Cas. 814. A Small Cause Court has power to attach immovable property before judgment under Order XXXVIII, r. 5. A. I. R. 1925 Mad. 589=48 M. L. J. 406=48 M. 48=87 Ind. Cas. 399. But a Provincial Small Causes Court has no power to attach immovable property before judgment and to decide a claim case thereon. A. I. R. 1924 Cal. 193=28 C. W. N. 16=80 Ind. Cas. 390. A Small Cause Court can attach and sell a preliminary decree for foreclosure for immovable property. 44 Ind. Cas. 252. A Small Cause Court cannot attach immovable property in execution of a decree, even though it is also an ordinary Court, unless the decree has been formally transferred to the ordinary side. A. I. R. 1929 Lah. 398=30 P. L. R. 40=114 Ind. Cas. 329 ; 132 Ind. Cas. 208. Small Cause Court has jurisdiction to create charge upon immovable property. A. I. R. 1937 All. 194.

\* IX. of 1887.

† The words within brackets have been substituted for the words "so far as they relate to injunctions and interlocutory orders" by Act 1 of 1926.

8. [S. 8.] Save as provided in sections 24, '38 to 41, 75, clauses (a), (b) and (c), 76, 77 and 155 to 158, and by the Presidency Small Cause Courts Act, 1882,\* the provisions in the body of this Code shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay :

† [Provided that—

(1) the High Courts of Judicature at Fort William, Madras and Bombay, as the case may be, may, from time to time, by notification in the "official Gazette"‡ direct that any such provisions not inconsistent with the express provisions of the Presidency Small Cause Courts Act, 1882,\* and with such modifications and adaptations as may be specified in the notification, shall extend to suits or proceedings or any class of suits or proceedings in such Court ;

(2) all rules heretofore made by any of the said High Courts under section 9 of the Presidency Small Cause Courts Act, 1882, \* shall be deemed to have been validly made].

**Amendment in Burma.**—This section has been omitted in Burma by G. B. order of 1937.

**Notes.**—Where a decree of the Madras Small Cause Court is transferred to a mofussil District Munsiff's Court for execution, not on its Small Cause side, but on its original side, against the immovable property of the judgment-debtor, an order made by the latter Court in execution is appealable under s. 47 of the C. P. Code. A District Munsiff's Court in executing a decree of the Madras Small Cause Court in respect of the movable property exercises its powers not as a Small Cause Court but as a Court of original jurisdiction, and the rules applicable to proceedings in execution of an original decree are applicable to the execution proceedings of the Small Cause decree so transferred to the original side of the Court. 90 Ind. Cas. 509=49 M. L. J. 104=A. I. R. 1925 Mad. 1179=(1925) M. W. N. 713.

## PART I.

### SUITS IN GENERAL.

#### JURISDICTION OF THE COURTS AND *Res Judicata*.

9. [S. 11.] The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

**Explanation.**—A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

**Scope.**—The Scope of the section is very vast, including even what are known as rent suits or suits cognizable by the Revenue Courts, but for the circumstances that such suits, though civil in their nature, are expressly excluded from the jurisdiction of Civil Courts, by dint of some Special Statutes. 12 A. 409 (F. B.). In suits relating purely to rituals or religious observances, the Civil Courts have no jurisdiction ; but the Courts are bound to enquire into the questions of religion or ritual, which are material for determining civil rights in dispute between the parties. 30 M. 15=16 M. L. J. 471. Civil Courts must be taken *prima facie* to have jurisdiction to entertain and dispose of all suits of a civil nature. Persons who allege that there is a bar must prove it. (1930) M. W. N. 945. Civil Courts have jurisdiction to try suits of a civil nature under this section, except suits of which cognizance is expressly or impliedly barred. A. I. R. 1930 Oudh 199 (F. B.)=137 Ind. Cas. 606=9 O. W. N. 488. It is for the party who seeks to oust the jurisdiction of the ordinary Civil Courts to establish his contention. A. I. R. 1928 Lah. 121=9 Lah. 504=29 P. L. R. 396 (F. B.) ; see also 54 A. 646=A. I. R. 1932

\* XV of 1882.

† Provisos (1) and (2) were added to s. 8 by the Code of Civil Procedure (Amendment) Act, 1914 (I of 1914), s. 2.

‡ Substituted by G. I. Order, s. 4 (1).

A. 293 (F. B.)=1932 A. L. J. 437 ; 11 Rang. 125=A. I. R. 1933 Rang. 124. The right of conscience, i. e., the right of individual members of a community to hold certain religious beliefs and opinions, is of course a religious one and one that cannot be called in question or adjudicated upon in the Civil Court, and it is not covered by the explanation of s. 9, C. P. Code. But the right to remain in the community or to exercise rights and privileges of the members of the community, is of course a civil one, and one that must be decided by the Civil Court when it is called in question. A. I. R. 1935 Nag. 156=157 Ind. Cas. 302. Where a legal right exists and its infringement is alleged, a cause of action is disclosed and unless there is a bar to the entertainment of such a suit the ordinary Civil Courts are bound to entertain it. The words "expressly barred" in s. 9, mean barred by any enactment for the time being in force. A. I. R. 1935 Oudh. 96=11 O. W. N. 1435=152 Ind. Cas. 861. Suits are of civil nature if they are suits between subject and subject dealing with civil rights. A suit for a declaration that the assessment of town-tax by a Panchayat is illegal and *ultra vires* is not between subject and subject but between a subject and a branch of a Local Self Government and it does not deal with civil rights but it deals with a question to taxation, and as such is not a suit of civil nature and Civil Court has no jurisdiction in a suit of that nature. A. I. R. 1936 All. 117=1936 A. L. J. 33=159 Ind. Cas. 897.

**No jurisdiction in caste question.**—A caste is a social combination, the members of which are entitled by birth, not by enrolment. Its rules consist partly of resolutions passed from time to time, but for the most part of usages handed down from generation to generation. The caste is not a religious body, though its usages, like all other Hindu usages, are based on religious feelings. In religious matters, strictly so called, the members of the caste are guided by their religious preceptors and their spiritual heads. In social matters they lay down their own laws. Caste is not a corporation or partnership. Of course a caste, regarded as a social organism, is very different from a club, but both institutions are unincorporated aggregates of individuals, associated together for purposes other than trade, and the legal consequences which flow from the position must apply to both bodies. 56 B. 242=34 Bom. L. R. 313=137 Ind. Cas. 461=A. I. R. 1932 B. 122=A. I. R. 1932 B. 312 (F. B.). A caste question is a question which relates to matters which affect internal autonomy of the caste and its social relations. *Ibid.* The Hindu caste is unique aggregation so wholly unknown to the English law that English decision concerning English Corporations and partnership tend rather to confusion than to guidance upon matters relating to caste. Where according to well-established principles certain questions have been removed from the jurisdiction of the Court, they can not be brought within the jurisdiction, on the plea that the Court has inherent jurisdiction to do what justice requires for the parties upon it. 11 Bom. L. R. 1014=34 B. 467=4 Ind. Cas. 108. The recognition by Courts of Hindu castes as distinct corporation with exclusive legal rights for certain purposes ought not to be extended to Christian communities. 39 M. 1059=39 M. L. J. 423=34 Ind. Cas. 557. Court can decide that rights to the user of property is in accordance with existing caste usage but cannot decide whether a particular user is sanctioned by custom of caste. 76 Ind. Cas. 635=A. I. R. 1924 Bom. 522. A *konkani Brahmin* had been ex-communicated by order of spiritual tribunal which was the recognised authority in all such matters the order having been passed in perfect good faith, without malice and in due exercise of spiritual authority. There was no negation of the natural justice. The suit by the *Brahmin* for declaration that he was in caste as well as for damages is not maintainable. A. I. R. 1930 Mad. 160=123 Ind. Cas. 14. For ex-communication from caste it is necessary, that there must be a caste offence, that the rules of procedure of the caste (if any) must be complied with, that notice of charge and of the meeting at which it is to be dealt with must be given to the person accused, and full opportunity afforded to him of defending himself, and that notice must be given to the members of the caste of the meeting and what it is intended to be dealt with. *Ranje v. Naranje*, A. I. R. 1935 Bom. 268=37 Bom. L. R. 261=157 Ind. Cas. 127 ; see also 23 B. 122 ; 10 M. 133 ; 11 B. 185 ; 21 C. 463 ; *Labonchere v. Earl of Whamcliff*, 19 Ch. D. 346 ; *Young v. Ladies Imperial Club*, (1920) 2 K. B. 523=89 L. J. K. B. 563, *Maclean v. The Worker's Union*, (1929) 1 Ch. 602=98 L. J. Ch. 293. The General principle applicable to the expulsion of members from a club governs cases of expulsion of persons from a caste. *Abdul Razak v. Adam Haje*, A. I. R. 1935 Bom. 367=37 Bom. L. R. 603=159 Ind. Cas. 650. A Civil Court has jurisdiction to entertain a suit for a declaration that a resolution of a caste tribunal ex-communicating a person from caste is void. *Ibid.*

But a properly assembled caste Panchayat has jurisdiction to outcaste members of its community who have committed caste offence. 37 Bom. L. R. 417=A. I. R. 1935 Bom. 361=158 Ind. Cas. 414.

**When jurisdiction can be entertained in Caste question.**—The right to inspect account books kept in connection with caste funds and properties is not in any sense a caste privilege. It is a legal right. The members of the caste are at all reasonable times and on proper demand entitled to full and free inspection of all account books, paper and vouchers relating to the trustee's management of caste properties under their management. 56 B. 242=34 Bom. L. R. 343=137 Ind. Cas. 461=A. I. R. 1932 Bom. 122 (F. B.) ; see also 11 Bom. L. R. 1014=34 B. 467=4 Ind. Cas. 108 ; 11 Bom. L. R. 1267=4 Ind. Cas. 569. Court has jurisdiction over a matter not relating to internal administration of caste but to the property of the caste. 92 Ind. Cas. 549=A. I. R. 1926 Bom. 69=50 B. 124=27 Bom. L. R. 1503. Civil Courts can declare a *pat* marriage to be invalid A. I. R. 1926 Nag. 488=22 N. L. R. 134=9 N. L. J. 160. A Court has jurisdiction to interfere where the ex-communication decision of a *jamaat* has not been arrived at in consonance with principles of justice. A. I. R. 1930 Sind 204=126 Ind. Cas. 49 ; see also 23 B. 122 ; 17 M. 222 ; 24 B. 13 ; 10 M. 133 ; 7 M. L. T. 190=5 Ind. Cas. 5 ; 33 M. 67=17 Ind. Cas. 527. Rights of *Acharis inter se* can be adjudicated upon and enforced by Civil Courts. A. I. R. 1928 Lah. 703=10 Lah. L. J. 242=112 Ind. Cas. 262. Civil Court has jurisdiction to enquire into wrongful expulsion of members from membership of caste involving rights to property. A. I. R. 1934 Bom. 431.

**Jurisdiction of Civil Courts in religious matters.**—Courts have power in any matter of spiritual and temporal character to enquire into the law or rules of the tribunal or authority which has inflicted the alleged injury. 39 M. 1056=20 M. L. J. 423=34 Ind. Cas. 587. But a suit does not lie for a mere honour or dignity unconnected with fees, profits or emoluments. 51 Ind. Cas. 905. Courts are not bound to enter into detailed considerations and decide rights of *Sanyasis* to receive honours in temples unless they are mixed up with matters of a civil nature. 53 Ind. Cas. 483=10 L. W. 480=2 Cr. L. J. 755=1919 M. W. N. 872. Right to worship on receiving emoluments or right to perform festivals hereditarily is civil right and can be enforced. 35 Ind. Cas. 88=3 L. W. 512. But the determination of question of orthodoxy is not within the province of Civil Courts. 37 Ind. Cas. 780. Person having right to hold office at certain place in certain season can sue to maintain it. But right to enter disciple's house though not called, does not create legal character to maintain a suit for its declaration. 1 P. L. J. 381=2 Pat. L. W. 390=35 Ind. Cas. 345. Suit for exclusive conduct of festival and suit to enforce claim to honours and perquisites are maintainable. So also a right to worship in a particular manner is a civil right. 31 M. L. J. 758=36 Ind. Cas. 568=(1916) 2 M. W. N. 327. But a right to religious honour is not cognizable unless it is an emolument attached to office. 45 Ind. Cas. 959. Suit by co-sharer for share of voluntary offerings of a temple is maintainable. 70 P. L. R. 1919=51 Ind. Cas. 236=26 P. R. 1919.

A suit to establish the right to worship in a temple according to the worshippers' belief is a suit of civil nature within s. 9. The right to conduct religious processions in public streets is a right inherent in every person provided he exercises it lawfully 44 B. 410=22 Bom. L. R. 307=56 Ind. Cas. 419. A Court cannot interfere with question of ritual. A. I. R. 1929 Mad. 526=120 Ind. Cas. 874. No suit lies for declaration of right to religious honours. A. I. R. 1929 Mad. 493=29 L. W. 604=119 Ind. Cas. 149 ; see also 63 Ind. Cas. 115=41 M. L. J. 287 ; 1932 M. W. N. 1090. The Civil Court will not entertain a suit to vindicate a right not to an office but to a mere dignity unconnected with any fees, profits or emoluments. 33 Bom. L. R. 479=A. I. R. 1931 Bom. 272=132 Ind. Cas. 440 ; 7 M. 91 ; 2 B. 476 ; 6 B. 116 ; 28 Bom. L. R. 60 ; 20 M. L. J. 530. No suit will lie for the vindication of a right to gratuitous payments which are not the emoluments attached to an office by way of remuneration for services performed. 33 Bom. L. R. 479=A. I. R. 1931 Bom. 273=132 Ind. Cas. 440. Suit by priest for voluntary gifts made by another *jajman* is not tenable either against the *fajman* or the other priest in the Provinces of Bihar and Orissa. 10 P. L. T. 117=116 Ind. Cas. 513=A. I. R. 1929 Pat. 103. Where a dispute in Upper Burma involving ecclesiastical matter is within competence of Buddhist ecclesiastical authorities, the Civil Courts have no jurisdiction. 114 Ind. Cas. 540=A. I. R. 1929 Rang. 77=6 Rang. 783. Suit for a right to religious office is of a civil nature though no emoluments are attached. A. I. R. 1927 Cal. 783=54 C. 614=105 Ind. Cas. 188. Suit for a declaration by a body of Brahmins that they



have a right to recite *Vedas*, etc., in a temple is maintainable. A. I. R. 1927 Mad. 131=98 Ind. Cas. 229. A Court will not decide mere questions of religious rites or ceremonies unless it is necessary to decide rights to property. A. I. R. 1921 Bom. 338=24 Bom. L. R. 1060=84 Ind. Cas. 759. A suit lies for share of income earned as Hindu priest on the river banks. A. I. R. 1924 Oudh. 252=10 O. L. J. 595=27 O. C. 114=78 Ind. Cas. 256. Where the plaintiff a female heir prayed that she should be allowed to take a turn at the worship in the temple so that her full share in the offerings might be secured to her : *Held* that such a suit is maintainable. A. I. R. 1923 All. 425=45 A. 437=71 Ind. Cas. 1026. Where a *pujari* of a deity was removed for misconduct by private tribunal duly constituted under previous agreement made by *pujari*, a Civil Court can determine if he was removed on valid grounds. 25 C. W. N. 201=62 Ind. Cas. 510=A. I. R. 1921 Cal. 328. Suit for share in offering to deity is cognizable by Civil Court. 60 Ind. Cas. 924=23 Bom. L. R. 125=45 B. 683. A suit by a plaintiff claiming to be carried in a *palanquin* in public street as *Jagat Guru* is not a suit of a civil nature. 60 Ind. Cas. 907. A *pragwall* used a particular kind of flag. The defendant put up a similar flag so as to mislead pilgrims into the belief that he was the *pragwall* : *held* that the plaintiff had a right to maintain a suit to restrain the defendant from making use of the emblem or flag. 18 A. L. J. 679=59 Ind. Cas. 873. But a right to receive *dan* by offering of *kusha* grass to pilgrims on river bank cannot be declared. A. I. R. 1921 All. 374=43 A. 159=59 Ind. Cas. 659. Where defendant prohibits plaintiff, a Hindu priest from officiating, a suit for injunction lies. A. I. R. 1921 Bom. 209=45 B. 234=59 Ind. Cas. 271. The Civil Court can question the appointment of a trustee by the Devasthanam Committee, if it is not made reasonably and in good faith. 42 M. 668=26 M. L. T. 143=53 Ind. Cas. 605. Whether a *gayawal gaddi* is an office or a business, the person is entitled to it can sue for possession of the *guddi* and its books and for a declaration that he is the lawful holder of the *guddi*. 3 Pat. L. W. 136=2 P. L. J. 705=42 Ind. Cas. 478. A claim by person to exercise a right of worship in a temple can be taken cognizance of by a Civil Court. A. I. R. 1933 Mad. 726=140 Ind. Cas. 1014=38 L. W. 338. The hereditary right to appoint to the office of a *Swamiyar* is a possible legal right. A. I. R. 1929 P. C. 53=56 M. L. J. 121=33 C. W. N. 382=113 Ind. Cas. 476 (P. C.). Specific duty of being present at the performance of religious ceremonies with emoluments attached, must be regarded as an office within s. 9. A. I. R. 1928 Mad. 377=109 Ind. Cas. 771. A suit to recover share of offerings made by disciples where offerings are not connected with any office, is not maintainable in Civil Court. A. I. R. 1928 Mad. 851=110 Ind. Cas. 782. Suit chiefly with respect to the right to receive offerings and incidentally to the right of worship is maintainable. A. I. R. 1925 Bom. 209=76 Ind. Cas. 629. A special kind of worship, to which some dignity is attached, but no emoluments of value are attached cannot be the subject of a suit in a Civil Court. A. I. R. 1935 Mad. 679=41 L. W. 752=1935 M. W. N. 520, see also A. I. R. 1935 Mad. 621=41 L. W. 384=1935 M. W. N. 615=69 M. L. J. 14 ; A. I. R. 1936 Mad. 973=71 M. L. J. 588=1936 M. W. N. 954.

**Award under Co-operative Societies Act.**—The Civil Courts have no jurisdiction to set aside an award made by arbitrators appointed under the Co-operative Societies Act. A. I. R. 1935 Bom. 91=36 Bom. L. R. 1245=154 Ind. Cas. 583.

**Suit to declare Order of Privy Council Illegal and void.**—No Court in British India has jurisdiction to grant a declaratory decree to the effect that a decree passed by their Lordships of the Judicial Committee is illegal and void. 158 Ind. Cas. 338=1935 O. W. N. 1071.

**Provision for special remedy**—Where a right of action exists, a suit is maintainable to enforce that right independently of the special remedies provided by the Code. 160 Ind. Cas. 209=1935 M. W. N. 1207=43 L. W. 262=A. I. R. 1935 Mad. 421.

**Ouster of Jurisdiction by Legislature.**—It is an established principle of law that when an Act of Legislature gives power to any person for a public purpose for which an individual may receive an injury, then if the mode of redress is also specified in the statute jurisdiction of ordinary Courts will be ousted. A. I. R. 1928 Lah. 562=10 Lah. 338=111 Ind. Cas. 508. Unless Courts are satisfied that conditions ousting them are fulfilled, they will not hold that they are barred. 11 Rang. 125=A. I. R. 1933 Rang. 124. Civil Court's jurisdiction was held not to be ousted by rule 40 of the Election rules framed by the old Bengal Municipal Act. 37 C. W. N. 122=A. I. R. 1933 Cal. 492=60 C. 438. "Where a special tribunal, out of the ordinary

course, is appointed by an Act to determine questions as to right which are the creation, of that Act, then except so far as otherwise expressly provided or expressly implied that tribunal's jurisdiction to determine those questions is exclusive. It is an essential condition of those rights that this should be determined in the manner prescribed by the Act to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any; there is no change in the old order of things; a new order is brought into being," *Per Jenkins C. J.* in *Bhaisankar v. The Municipal Corporation of Bombay*, 31 B. 604; see also 36 M. 120; Maxwell 240; A. I. R. 1926 Mad. 798=94 Ind. Cas. 546; A. I. R. 1933 Nag. 193 (F. B.)=29 N. L. R. 278=143 Ind. Cas. 514; 157 Ind. Cas. 270=1935 A. L. J. 111=1935 A. W. R. 1094.

**Actions of public body.**—Misuse of the powers given to a public body by attempting to acquire land not in furtherance of the objects of the statute but for the purposes of exacting exemption-fee from owners is actionable in a Civil Court. 47 C. 500=47 I. A. 45=24 C. W. N. 881=32 C. L. J. 65=18 A. L. J. 521=22 Bom. L. R. 586=38 M. L. J. 511=11 L. W. 566 (P. C.)=56 Ind. Cas. 37 affirming 44 C. 219=21 C. W. N. 8. Municipal Board will not be justified in refusing to grant a licence properly applied for under the bye-laws in order to secure an advantage to itself in a dispute about a question of title with another person. Civil Court can interfere in such a suit. 52 Ind. Cas. 785=17 A. L. J. 976. When a Collector's decision in confiscating silver is not in accordance with the provisions of Sea Customs Act, a Civil Court can interfere 49 Ind. Cas. 427. Where the Corporation of Calcutta refuses to admit the owners, right to compensate on the ground that the building was erected after 1863, and proceeds to demolish it, the Civil Court has jurisdiction to entertain a suit for a declaration that the owners is entitled to compensation. 21 C. W. N. 194=24 C. L. J. 498=43 I. A. 243=36 Ind. Cas. 912=32 M. L. J. 631 (P. C.). If action of municipality is *ultra vires*, Civil Courts can interfere. A. I. R. 1926 Lah. 461=93 Ind. Cas. 127; A. I. R. 1927 All. 432=101 Ind. Cas. 446; A. I. R. 1927 Bom. 603=20 Bom. L. R. 1325=106 Ind. Cas. 265; 113 Ind. Cas. 87=A. I. R. 1929 Sind 69; 32 C. W. N. 1055=56 C. 280=A. I. R. 1929 Cal. 33.

**10. [S. 12.]** No Court shall proceed with the trial of any suit in which

the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, [or in any Court beyond the limits of British India established] or continued by the Governor-General in Council and having like jurisdiction, or before His Majesty in Council.

**Explanation.**—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit founded on the same cause of action.

**Amendment in Burma.**—The words within brackets has been omitted in Burma by G. B. Order of 1937. In Burma substitute the words "British India" by "British Burma."—*Vide* G. B. Order of 1937.

**Scope**—The provisions of the section leave no discretion to the Courts in respect of the stay of suits when circumstances are such as to invoke the operation of the section. 36 C. W. N. 667=140 Ind. Cas. 135=A. I. R. 1932 Cal. 751. One test of the applicability of this section to a particular case is whether on the final decision being reached in the previous suit such decision would operate as *res judicata* in the subsequent suit. *Ibid.* A suit must commence with a plaint. 22 M. 256. This section is inapplicable unless both subject-matter and relief are identical. The fact of one issue being common would not necessitate stay of subsequent suit. A. I. R. 1929 All. 805=51 A. 1017=(1930) A. L. J. 284=122 Ind. Cas. 752; 114 Ind. Cas. 775=A. I. R. 1929 Oudh 351. This section does not apply to execution proceedings. A. I. R. 1929 Lah. 694=119 Ind. Cas. 488. Before an order under s. 10 staying a suit is passed, the Court must see (1) if the matter in issue is also directly and substantially in issue in a previously instituted suit; (2) between the same parties; (3) in the same or any other Court in British India; and (4) having jurisdiction to grant the relief claimed. 110 Ind. Cas. 418; 106 Ind. Cas. 661=A. I. R. 1927 Mad. 1199; A. I. R. 1929 Mad. 113=26 L. W. 241=103 Ind. Cas. 274. This section is not applicable where the parties are not the same but the question is the same. A. I. R. 1922 Mad. 321=68 Ind. Cas. 167; 15 L. W. 667; 61 Ind. Cas. 830. The three

essential conditions that are necessary for bringing into operation s. 10 are : (1) that the matter in issue in the second suit is directly and substantially in issue in the previously instituted suit ; (2) that the parties in the two suits are the same, and (3) that the Court in which the first suit is instituted, is a Court of competent jurisdiction to grant the relief claimed in the subsequently instituted suit. A. I. R. 1933 Cal. 887=60 C. 1096. Under section 10 it is mandatory upon the Court not to proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit, between the same parties, in another Court having jurisdiction to grant relief. The mere addition of prayers for a declaration that certain interlocutory order in the first suit are illegal and for an injunction restraining defendant from proceeding with the first suit, cannot possibly change the character of the suit, which could otherwise be indetical for the purpose of section 10. In endeavouring to arrive at a correct decision as to whether the subsequent decision as to whether the subsequent suit is *parallel* to the previous suit, one must have regard to the position of affairs at the time when each of the suit was respectively instituted and further what would be the position of affairs when both the suits have been tried and finally decided. The real criterion ought to be whether, if the first suit had been determined and then the second one started, the matter in the second suit might be regarded as *res judicata* by reason of the decision in the first. *Durga v. Kanti*, 38 C. W. N. 818=61 C. 670. It is hardly open to a party to blow hot and cold and ask the Court not to inquire into an application filed by such party until a previous suit in respect of the same subject-matter filed by him decided in another Court. A. I. R. 1934 Sind 38=149 Ind. Cas. 1169. When stay is asked in a criminal proceeding the principle of s. 10 may well be applied. *Kalki v. Kishor*, 151 Ind. Cas. 897=A. I. R. 1934 All. 454=1934 A. L. J. 342=A. I. R. 1934 All. 131. If two Courts have concurrent jurisdiction, the institution of proceedings by one party in one Court, cannot in law, prevent the other party from taking proceedings with respect to the same subject-matter in the other Court, and all that can be done in such a case is to stay proceedings in one of the Courts on the principle of s. 10, in order to avoid multiplicity of litigation. *Echholz v. Amar*, 157 Ind. Cas. 796=A. I. R. 1935 Lah. 76=A. L. R. 1935 Lah. 260 ; see also A. I. R. 1933 Sind 255. The date of presentation of the plaint, and not the date of its admission is the date of institution for purposes of s. 10, C. P. Code. *Harendra Nath v. Dheerendra*, 62 C. 1115. For application of s. 10, the entire matter in the subsequent suit must be in issue in the previous suit and it is not sufficient that there should be one matter in issue in common in both the suits. A. I. R. 1935 Mad. 112=155 Ind. Cas. 1002=1935 M. W. N. 123=41 L. W. 449. As regards the application of this section when a partition proceeding is pending in Revenue Court *vide* 161 Ind. Cas. 865=1936 A. L. J. 347=A. I. R. 1936 All. 485. Where a suit was first instituted in wrong Court and subsequently in a proper Court, the second suit is not a continuation of the first suit even though subject-matter and parties are the same. A. I. R. 1933 Sind 117=144 Ind. Cas. 56. Section 10 does not make the trial of the latter suit without jurisdiction unless it is between parties under whom the parties in the earlier suit claim litigations under the same title. 31 Ind. Cas. 25. Concurrent jurisdiction of both Courts is an essential requisite for a stay order under this section. 12 N. L. R. 174=37 Ind. Cas. 540. The word jurisdiction has no reference to territorial jurisdiction, 13 Bur. L. T. 19=10 L. B. R. 154=57 Ind. Cas. 904. Stay does not prevent passing of interlocutory orders. A. I. R. 1922 Bom. 276=46 B. 431=33 Bom. L. R. 1228. Section 10 does not bar suit nor justifies dismissal. A. I. R. 1925 Pat. 201=77 Ind. Cas. 157. It is doubtful whether a Sub-ordinate Court in British India has power to restrain by injunction a party from prosecuting a suit in a foreign Court though within the British Empire. The Chartered High Courts have such power A. I. R. 1928 Mad. 491=27 L. W. 418=109 Ind. Cas. 281. Court can stay suit under its inherent power even where it does not come within the provision of s. 10. A. I. R. 1929 Oudh 341=7 O. W. N. 157=114 Ind. Cas. 775.

**Matter in issue.**—"Matter in issue" means entire subject in controversy and not main question involved. A. I. R. 1925 Mad. 574=48 M. L. J. 251=88 Ind. Cas. 421 ; 24 C. L. J. 514=36 Ind. Cas. 641 ; A. I. R. 1927 Bom. 245=29 Bom. L. R. 382 ; A. I. R. 1929 All. 805=51 A. 1017=1930 A. L. J. 284=122 Ind. Cas. 752 ; A. I. R. 1922 Mad. 304=31 M. L. T. 360=70 Ind. Cas. 682 ; A. I. R. 1923 Lah. 69=69 Ind. Cas. 111=33 P. W. R. 1922 ; 70 Ind. Cas. 5=A. I. R. 1923 Mad. 88 ; 40 L. W. 715=67 M. L. J. 748=1934 M. W. N. 1380 ; A. I. R. 1935 Lah. 816. For a stay of a

suit under this section, identity of relief is no longer essential. If the matter in issue in two suits is the same, the latter suit must be stayed without regard to the relief sought. 55 Ind. Cas. 254=12 Bur. L. T. 203.

**Suit includes appeals.**—The term suit includes appeals. 75 Ind. Cas. 231=A. I. R. 1923 Cal. 716=27 C. W. N. 772. A suit on same cause of action was stayed pending decision of appeal on the ground of balance of convenience. A. I. R. 1931 Lah. 65=31 P. L. R. 550=129 Ind. Cas. 889. Applying for obtaining leave to appeal to His Majesty does not amount to pendency of appeal. A. I. R. 1929 Rang. 67=6 R. 775=115 Ind. Cas. 665. Where same matter is in issue in suit in another Court and appeal in High Court between same parties, the High Court can order stay. A. I. R. 1926 Lah. 692=96 Ind. Cas. 958.

**Time for stay.**—The Court has power, generally to stay such second suit at any stage at which it seems expedient so to do, and this even before the suit proceeds to "trial", in the strict sense of the term. However, it is always expedient to stay or arrest altogether the second suit at the earliest possible moment. *Durga v. Kanti*, 61 C. 670=38 C. W. N. 818.

**Revision**—High Court can interfere in revision against order under s. 10 if suitable grounds are disclosed. 139 Ind. Cas. 48=33 P. L. R. 787=A. I. R. 1933 Lah. 34; 34 P. L. R. 123=141 Ind. Cas. 186. Order rejecting application for stay of suit is interlocutory order and is therefore not subject to revision. Court can however interfere under s. 151 or Government of India Act, s. 107. 128 Ind. Cas. 49=A. I. R. 1930 Lah. 525=31 P. L. R. 174; see also 141 Ind. Cas. 177=34 P. L. R. 86=A. I. R. 1933 Lah. 191. Order refusing to exercise jurisdiction under s. 10 is revisable. A. I. R. 1928 Oudh 355=5 O. W. N. 604. No revision lies against an order refusing to stay a suit under s. 10 there being no case decided under s. 115. A. I. R. 1924 Lah. 567=75 Ind. Cas. 101; 67 Ind. Cas. 167=1 Lah. L. J. 425.

**Appeal.**—An order by a single Judge of the High Court refusing to stay a suit under this section is a judgment within clause 15 of the Letters Patent and is appealable. 61 C. 670=38 C. W. N. 818.

**Suit whether includes Arbitration proceeding.**—In *Srikrishna khanna, In re*, 1, A. I. R. 1934 Sind 38. *Rupchand A. J. C.* said: "At the time when I was dealing with the case of Messrs *Grahams Trading Company* (Jud. Mis. No. 182 of 1933) my attention was not invited to the case of *S. R. Malotra v. L. Sukh dayal*, A. I. R. 1928 Sind 169, where I expressed a doubt with regard to the ruling in *Jainarain Babulul v. Nasrindus*, A. I. R. 1922 Sind 6, with regard to the question whether arbitration proceedings are a suit within the meaning of section 10 and s. 141, C. P. Code and whether an arbitrator is a party to the proceedings instituted by a person adversely affected by the award filed under the Arbitration Act, to have it set aside. I think there is a good deal to be said in favour of the view taken by me.....see also *Grahams v. Chindu*, A. I. R. 1935 Sind 228.

11. [S. 13.] No Court shall try any suit or issue in which the matter

*Resjudicate.* directly and substantially in issue has been  
directly and substantially in issue in a former

suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

**Explanation I.**—The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

**Explanation II.**—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

**Explanation III.**—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

**Explanation IV.**—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

**Explanation V.**—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

**Explanation VI.**—Where persons litigate *bonafide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

**Principle.**—The rule of *res judicata* is founded on ancient precedent and is dictated by wisdom which is for all time 43 I. A. 91=43 C. 694=20 C. W. N. 738 (744). "It hath been well said" declared Lord Coke, *interest rei publicae ut sit finis litium* otherwise great oppression might be done under colour and pretence of law." *Priddle v. Napier*, 6 Coke, 9A. Though the rule of the Code may be traced to English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators *Vijnanesvara* and *Nilkantha*, who include the plea of former judgment among those allowed by law, each citing for his purpose the text of *Katyayana*, who describes the plea thus: "If a person though defeated, at law sue again he should be answered, "you are defeated formerly." This is called the plea of former judgment. And so the application of the rule by the Courts of India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law. 43 I. A. 91=43 C. 694=20 C. W. N. 738 (744).

The following rule was laid down by Sir William De Grey C. J. in the *Dutchess of Kingston's* case, 20 How St. Tr. 355 (357): "As a general principle, a transaction between two parties, in a judicial proceeding, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of a fact the verdict of a jury in finding the fact, and the judgment of the Court upon the facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers. From the variety of cases relating to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true; first, that the judgment of a Court of concurrent jurisdiction directly upon this point, is a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another Court; secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties coming incidentally in question in another Court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." "If" said Lord Kenyon C. J. in *Great Head v. Bramley*, 7 T. R. 456, "an action be brought and the merits of the question be discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although perhaps some objection or argument might have been urged upon the first trial, which would have led to a different judgment." The same learned Judge said in *Marriott v. Hampton*, 7 T. R. 269: "If this action could be maintained I knew not what cause of action could ever be at rest. After recovering by process, of law there must be an end of litigation, otherwise there would be no security for any person." A party who has lost in one Court can not be permitted to add causes of action or prayers for reliefs in another suit for the purpose of swelling the valuation of his suit and claim that the decision in the former suit does not operate as *res judicata*. But if it appears that his subsequent suit proceeded upon a cause of action which did not exist at the date of the previous suit, or if that cause of action existed it was one which he could not have availed of at that time, having regard to the nature of the suit as it then was, the fact that he had now instituted a suit embracing the entire cause of action with the result that his suit was of a higher value would justify him in claiming that the decision in the earlier suit was not operative as *res judicata*. If it is possible to treat the entire cause of action upon which the latter suit is founded as divisible and if in the earlier suit one of the component parts of the cause of action was relied upon, then the previous decision will stand as a bar to the extent of the matter involved in the earlier suit. A. I. R. 1935 Cal. 792. It is a principle in every system

of jurisprudence that there should be finality in litigation. A judgment not appealed from binds the parties and privies for all time by what appears upon its face ; and if it can be shown that in the course of the action that resulted in the judgment a certain definite and material issue was raised by the parties and determined judicially or by consent, it would be contrary to public policy to allow the same parties to reargue the same matter in subsequent legal proceedings. Estoppel by matter of record rests on this principle, and although it may be said in one sense to exclude the truth, it is essentially just and righteous. There is no difference within the meaning of s. 11, C. P. Code between a certain definite material issue which has been raised or which should have been raised. There is no difference in this matter between a consent decree and a decree passed *per invitum*. A. I. R. 1936 Sind 99=29 S. L. R. 455=164 Ind. Cas. 43.

**Resjudicate and estoppel distinguished.**—*Res judicata* bars fresh litigation at the outset and binds parties and his representatives estoppel is a rule of evidence preventing a man who by his acts or statement has induced another to believe a thing to be true from denying the truth of that thing to the prejudice of the person misled. A. I. R. 1927 Pat. 33=1 Pat 174=3 P. L. T. 506=67 Ind. Cas. 266. Section 11 of the Civil Procedure Code is concerned with the law of procedure. A. I. R. 1922 Sind 6=16 S. L. R. 79=66 Ind. Cas. 796. The rule of *res judicata* does not create any new right or interest in the property, though it may indirectly affect the rights of persons against whom it is effective. The rule is a rule of personal estoppel and does not attach itself to property. A. I. R. 1921 Mad. 306=44 M. 514=41 M. L. J. 288=63 Ind. Cas. 205. There is a difference between *res judicata* and estoppel. *Res judicata* ousts the jurisdiction of the Court while estoppel does no more than shut the mouth of a party. Estoppel never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it at another time ; while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over. A. I. R. 1936 Sind 99=164 Ind. Cas. 43.

**Section is not exhaustive.**—This section is not exhaustive, but the statutory principles in this section must be fulfilled before any of the principles of *res judicata* can be applied. 126 Ind. Cas. 570=A. I. R. 1930 Lah. 487 ; see also A. I. R. 1930 Bom. 431=54 B. 696=32 Bom. L. R. 383=126 Ind. Cas. 305 ; A. I. R. 1930 Cal. 5=56 C. 639=120 Ind. Cas. 710 ; A. I. R. 1929 Lah. 627 ; 45 M. 320=49 I. A. 129 (P. C.). General principles of *res judicata* cannot be invoked for cases covered by s. 11. 30 C. W. N. 415=A. I. R. 1926 Cal. 568=44 C. L. J. 399 ; 96 Ind. Cas. 910=A. I. R. 1926 Lah. 670 ; 110 Ind. Cas. 554=56 M. L. J. 52=A. I. R. 1928 Mad. 840 ; 108 Ind. Cas. 623 ; 117 Ind. Cas. 68. The statement of doctrine of *res judicata* in section 11 is not exhaustive. 53 A. 103 (P. C.)=58 I. A. 158=A. I. R. 1931 P. C. 114=53 C. L. J. 552=35 C. W. N. 661=1931 A. L. J. 453=33 Bom. L. R. 979=61 M. L. J. 195=132 Ind. Cas. 598 (P. C.) The question of *res judicata* is not confined within the limits of s. 11 of the C. P. Code but has a wider extension than that. 33 Bom. L. R. 1139=A. I. R. 1931 Bom. 507 ; 57 I. A. 24 ; 49 I. A. 129 ; 11 I. A. 37 ; see also 158 Ind. Cas. 1074=A. I. R. 1935 Cal. 596 ; 80 Ind. Cas. 674=40 C. L. J. 291 ; A. I. R. 1924 Cal. 600=39 C. L. J. 40=79 Ind. Cas. 520 ; A. I. R. 1928 Oudh. 359=5 O. W. N. 265 ; A. I. R. 1934 Cal. 112 ; 40 C. W. N. 174

But section 11, Civil Procedure Code is exhaustive in respect of all cases falling within its terms and with regard to such cases, the Court is not entitled to travel outside the section and apply the general principles. *Sekender v. Sadaruddin*, A. I. R. 1935 Cal. 792. "Section 11 of the Code is not exhaustive of the circumstances in which an issue is *res judicata*. Although the section did not in terms apply, the plea of *res judicata* still remained, apart from the limited provision of the Code, and it was that plea which the respondents had to meet in the present case". A. I. R. 1921 (P. C.) 11=48 C. 499=48 I. A. 187 (P. C.). This dictum was re-affirmed by *Lora Buckmaster* in *T. B. Ramchandra Rao v. A. N. S. Ramchandra Rao*, A. I. R. 1922 (P. C.) 80=45 M. 320=49 I. A. 129 (P. C.). Where it was remarked that "the principle which prevents the same cause being twice agitated is of general application and is not limited by the specific words of the Code in this respect."

**Scope of the Section.**—Section 11 is not applicable when the previous suit was not dismissed on merits, but had abated. 12 Lah. 275=A. I. R. 1931 Lah. 79=131 Ind. Cas. 98. If there are two issues which had been determined in a prior suit and the decision of either of those issues was enough to dispose of the plaintiff's claim, the decisions on both those issues would, nevertheless, operate as *res judicata*

in a subsequent suit. 32 P. L. R. 815. This section does not in terms apply to subsequent proceedings in the same suit. Such proceedings are only a part of the original proceedings and it cannot be said that the matter was decided either specifically or by implication in a previous suit. The rule of *res judicata* has been applied to subsequent proceedings when the point raised in the subsequent proceedings was raised in the earlier proceedings and specifically decided. But where there was no such specific decision in the earlier proceedings, the rule can not apply. 52 A. 901=1930 A. L. J. 1524=A. I. R. 1931 All. 99. When the question which had to be decided in the prior suit is different from what has to be decided in the subsequent suit, the principle of *res judicata* will not apply. A. I. R. 1931 Lah. 254. The rule depends upon the identity of the issues. In order to consider whether a previous decision is *res judicata* or not the substantial effect of what has been decided in the case has to be considered. 56 C. L. J. 369.

For the application of the rule of *res judicata* it is essential that there must be a previous order having the force of a decree. 9 O. W. N. 488 (511)=A. I. R. 1932 Oudh 199 (F. B.). Section 11 does not require the cause of action to be the same nor the reliefs claimed to be the same before the doctrine of *res judicata* can come into operation; what it requires is that the matter in issue shall be the same and it makes no distinction between questions of fact and questions of law. The rules of *res judicata* requiring the identity of the matter in issue will apply even when the subject matter, the object of the relief and the cause of action are different. 138 Ind. Cas. 161=15 N. L. J. 1=A. I. R. 1932 Nag. 90. For the application of the rule of *res judicata* there must be reciprocity. A. I. R. 1933 Pat. 210. Where the previous suit abates and is not dismissed on merits, this section has no application. A. I. R. 1931 Lah. 79=31 P. L. R. 973=131 Ind. Cas. 98. Subsequent proceedings are not barred when the points raised therein were not raised in the earlier proceedings and specifically decided once for all. A. I. R. 1931 All. 99=1930 A. L. J. 1524=130 Ind. Cas. 198. Observations in a judgment relating to a different matter though connected cannot bind a third party and the judgment itself cannot be evidence against him. A. I. R. 1930 Mad. 751=129 Ind. Cas. 650=1930 M. W. N. 306. Where after the dismissal of a suit for rent, subsequent suit by the tenant for declaration of his rights was decreed and a suit was thereupon filed for the apportionment of rent: *Held* that the previous rent suit operated as *res judicata*. A. I. R. 1931 Cal. 397=35 C. W. N. 46=132 Ind. Cas. 81. The Court cannot travel outside s. 11 when case falls within its terms. A. I. R. 1928 Mad. 840=56 M. L. J. 52=110 Ind. Cas. 554; 117 Ind. Cas. 68. Section 11 only requires that the issue and not the subject-matter, should be common. A. I. R. 1927 Mad. 450=100 Ind. Cas. 402; 33 C. W. N. 876=57 C. 258=A. I. R. 1930 Cal. 47=124 Ind. Cas. 161. Issue constituting *res judicata* is to be construed with reference to pleadings, judgment and record. A. I. R. 1930 Pat. 71=10 P. L. T. 630=120 Ind. Cas. 292. Subject-matter of the two suits need not be identical. It is enough if the issue determined is the same. 88 Ind. Cas. 985=A. I. R. 1925 Oudh 390=12 O. L. J. 248=29 O. C. 93; 89 Ind. Cas. 282=A. I. R. 1925 Oudh 444=12 O. L. J. 524. It is not open to rely upon the principle of finality which forms the basis of the general view of *res judicata* apart from s. 11. A. I. R. 1925 Cal. 1046=85 Ind. Cas. 979.

A question at issue between the parties once heard and finally decided, binds the parties at subsequent stages of the same suit, under general principles of law though not under s. 11. 48 C. 499=48 I. A. 187=19 A. L. J. 366=40 M. L. J. 423=25 C. W. N. 915=23 Bom. L. R. 648 (P. C.). The doctrine of *res judicata* should not be unduly conditioned and qualified by all sorts of ingenious attempts at evasion where there has been in fact a fair contest on a question and Court has given a final decision thereon. 108 P. L. R. 1919=67 Ind. Cas. 775. The principle applies to all orders passed in the same suit between the same parties when the question arises in subsequent proceedings in suits. A. I. R. 1924 Mad. 406=73 Ind. Cas. 903. It is difficult if not impossible to answer in general terms a question as to whether a whole class of cases can or cannot be held barred by *res judicata*. A. I. R. 1929 Oudh 172=6 O. W. N. 191.

Even when law has been since determined to be otherwise by judicial decision, the rights of parties decided upon prior law remain unaffected. A. I. R. 1928 Cal. 777=56 C. 723=33 C. W. N. 126=48 C. L. J. 327=115 Ind. Cas. 593. For the purposes of *res judicata* a finding by necessary implication is no less potent than an express finding. 113 Ind. Cas. 120=A. I. R. 1931 Lah. 888.

The prohibition in s. 11 applies also to an appellate Court. Where pending a second appeal, the former suit is decided on second appeal, it operates as *res judicata* (1919) M. W. N. 455=52 Ind. Cas. 625. Matters decided by the lower Court cease to be *res judicata* and if the appeal is disposed of on some other ground, the finding of lower Court is not *res judicata* concerning matters not covered by appellate judgment. 27 M. L. T. 54=56 Ind. Cas. 199. Implied adjudication is *res judicata*. 24 M. L. T. 205=48 Ind. Cas. 905=8 L. W. 206. Where a suit of the nature cognizable by a Court of Small Causes is tried as a regular suit, decision operates as *res judicata*. 41 A. 54=16 A. L. J. 782=47 Ind. Cas. 837. Where in an appellate judgment, a point is left undecided, through it was decided by the trial Court, the appellate judgment does not operate as *res judicata* 47 Ind. Cas. 685. If there is an appeal it destroys the finality of the decision of the lower Court and if the ultimate Court of Appeal dismisses the suit as being badly framed the merits of the case are not *res judicata*. 45 C. 492=44 I. A. 213=128 P. W. R. 1917=22 M. L. T. 451=22 C. W. N. 121=26 C. L. J. 568=15 P. L. J. 889=19 Bom. L. R. 972=34 M. L. J. 12=7 L. W. 62=42 Ind. Cas. 959. A judgment obtained by fraud or collusion does not operate as *res judicata*. 1936 A. L. J. 1162. section 11 does not affect jurisdiction of Court. A. I. R. 1934 Cal. 282. In order to operate as *res judicata* raising of express issue is not necessary, decision by implication is sufficient. A. I. R. 1934 Cal. 179. If s. 11 is applicable it must be applied in its entirety. A. I. R. 1934 Sind. 112. In deciding whether a suit is barred by *res judicata*, the pleadings, issues and judgment of previous case should be looked at. A. I. R. 1934 Oudh. 265. Where an issue was tried between parties in proper suit in competent Court, it cannot be tried again in another suit between them. A. I. R. 1934 Sind. 112. Decree in redemption cannot operate as *res judicata* unless it extinguishes right to redeem. A. I. R. 1934 P. C. 205. Principle of *res judicata* though wider cannot transgress s. 11. A. I. R. 1934 Nag. 178. Order of Court is binding on all except superior Court in appeal or revision. A. I. R. 1934 Lah. 416. If two conflicting decrees have been obtained by parties in two different Courts or even from the same Court then the last one should be the effective decree between the parties and the first decree should be regarded as dead. The basis of this statutory rule is that if a party who could raise the plea of *res judicata* does not raise the same when an opportunity is given to him he must be deemed to have waived it. A. I. R. 1935 All. 645=155 Ind. Cas. 571. A judgment can operate as *res judicata* only in so far as it finally determines a controversy which is directly and substantially in issue in the case. A. I. R. 1935 Nag. 22=18 N. L. J. 32. A matter which is *res judicata* cannot be agitated afresh merely by reason of a suggestion, made in a judgment which was unnecessary to the decision of the case, that the party may bring another suit. 158 Ind. Cas. 995=A. I. R. 1935 Pesh. 150.

**Applicability of the Section.**—Where a person is merely a *pro forma* defendant in a previous suit and no relief is sought against him there, he is not precluded from raising the same question in subsequent suit and the principle of *res judicata* in any shape or form does not apply. A. I. R. 1935 Lah. 942. Where the decision of the Court in a previous suit determined that section 12A of the Chota Nagpur Encumbered Estates Act had never applied to a transaction a Court in a new suit between the same parties with regards to the same transaction cannot try a new issue as to its applicability in face of express prohibition in s. 11 of the C. P. Code. 63 I. A. 53=15 Pat. 203=1936 A. L. J. 104=38 Bom. L. R. 339=62 C. L. J. 521=38 P. L. R. 325=40 C. W. N. 289=1936 O. W. N. 127=1936 M. W. N. 321=A. I. R. 1936 P. C. 46=70 M. L. J. 122 (P. C.).

**Application of the general principle of *res judicata* and S. 11 of the C. P. Code.**—In *Iswar Datt v. General Assurance*, A. I. R. 1937 Lah. 346, *Bhide J.* observed: "Section 11 of the C. P. Code has been interpreted to apply when the two Courts concerned have concurrent jurisdiction: *Cf.* (9 C. 439=9 I. A. 197). But the principle of *res judicata* is of wider application, as pointed out by their Lordships of the Privy Council in 48 C. 499=48 I. A. 187=60 Ind. Cas. 631 and 45 M. 320=49 I. A. 129=67 Ind. Cas. 408. It has been held to govern cases where the matter in issue is the same and has been previously decided by a competent Court. For instance, when a Court has exclusive jurisdiction to try any matter its decision on that point will operate as *res judicata*; *Cf.* A. I. R. 1926 Sind. 236, A. I. R. 1934 Sind. 112; A. I. R. 1934 Lah. 324=36 P. L. R. 64; A. I. R. 1932 Lah. 623=143 Ind. Cas. 59=34 P. L. R. 462; A. I. R. 1929 Lah. 586=121 Ind. Cas. 507=30 P. L. R. 427."



**Application of the principle of *res judicata* to appeals**—In *Lushmi v. Bhullar*, A. I. R 1927 Lah. 289=8 Lah. 384=104 Ind. Cas. 849 (F. B.). *Tekchana J.* observed: "It must therefore be settled at the very outset whether s. 11 applies to appeals or whether its operation is limited only to suits as meaning proceedings in an action in Courts of the first instance as distinguished from proceedings in appellate Courts. After a careful examination of the section I have reached the conclusion that it applies to suits only and not to appeals. It is no doubt true that in the body of the Civil Procedure Code, as well as in other enactments, the word 'suit' is often used as including proceedings before the appellate Court, and also other proceedings of civil nature. But having regard to the phraseology used in s. 11, and more particularly to Expl. II, which, it might be noted, was for the first time added in 1908, the word "Court" as used in this section can but mean the trial Court, and 'suit' signifies proceedings beginning with the plaint and ending with the decree in that Court. It seems to me that no other interpretation is possible. If the word 'suit' is to be taken as including 'appeal', the section becomes inconsistent with Expl. II.....If then s. 11 does not in terms, apply to appeals, we have to fall back upon the general principles of the rule of *res judicata* and to see if there is anything in those principles which debars the appellate Court from hearing and deciding an issue under circumstances such as those described in the question. It is, however, necessary to bear in mind that in applying these general principles, the Courts are not hampered by any technical rules of interpretation such as govern the applicability of a statute. As remarked by *Sir Lawrence Jenkins* in *Sheopersan Singh v. Ramanandan Prasad*, 43 C. 654 (706)=33 Ind. Cas. 194=43 I. A. 91 (P. C.) 'the application of the rule by Courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law.' In England, the same rule was laid down by *Butt M. R.* in *Re May* (28 Ch. D. 516). When he said that the doctrine of *res judicata* was not a technical doctrine, but was very substantial one'. So also in Roman Law, as administered by the Praetors, the '*exceptio res judicata*' was among the 'equitable grounds' on which the defendant was allowed to render ineffectual an action *ipso jure* (see Bown's Legal Maxim, Ninth Edition, page 225). In India, some Judges have gone to the extent of laying down that in interpreting the sections of the Civil Procedure Code relating to *res judicata*, the fundamental principle of the rule embodied in it should not be ignored: [per *Mahmood J.* in *Sita Ram v. Amir Begam*, (8 A. 324) and per *West J.* in *Bholubai v. Adusang* (9 B. 75 at p. 81). What we have therefore, to do, is to ascertain the *raison d'être* of the doctrine and then to apply it to the facts of a particular case unfettered by any technicalities. It is the spirit of the law and not its letter which is to be the governing factor, the soul of the rule rather than its outward form.

"Let us see what are the fundamental principles of *res judicata* and how do they affect the present case. It has already been indicated that the foundation of the rule, as understood both by ancient and modern lawyers is that a question must be once fairly and finally tried by a competent Court and after this has been done all further litigation about it should be concluded for ever between the parties. The maxim is, as has been stated above that, no one shall be vexed twice over the same matter." This, to my mind, presupposes that the issue has been once fairly and finally tried in a former litigation, which was independent of the proceedings in which the same matter is again in dispute. The essence of the rule seems to me to be that the two proceedings should be so independent of each other that the trial of the one cannot be confused with the trial of the other. Where two suits having a common issue, are, by consent of parties or by order of the Court, tried together, the evidence being written in one record and both suits disposed of by a single judgment, can it be said that there have been two distinct and independent trials? There being but one finding and one judgement, on what principle can the hearing of the appeal in which this finding and this judgement are under consideration be barred merely because no appeal has been filed in the connected suit which was disposed of by that very judgment? There has been in substance as well as in form, but one trial and one verdict, and I venture to think, it will be a travesty of justice to stifle the hearing of the appeal against such a judgement on the ground that the findings contained in it operate as *res judicata*. In such a case there can be no question of the successful party being 'vexed twice' over the same matter, nor does the hearing of the appeal in any way militate against any rule of public policy, which requires that there must be an end of the litigation. There is not only nothing here to attract the principles underlying the rule of *res judicata*,

but, on the other hand, it seems to me that the acceptance of such a plea in such circumstances would strike at the very root of the basic conception of the doctrine which requires that a party must have at least one fair trial of the issue resulting in a decision by the Court of ultimate appeal as allowed by the law for the time being in force." See also A. I. R. 1925 All. 488=87 Ind. Cas. 804; A. I. R. 1927 Lah. 821=9 Lah. L. J. 526=105 Ind. Cas. 850.

**Essential conditions of the application of the doctrine.**—In order to give rise to a valid bar to *res judicata* the following conditions must be fulfilled :—

(I) There must be two suits, one of which must have been passed and finally decided prior to the second suit whether or not it was instituted prior thereto.

(II) The matter directly or substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit.

(III) The subsequent suit must be between the parties (including their privies) of the former suit.

(IV) The parties of the two suits must be litigating under the same title.

(V) The Court trying the former suit must have been competent to try the second suit or the suit in which such issue has subsequently been raised.

**Has been heard and finally decided**—Matter should be heard and finally decided. A. I. R. 1931 Oudh 157=8 O. W. N. 179. Issue raised and tried out cannot be re-agitated. 99 Ind. Cas. 211=13 A. L. J. 813=A. I. R. 1926 Oudh 613=3 O. W. N. 771. Possibility of appeal being filed and decision upset does not affect finality. A. I. R. 1926 Rang. 122=95 Ind. Cas. 104. When question decided in effect though not in express terms, the rule of *res judicata* applies. A. I. R. 1926 Oudh 101=12 O. L. J. 571=91 Ind. Cas. 583. A decision to be final for the purpose of s. 11, need not be on merits. A. I. R. 1929 Oudh 275=118 Ind. Cas. 766=6 O. W. N. 281. Where the trial Court gave a finding on a certain question even though there was no specific issue regarding it, but the finding was objected to in appeal and the appellate Court without specifically referring to it dismissed the appeal, the question must be deemed to be heard and finally decided within the meaning of s. 11 and would operate as *res judicata*. 33 Bom. L. R. 1139=A. I. R. 1931 Bom 507. Where a prior suit has been dismissed both on merits and as not maintainable, it operates as a *res judicata*. 1931 A. L. J. 104=A. I. R. 1931 All. 131=130 Ind. Cas. 1. In order to constitute *res judicata*, the previous suit should have been heard and finally decided and not have been dismissed as the Court had no jurisdiction to entertain the suit. A. I. R. 1931 All. 200=130 Ind. Cas. 4.

Where there has been an appeal the matter is no longer *res judicata* but *res sub-judice* and where an appeal is not finally heard and decided matters therein are not *res judicata*. A. I. R. 1927 Lah. 1=7 Lah. 423=27 P. L. R. 663=98 Ind. Cas. 584. Issue as to construction of a document decided in prior suit is *res judicata* in a subsequent suit though property involved therein is different. A. I. R. 1926 Mad. 695=23 L. W. 540=95 Ind. Cas. 325. Where in a suit between principal and agent, amount due in respect of certain transactions is settled, second suit in respect of same transactions is barred. A. I. R. 1925 Lah. 596=7 Lah. L. J. 420=26 P. L. R. 685=92 Ind. Cas. 198. But where an issue as to nature of property was not decided in prior suit, decision in that is not *res judicata*. A. I. R. 1927 Mad. 1100=103 Ind. Cas. 887. Question raised but not decided does not become *res judicata*. 6 P. W. R. 1918. Where issues were not framed and application for correction of the *jama bandi* was not decided on evidence, the order is not *res judicata*. 13 R. D. 856.

Where a plea of non-joinder was not allowed to be raised in a suit on the ground that it was taken at a late stage, that plea should be considered to have been taken and to have been decided against the party taking it. A. I. R. 1926 Cal. 511=91 Ind. Cas. 683. Where a matter is only heard but not decided either because it is unnecessary or it is reversed, the matter is not *res judicata*. 13 L. W. 25=57 Ind. Cas. 735. When a question is already decided by a Judge and the same Judge subsequently arrives at a contrary decision on the same question in the same proceeding, the re-opening of the question is barred as *res judicata*. 164 Ind. Cas. 282=17 Pat. L. T. 756=A. I. R. 1936 Pat. 447. The principle of *res judicata* is mutual. A judgment, if binding upon one party, is binding upon both, and not merely as against the person who is defeated in the suit. 38 Bom. L. R. 853=A. I. R. 1936 Bom. 402=165 Ind. Cas. 987. A decision on a preliminary plea cannot operate as *res judicata*. A. I. R. 1936 Mad. 165=43 L. W. 116=160 Ind. Cas. 753; see also 1936 A. L. J. 622=A. I. R. 1936 All. 412. Where the opinion expressed in a case

is really *obiter* for the purposes of that case, the opinion in that case does not operate as *res judicata*. A. I. R. 1936 Lah. 185; but see 17 P. L. T. 356 where it is stated that an *obiter* may operate as *res judicata* under certain circumstances. A decision on a point does not operate as *res judicata* where no issue on that point has been raised. 1936 O. W. N. 717=164 Ind. Cas. 466. A decision under Order 17, rule 3, Civil Procedure Code, in a previous suit of a representative character and conducted without any negligence is to be deemed to be a decision on merits and such a decision falls within the scope of s. 11 of the C. P. Code. A. I. R. 1936 Lah. 385=38 P. L. R. 809=165 Ind. Cas. 808. In order to create an effective bar, a suit must have been finally heard and decided. A. I. R. 1935 Lah. 974; see also 157 Ind. Cas. 368; A. I. R. 1935 Pat. 526=16 Pat. L. T. 448=158 Ind. Cas. 734. A statement by the Judge in the judgment which is merely *obiter* and without which the suit has already been decided does not operate as *res judicata*. A. I. R. 1935 Lah. 96=157 Ind. Cas. 816. The dismissal of the suit on the grounds of multifariousness and misjoinder of parties without deciding on the merits does not bar a subsequent suit. 155 Ind. Cas. 7=37 Bom. L. R. 62=A. I. R. 1935 Bom. 131. Unnecessary decision does not operate as a bar. 68 M. L. J. 625=A. I. R. 1935 Mad. 551=156 Ind. Cas. 1033=1935 M. W. N. 612; A. I. R. 1935 Mad. 696. There is no bar where the appellate Court refuses to decide on the merits. A. I. R. 1935 Lah. 686=159 Ind. Cas. 419. Adverse finding on unnecessary issues does not also bar. A. I. R. 1935 Cal. 733. A decision is none-the-less *res judicata* even if in point of law it is wrong. 14 Pat. 633=159 Ind. Cas. 173=16 Pat. L. T. 819. A judgment by consent giving validity to a transaction which is illegal or *ultra vires* does not operate as *res judicata*. A. I. R. 1935 Oudh 121=11 O. W. N. 1571.

**Mortgage suit.**—If in a mortgage suit the intention of Court is only to declare and maintain a relationship of mortgagor and mortgagee between the parties and also to fix amount of the mortgage money due from the mortgagor to the mortgagee and to declare the mortgagor's right to recover possession on payment of that sum of money, then the matter as to when and how the mortgagor may recover possession of the mortgaged property, or the mortgagee may foreclose or sell in default; and this in either case the mortgage be extinguished, must be held not to have been finally heard and decided. A. I. R. 1930 Oudh 465=7 O. W. N. 902=130 Ind. Cas. 75. In a suit by a mortgagee for recovery of the mortgage debt against a Hindu father and sons the plaintiff's pleader stated that the sons may be discharged and a simple money decree passed against the father. In a subsequent declaratory suit brought by the sons that the joint-family property was not liable to attachment and sale in execution of the simple money decree passed against the father, the statement does not operate either as an estoppel or as *res judicata*. A. I. R. 1927 Oudh 15=3 O. W. N. 862=98 Ind. Cas. 300. Where a decree for redemption did not fix period for paying mortgage-money, a second suit for redemption is not barred. A. I. R. 1927 Oudh 457=4 O. W. N. 882=105 Ind. Cas. 93; but see 5 O. L. J. 648=48 Ind. Cas. 922. Where in a redemption suit, decree is not drawn as per Order XXXIV, r. 7, subsequent suit for redemption is not barred. A. I. R. 1925 Lah. 31=5 Lah. 371=84 Ind. Cas. 67. Where mortgagor sues for accounts under one mortgage and mortgagee puts forth other mortgages and the Court decides suits only with respect to one mortgage, that decision does not bar subsequent suit on other mortgages. A. I. R. 1925 Bom. 311=27 Bom. L. R. 488=87 Ind. Cas. 716. A mortgagee who has sued for and obtained a decree for possession under his mortgage from the mortgagor is barred from a fresh suit for possession unless he had been dispossessed after the date of the former decree. 2 Lah. L. J. 678=67 Ind. Cas. 281. Where in a mortgage suit, a decree is passed for redemption without condition as to payment of money in a certain time, a fresh suit for redemption is not barred. A. I. R. 1922 All. 377=44 A. 730=20 A. L. J. 631=69 Ind. Cas. 167. Mortgagor who has brought a suit for redemption and obtained a decree *nisi* which neither the mortgagor nor the mortgagee has applied to be made absolute, can after the execution of that decree is time-barred, bring a fresh suit for redemption. 21 Bom. L. R. 56=43 B. 334.

Where a decree is once passed in a suit on a mortgage, the mortgage merges in the decree and a second suit on the mortgage does not lie. 20 P. R. 1917=26 P. L. R. 1917=39 Ind. Cas. 753. In a suit for redemption of a decree for payment of the mortgage amount by instalments was passed under the Deccan Agriculturists Relief Act, but the decree was left unexecuted. Mortgagor or any person claiming under him by a title subsequently decided, cannot bring a suit for redemption of property.

His remedy lies in execution. 20 Bom. L. R. 164=42 B. 246=44 Ind. Cas. 908. Where the right to redeem was in issue in a mortgage suit for sale and Court decreed the sale, a fresh suit for redemption is barred. A. I. R. 1926 Mad. 816=49 M. 691=25 L. W. 258=50 M. L. J. 612=96 Ind. Cas. 607.

**Rent Suit.**—The judgment of a former rent suit does operate as *res judicata* between the parties if in the subsequent suit between the parties, the areas of lands and the defence are all the same. A. I. R. 1926 Cal. 369=90 Ind. Cas. 756. Where a review against a decree expending rent of a tenancy and holding it to be permanent was dismissed holding that the applicant was aggrieved not by decree but by judgment, but the pronouncement in which regarding permanent nature of the tenancy was however accepted by the Judge as having been based on misapprehension of Counsel's argument on the subject. Such a judgment cannot be *res judicata* as to the nature of tenancy. *Dhumi Mal v. Moti Sagor*, A. I. R. 1927 P. C. 102=8 Lah. 573=54 I. A. 178=52 M. L. J. 653=29 Bom. L. R. 870=31 C. W. N. 677=25 A. L. J. 959=28 P. L. R. 658=26 L. W. 634 (P. C.)=101 Ind. Cas. 355 (P. C.) Decision in previous suit on liability of defendant to pay interest as per *kabuliyat* is *res judicata* in subsequent rent suit. A. I. R. 1923 Cal. 361=76 Ind. Cas. 444. Where fixed parcel of land with definite boundaries is dismissed, question as to rent are decided in the suit is binding. A. I. R. 1924 Pat. 307=74 Ind. Cas. 961. As regards rent suits the decision as regards the rent for one year precludes question as to rent for following years. A. I. R. 1925 Mad. 378=82 Ind. Cas. 990. Where relationship of landlord and tenant held not established in former suit for rent for suit years, another suit to eject defendant on grounds of his not being a tenant is not barred. A. I. R. 1921 Cal. 355=33 C. L. J. 334=61 Ind. Cas. 201. Where in a suit for rent, the question of title is decided incidentally, that decision is not *res judicata* in a subsequent suit for declaration of title for possession. 63 Ind. Cas. 762. In a case under s. 105, B. T. Act, the only point decided was the amount of additional rent to be allowed for the excess area it does not constitute *res judicata* as to the rate of rent. A. I. R. 1923 Cal. 282=68 Ind. Cas. 298. In an ejectment suit, where Court passes a decree for rent only, the finding as to title need not be incorporated in the decree. A. I. R. 1929 Bom. 32=3a Bom. L. R. 1602=114 Ind. Cas. 272.

**Leave to withdraw suit or appeal**—Where a suit was dismissed on account of formal defect in plaint but with liberty to file a fresh suit, subsequent suit on the same cause of action is not barred. A. I. R. 1930 Lah. 634=130 Ind. Cas. 572. Appellate Court can pass an order under Order XXIII, r. 1, and that the decision set aside in appeal cannot operate as *res judicata*. A. I. R. 1924 All 260=74 Ind. Cas. 894. Order under Order XXIII, r. 1, though erroneous is not void or one without jurisdiction and hence the order in a subsequent suit holds good, nor does the previous suit operate as *res judicata*. 31 L. J. 482=24 C. W. N. 723 (F. B.)=58 Ind. Cas. 806 (overruling 44 C. 567=20 C. W. N. 1000); see also 32 M. L. J. 434=40 Ind. Cas. 611=(1917) M. W. N. 234; but see 46 Ind. Cas. 392=3 Pat. L. J. 404; 56 Ind. Cas. 697=1 Pat. 300. Where a suit was allowed to be withdrawn with liberty to bring a fresh suit without the consent of other plaintiffs it was held that such an order was without jurisdiction, and suit must be thought not to be withdrawn. Fresh suit for partition is not barred by previous suit, cause of action being a recurring one. A. I. R. 1922 Pat. 489=1 Pat. 228. Whether leave to withdraw with permission to bring a fresh suit was properly granted or not, is not a matter for Court trying the subsequent suit to consider. A. I. R. 1922 Pat. 44=1922 Pat. 17=3 Pat. L. J. 80=64 Ind. Cas. 337=1 Pat. 90.

**Connected suits or appeals and res judicata**—Section 11 or at any rate the principle on which that section is based, will prevent an appellate Court from trying a case involving a matter decided finally by a suit heard along with the suit from the appeal is pending. A. I. R. 1925 Oudh 598=86 Ind. Cas. 380. Where in two suits the lands in dispute are different but the issue as to defendant's title to the lands raised in both and decided in one, that decision is *res judicata*. A. I. R. 1926 Rang. 122=4 Rang. 8=95 Ind. Cas. 104. Where in both of the cross-suits between the same parties the question at issue arising out of the same transaction is the same, and one is decided before the other, the decision in the suit decided first is *res judicata* against other. 96 Ind. Cas. 694 (All) But where two suits between same parties against each other were tried as cross-suits. One suit does not operate as *res judicata* against appeal from the other. A. I. R. 1931 Cal. 353=34 C. W. N. 839=131 Ind. Cas. 562; see also

A. I. R. 1926 Mad. 378=92 Ind. Cas. 352 ; A. I. R. 1927 Oudh. 575=4 O. W. N. 297 =120 Ind. Cas. 171 ; 78 Ind. Cas. 1026=A. I. R. 1924 All. 834. Where rival pre-emptors sue for pre-emption and the suit of one of them is dismissed, the failure on the part of the vendee or the remaining pre-emptors to appeal from the decree does not debar them from appealing against the decree passed in their own suits. A. I. R. 1927 All. 540=101 Ind. Cas. 518 ; but see A. I. R. 1927 Lah. 98=8 Lah. L. J. 136=27 P. L. R. 203=93 Ind. Cas. 1014.

Where both parties appeal against trial Court's decision but one appeal was allowed and the other dismissed and a second appeal was filed against one appellate decree only, other unappealed decree does not bar hearing of the second appeal. A. I. R. 1928 All. 274=50 A. 517=26 A. L. J. 258=113 Ind. Cas. 93. Where during the pendency of appeal from preliminary decree in a mortgage suit an appeal from final decree was presented but was dismissed for want of prosecution: *Held* that the appellate Court is not, by such dismissal, debarred from granting, in the appeal before it, a relief inconsistent with the final decree. A. I. R. 1926 All. 667=48 A. 611=24 A. L. J. 769=96 Ind. Cas. 1. Where two suits regarding same subject-matter are tried on the same evidence and separate decrees are drawn up though judgments fallow closely each other, an appeal against one of the decrees is not barred by a failure of appeal against the other under s. 11, C. P. Code. 29 M. L. J. 551=39 Ind. Cas. 216 ; but see 156 Ind. Cas. 998 ; 61 C. L. J. 93=39 C. W. N. 938=62 Cal. 642 ; A. I. R. 1936 Rang. 401=164 Ind. Cas. 743. If two suits involving common issues are disposed of in one judgment and an appeal is filed against the decree in one and not from the decree in the other, the matter decided in the latter cannot become *res judicata*. 40 C. W. N. 1176.

**Adverse findings**—If a decree is wholly in favour of the defendant, no issue decided against him can operate as *res judicata* so as to bind him in a subsequent suit, for he cannot appeal from a finding on any such issue. Conversely, if a plaintiff's suit is decreed in its entirety no issue decided against him can be *res judicata* in a subsequent suit, for he cannot appeal from a finding on any such issue, the decree being wholly in his favour. A. I. R. 1933 Mad. 770=38 L. W. 614 ; see also A. I. R. 1933 Lah. 218=34 P. L. R. 225=141 Ind. Cas. 339 ; 164 Ind. Cas. 851 ; A. I. R. 1922 P. C. 241 ; A. I. R. 1932 Mad. 541=1932 M. W. N. 1169=139 Ind. Cas. 197 ; A. I. R. 1932 Mad. 207=62 M. L. J. 141=35 L. W. 35=1931 M. W. N. 1323=55 M. 483.

**Arbitration**.—When a party raises an objection as to appointment of arbitrators before the arbitration Court and procures a decision in it, a suit to set aside an award made by the arbitrator on the same ground will be barred by *res judicata*. 137 Ind. Cas. 846=33 P. L. R. 365=A. I. R. 1932 Lah. 378. Where objections have been preferred during the arbitration proceedings and disallowed, the principle of finality applies and the same matter cannot be agitated in a separate civil suit. A. I. R. 1936 Lah. 865 ; see also A. I. R. 1925 Sind 42 ; A. I. R. 1930 Sind 195 ; A. I. R. 1932 Sind 20.

**Refusal of plaint for want of jurisdiction**.—Where Court refused plaint for want of jurisdiction, suit on the same cause of action may be instituted after the Court was vested with jurisdiction. A. I. R. 1931 All. 200=130 Ind. Cas. 4.

**Decision by Court which is not competent**.—Decision by Court not competent to try an issue is not *res judicata*. A. I. R. 1928 Oudh 296=107 Ind. Cas. 895. Where in a partition proceedings a question of title was open to a Revenue Officer to be tried as a Civil Court, following the procedure of a Civil Court as the presiding officer of such a Court, but he did not try it as a Civil Court it is barred by the rule of *res judicata* in a subsequent civil suit. A. I. R. 1926 Lah. 128=91 Ind. Cas. 528.

**Dismissal of suit for want of evidence**.—Dismissal of suit for want of evidence bars fresh suit. 34 Ind. Cas. 640=3 O. L. J. 236 ; see also 1 M. 84 ; 12 W. R. 34 (P. C.) ; A. I. R. 1928 Cal. 271. Dismissal of suit for non-prosecution under Order XVII, r. 3 bars subsequent suit. 40 A. 590=16 A. L. J. 462. Dismissal owing to failure of party to produce evidence is one on merits and operates as *res judicata*. A. I. R. 1929 Mad. 404=122 Ind. Cas. 519.

**Dismissal for default**.—In case of dismissal for default no question of *res judicata* arises. 41 Ind. Cas. 505 ; 9 C. 426 ; 10 C. 98 (P. C.) ; 24 Ind. Cas. 480=12 A. L. J. 911 ; 56 Ind. Cas. 932 ; 54 Ind. Cas. 789 ; 80 Ind. Cas. 933=46 A. 820=22

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A. I. R. 749. Dismissal for default of an appeal does not bar fresh appeal. A. I. R. 1923 Pat. 514=2 Pat. 739=75 Ind. Cas. 284. Dismissal of suit for default of plaintiff to appear on the day fixed for appointing a guardian to minor defendant, fresh suit is not barred. 6 P. L. J. 650=2 P. L. T. 572=63 Ind. Cas. 570=A. I. R. 1922 Pat. 252. Where a suit brought by one of the parties to the reference to complete the arbitration and for a decree in terms of the award which might be passed was dismissed for default, it does not operate as *res judicata* in a subsequent suit for possession of the specific property under the award. 49 Ind. Cas. 89=8 L. W. 551=24 M. L. T. 424=(1918) M. W. N. 683.

**Other cases of dismissal, which does not bar.**—Dismissal of suit for want of proper Court-fees is not *res judicata*. A. I. R. 1928 Oudh. 503=114 Ind. Cas. 120=5 O. W. N. 895=4 Luck. 159; 13 M. 44; 35 B. 38; 8 A. 282. Dismissal of suit for non-joinder does not operate as *res judicata*. 104 Ind. Cas. 576. Where a suit is dismissed on the ground that it is not properly framed, the decisions on other issues by the Court, do not operate as *res judicata*. A. I. R. 1925 Cal. 996=41 C. L. J. 396=88 Ind. Cas. 616. A dismissal under Order IX, r. 3 creates no *res judicata*. A. I. R. 1925 Oudh. 337=12 O. L. J. 1=28 O. C. 8=85 Ind. Cas. 509. Dismissal for misdescription of suit property does not bar a subsequent suit. A. I. R. 1925 Lah. 193=38 Ind. Cas. 579; 2 Pat. L. J. 313=39 Ind. Cas. 126. Dismissal of prior suit for non-joinder of parties is not *res judicata*. A. I. R. 1922 Mad. 259=43 M. L. J. 572=1922 M. W. N. 428=73 Ind. Cas. 491. A dismissal of an appeal, for want of a copy of the first Court's judgment necessary under the Allahabad High Court rules, does not operate as *res judicata*. 19 A. L. J. 706=63 Ind. Cas. 344. Dismissal on pleadings is no bar to second suit. 45 Ind. Cas. 969=24 M. L. T. 311=7 L. W. 557. Dismissal of application for leave to appeal *in forma pauperis* is not *res judicata*. A. I. R. 1930 Lah. 501=126 Ind. Cas. 591. Rejection of memo of appeal presented by an unauthorized vakil is not *res judicata*. A. I. R. 1930 All. 112=(1930) A. L. J. 394=121 Ind. Cas. 546. In case of dismissal of suit for mere declaration on the ground that plaintiff ought to have asked for possession also, latter suit for possession is not barred. A. I. R. 1929 Lah. 596=127 Ind. Cas. 8. Dismissal of suit on technical ground does not bar latter suit. 47 Ind. Cas. 909. Dismissal on pleadings is no bar to second suit. 7 L. W. 557=(1918) M. W. N. 299=(1918) M. W. N. 427=45 Ind. Cas. 326.

**Same cause of action.**—Where cause of action in two suits are different *res judicata* should be restricted to questions of fact and mixed questions of fact and law and should not be extended to pure questions of law. A. I. R. 1929 Cal. 415=49 C. L. J. 357=125 Ind. Cas. 299. Where in the first suit plaintiff sued as reversioner and in the subsequent suit he claimed as widow's heir, the latter suit is not barred. A. I. R. 1931 All. 21=1930 A. L. J. 1254=130 Ind. Cas. 13. Where suit for arrears of rent, was dismissed on the ground that no relationship of tenancy existed subsequent suit on title for ejectment is not barred. A. I. R. 1921 Cal. 355=33 C. L. J. 334=61 Ind. Cas. 201. Where cause of action is different but the same relief is claimed in both suits, the latter suit is not barred. A. I. R. 1925 Mad. 1172=86 Ind. Cas. 949. Where two causes of action are the same or different is no test. A. I. R. 1929 Oudh. 172=6 O. W. N. 191=4 Luck. 603=116 Ind. Cas. 200. Withdrawal of a previous suit for ejectment does not bar a subsequent suit for ejectment against the same party. A. I. R. 1926 All. 34=89 Ind. Cas. 397.

**Decision when *res judicata*.**—Award of arbitrators is *res judicata* on questions decided by the award. A. I. R. 1930 Oudh. 389=7 O. W. N. 541=127 Ind. Cas. 254. Where a suit has been decreed but permission has been given to defendant to file another suit, the permission does not prevent the bar of *res judicata*. 33 Bom. L. R. 613=A. I. R. 1931 Bom. 417. Though section 109 of B. T. Act may not in express terms prohibit a Civil Court from entertaining a defence which is at variance with a decision under s. 106, yet it is clear provisions of s. 107 (1) of the B. T. Act read with s. 11, C. P. Code that a Court trying a rent suit had no jurisdiction to decide an issue between the parties which has already been finally and definitely decided by a decision under s. 10 of the B. T. Act. 12 P. L. T. 717=A. I. R. 1931 Pat. 215=10 P. 337. The retrial of issues that have been finally decided in the same suit is barred by *res judicata*. A. I. R. 1921 P. C. 11=40 M. L. J. 423=48 C. 499=48 I. A. 187=19 A. L. J. 366=23 Bom. L. R. 648=33 C. L. J. 405=25 C. W. N. 915=60 Ind. Cas. 631. Dismissal of suit to contest alienation is *res judicata* in a subsequent suit by the same reversioner for possession after the death of the widow. A. I. R. 1921 Lah. 187=4 Lah. L. J. 442=59 Ind. Cas. 946. Decision as

given by predecessor-in-office of Judge after fully considering the law on the subject cannot be re-opened by successor. A. I. R. 1930 Lah. 836=122 Ind. Cas. 724. Party sought to be affected by *res judicata* should have notice and opportunity to contest. A. I. R. 1930 Mad. 414=120 Ind. Cas. 863. Where a party himself raised an issue which was decided in his favour by the trial Court and against him by the appellate Court, decision on the issue is *res judicata*, 118 Ind. Cas. 168. Where objections were raised and decided in appeal, the same cannot be raised by way of cross-objection. A. I. R. 1924 All. 867=22 A. L. J. 365=78 Ind. Cas. 677. Where the plaintiff was out of possession and a suit for declaration only was dismissed on merits, a subsequent suit for possession is barred. A. I. R. 1923 All. 554=77 Ind. Cas. 755. Judicial order made in one stage of a suit is binding. 34 C. L. J. 415=70 Ind. Cas. 6. A decision in a partition case not ultimately carried though, has the force of *res judicata*. 54 Ind. Cas. 303=1 U. P. L. R. (B. R.) 39. Suit against Receiver on allegations already found against plaintiff is barred. 22 Bom. L. R. 1126=45 B. 99=59 Ind. Cas. 421.

If relief in subsequent petition rests on some question of fact as in previous petition dismissed, petition is barred. A. I. R. 1929 Mad. 404=122 Ind. Cas. 519. An erroneous decision on a question of fact, operates as *res judicata* between parties to the previous suit. A. I. R. 1928 Cal. 717=48 C. L. J. 184=32 C. W. N. 828=115 Ind. Cas. 588. Construction of grant in previous suit though erroneous binds parties in subsequent suit relating to property involved in previous suit. 31 M. L. J. 97=(1916) 2 M. W. N. 96=35 Ind. Cas. 266. Prior decision of High Court as to construction of a solenama is binding in subsequent suit although position of two parties is subsequently changed, being a question of law. 46 C. 870=29 C. L. J. 465=51 Ind. Cas. 922; see also 2 Pat. L. W. 146=41 Ind. Cas. 778. Evidence adduced to prove that former decision is erroneous is irrelevant as an erroneous decree establishing rights is as much *res judicata* as just decree. (1918) M. W. N. 580=8 L. W. 473=49 Ind. Cas. 369. Where a plaintiff sues for correction of an entry in Record of Rights of the defendant and subsequently sues for possession of property alleging that it was not the *niskor* property of the defendant but part of his real property (which would have been the situation if this suit for correction of record had been decided in his favour) the decision against the plaintiff in the prior suit is bar to his subsequent suit. A. I. R. 1929 Cal. 385=49 C. L. J. 285=33 C. W. N. 623=120 Ind. Cas. 147. Where the question whether defendant executed a certain *Kabuliyat* in favour of the plaintiff was a material fact in issue in a previous suit and it was decided then that the plaintiff failed to prove the same there the decision is *res judicata* concerning everything in that *kabuliyat*. A. I. R. 1926 Cal. 1228=97 Ind. Cas. 291. The decision in a former suit between the parties though based on a mistaken view of the law, nevertheless operates as *res judicata* in a subsequent suit. The fact that the finding was based on a wrong view of the law and that the reason on which the decision was based was unsound does not affect the conclusiveness or binding nature of the decision as to the rights of the parties. 165 Ind. Cas. 957=38 Bom. L. R. 853=A. I. R. 1936 Bom. 402.

**Decision when not *res judicata***—Decision on assumed fact is not *res judicata*. 113 Ind. Cas. 384=30 Bom. L. R. 1089=A. I. R. 1929 Bom. 116. Where a particular question in dispute is expressly left open for a separate proceeding the question is not *res judicata*. 96 Ind. Cas. 302. When appeal from decision in previous suit is pending before Privy Council, the decision is not *res judicata*. A. I. R. 1931 Lah. 161. Issue raised and decided but unnecessary is not *res judicata*. A. I. R. 1926 Cal. 163=42 C. L. J. 560=92 Ind. Cas. 981. Where appellate Court decides case on grounds other than those of trial Court, the decision of trial Court on issues decided by it, is not *res judicata*. A. I. R. 1929 Cal. 179=90 Ind. Cas. 480; 86 Ind. Cas. 295. Where a point is expressly left undecided by the Court in a suit it can be agitated in subsequent suit. 88 Ind. Cas. 822=A. I. R. 1925 All. 770=48 A. 34=23 A. L. J. 950. Where there is no express adjudication on a particular point there is no *res judicata*. A. I. R. 1924 Lah. 469=6 Lah. L. J. 45=80 Ind. Cas. 525. Where a finding is recorded only to avoid a possible remand and is not the basis of the judgment the point is not *res judicata*. 82 Ind. Cas. 485=47 M. L. J. 532. In a suit for specific performance and possession, where latter relief has not referred to in judgment and the decision on that relief was not necessary, the decision is not *res judicata* as regards the latter relief. 27 Bom. L. R. 42=86 Ind. Cas. 137=A. I. R. 1925 Bom. 181. Where secondary relief claimed and determined by lower Court and not by appellate Court, the decision on that

relief is not *res judicata*. A. I. R. 1921 Mad. 21 (F. B.)=13 L. W. 25. A matter decided behind the back of the judgment-debtor without notice to him cannot operate as *res judicata*. A. I. R. 1930 All. 669=1930 A. L. J. 1400=128 Ind. Cas. 607. *Obiter dicta* not necessary for the decision of a suit cannot have the force of *res judicata*. 14 L. R. 457 Rev. Where plea of occupancy right was raised but not decided, the decision is not *res judicata*. A. I. R. 1922 P. C. 241=30 M. L. T. (P. C.) 279=48 I. A. 49=48 C. 460=64 Ind. Cas. 231. Where a question in issue is merely mentioned in the course of giving a narration of events in a judgment in former suit and there is no finding on it in that suit, the parties to former suit are not debarred from raising it again in a subsequent suit as between them on principles of *res judicata*. A. I. R. 1937 Oudh 116. The case of withdrawal is analogous to a dismissal in default as there is no decision on merits. There is no *res judicata* in such a case. A. I. R. 1928 Lah. 710. Where the Court in the previous suit definitely determines the area of the land in the defendant's possession and the annual rent payable for the same the defendant can only succeed in a subsequent suit by proving that the area and the rent have since altered. A. I. R. 1926 Cal. 672=23 C. L. J. 116. The fact that the personal remedy is asked for in the plaint and that nothing appears about it in the decree, is not enough to say that the plaintiff is forever barred from asking for it. A. I. R. 1927 Mad. 779=53 M. L. J. 489=39 M. L. T. 22=(1927) M. W. N. 330=103 Ind. Cas. 528. In a case where the previous proceedings were confined by statute to the question of possession a subsequent proceeding in which the question of title is raised is not barred. A. I. R. 1925 All. 200=L. R. 5A. 132 Rev.=78 Ind. Cas. 115. Decision in a previous suit is not *res judicata* if there is to contest, no issue and no finding between the parties although they were ranged on opposite sides. A. I. R. 1924 Nag. 124=76 Ind. Cas. 635. Dismissal of prior suit for non-joinder of parties is not *res judicata*. A. I. R. 1922 Mad. 259=43 M. L. J. 572=16 L. W. 26=73 Ind. Cas. 491. Where an ejectment suit is dismissed on the ground of absence of notice but the Court records a finding that the permanent tenancy alleged by the defendant is not proved decision on the question as to nature of tenancy is not *res judicata*. 67 Ind. Cas. 271. Dismissal of a suit by a Hindu widow for declaration that an execution sale was illegal, as the question was one under s. 47, C. P. Code, does not bar a subsequent suit by reversioner for possession. A. I. R. 1922 Bom. 96=24 Bom. L. R. 249=46 B. 726=67 Ind. Cas. 209. So long as the property remains joint, one of the co-owners can bring a second suit for partition though a previous suit for partition has been dismissed. 56 Ind. Cas. 610. Where in a previous suit for declaration as to the genuineness of a Will, the lower Court decided not only that it was genuine but that the Will was admissible as an authority to adopt though the latter point was not in issue and the appellate Court decided in favour of genuineness only, the decision is not *res judicata* as to other point. 57 Ind. Cas. 852.

Previous unexecuted decree in a partition suit does not bar fresh suit for partition. 77 P. R. 1915=164 P. W. R. 1915=31 Ind. Cas. 205. Where plaintiff obtained a decree for possession but that decree is barred by limitation a fresh suit is maintainable on the decree. 14 A. L. J. 102=32 Ind. Cas. 634. Issue not decided upon but left open though it should have been decided is not *res judicata*. 41 Ind. Cas. 19. Where suit is withdrawn with permission pending appeal there is no decision to operate as *res judicata*. 40 Ind. Cas. 353. Refusal to decide issue does not operate as *res judicata*. 4 Pat. L. W. 299=45 Ind. Cas. 526. Dismissal of suit on pleadings is no bar to second suit. 7 L. W. 557=45 Ind. Cas. 969=(1918) M. W. N. 427. Where an issue is expressly excluded from decision that decision is not *res judicata* so far that issue is concerned. 70 P. R. 1918=11 P. L. R. 1918=71 P. W. R. 1918=44 Ind. Cas. 859. Where a prior suit has been dismissed on preliminary point, question not directly in issue cannot be *res judicata* unless there has been a judicial determination expressly and impliedly on the matter. 42 Ind. Cas. 508. A suit disposed of in the absence of both the parties does not operate as *res judicata*. 39 Ind. Cas. 755=1 Pat. L. W. 375.

Plaintiff obtained a decree for possession of certain property which was not executed for three years. Possession over the property had been obtained otherwise than in execution and plaintiff was subsequently dispossessed: *Held* that dispossession of the plaintiff subsequent to the date of the decree was a fresh cause of action which can be the basis of fresh suit. 38 A. 509=14 A. L. J. 709=35 Ind. Cas. 601. Decision on suit by plaintiff as proprietor for possession is no bar to



subsequent suit by the same plaintiff as mortgagor for redemption, as he is not litigating under the same title. A. I. R. 1929 Lah. 833=120 Ind. Cas. 420. Where in the latter case the question in issue is the right to sell and in the previous case it was the right to mortgage, there is no *res judicata*. A. I. R. 1926 Oudh 139=2 O. W. N. 944=91 Ind. Cas. 1021. Where the issues in latter suit are different from the issues which formed the subject of the previous litigation it was held that the subsequent suit was not barred. 85 Ind. Cas. 76=A. I. R. 1924 All. 922. The mere fact that the petition in the suit itself, to have the property sold in a particular order is disallowed, is no bar to the executing Court making a fresh order in the course of execution. A. I. R. 1924 Mad. 509=19 L. W. 23=46 M. L. J. 32=83 Ind. Cas. 918. The dismissal of a previous suit for ejectment for want of notice does not bar a subsequent suit for the same relief with notice even when a decision concerning the defendant's status forms part of the dismissal order in the previous suit. A. I. R. 1924 Nag. 333=78 Ind. Cas. 147. The directions as to management of an endowment do not cease to be operative simply because the original provision as to devolution of shebaitship ceases to be operative, owing to its being varied. 85 Ind. Cas. 875=40 C. L. J. 564=29 C. W. N. 17.

**Ex-parte decrees.**—*Ex-parte* decrees in prior suits in which no issue was raised as to the rate of rent and there was no decision with regard to rate, do not operate as *res judicata* on that point. 65 Ind. Cas. 581. *Ex-parte* decision in rent suit involving questions of status and rate of rent operates as *res judicata*. A. I. R. 1930 Oudh. 335=7 O. W. N. 507=127 Ind. Cas. 241. *Ex-parte* decree is *res judicata* quite as much as decree passed on contest. A. I. R. 1929 All. 761=122 Ind. Cas. 664; see also A. I. R. 1929 All. 761=122 Ind. Cas. 664; see also A. I. R. 1929 All. 346=119 Ind. Cas. 567; A. I. R. 1926 Mad. 1144=97 Ind. Cas. 601; A. I. R. 1925 Mad. 378=82 Ind. Cas. 990; A. I. R. 1924 Oudh 419=11 O. L. J. 448=79 Ind. Cas. 660; A. I. R. 1923 Lah. 560=5 L. L. J. 163=74 Ind. Cas. 577. An *ex-parte* decree can operate as *res judicata* only on a necessary issue. 2 Pat. L. W. 108. But a decree for foreclosure passed *ex-parte* against a person joined as defendant on the only ground that he possesses the mortgaged property does not bar defendant or his transferee from setting up a title paramount in a subsequent suit, where there has been no express adjudication on title, though the final decree orders delivery of possession which accordingly has been delivered. 15 N. L. R. 114 (F. B.)=52 Ind. Cas. 82. A suit for declaration that a decree *ex-parte* is void for fraud can not lie if an earlier application to set aside the decree has been dismissed unless based on fresh grounds of fraud. A. I. R. 1924 Pat. 328=2 Pat. 833=5 P. L. T. 666=2 Pat. L. R. 65=74 Ind. Cas. 825. Rejection of application under Order IX, r. 13, does not bar a suit to set aside decree as fraudulent and also of proving non-service of summons incidentally. A. I. R. 1924 Pat. 241=1923 Pat. 336=5 P. L. T. 37=75 Ind. Cas. 344.

Decision against absent defendant is as much *res judicata* as one on contest. A. I. R. 1928 Cal. 717=48 C. L. J. 184=32 C. W. N. 828=115 Ind. Cas. 588. An *ex-parte* decree for rent does not more than affirm that a certain amount is claimed and allowed. There is no *res judicata* as to rate of rent especially when it relates to a later year. L. R. 9 A. 345 Rev. In a suit for rent *ex-parte* judgment of the Revenue establishes that the relationship of landlord and tenant does exist between the present parties. A. I. R. 1927 All. 552=49 A. 658=25 A. L. J. 467=101 Ind. Cas. 516. *Ex-parte* decree is admissible in a subsequent rent suit to prove rate of rent allowed but is not conclusive. A. I. R. 1926 Cal. 767=91 Ind. Cas. 380. An *ex-parte* decree for rent which was subsequently satisfied can operate as *res judicata* on the question of the relationship of landlord and tenant. A. I. R. 1926 Cal. 114=87 Ind. Cas. 672. Subsequent suit to set aside an *ex-parte* decree contained matters which could not have been raised in an application under Order IX, rule 13 which had been dismissed: Held that the question of non-service of summons was not precluded by *res judicata*. A. I. R. 1925 Cal. 663=41 C. L. J. 281=29 C. W. N. 325=86 Ind. Cas. 779. Where a number of defendants in a case have a common interest and the contest is carried on by some of them *bonafide* against the plaintiff's claim the defendants who are *ex-parte* are also bound by the decision. A. I. R. 1924 Mad. 571=46 M. L. J. 471=34 M. L. T. 209=83 Ind. Cas. 985.

*Ex-parte* decree in rent suit is *res judicata* on the point of rate of rent. A. I. R. 1926 Cal. 515=33 C. W. N. 507=117 Ind. Cas. 854. But *Ex-parte* order passed without hearing opposite party is not *res judicata*. A. I. R. 1929 Sind. 110=116 Ind. Cas. 101. *Ex-parte* decision of settlement officer under s. 105, B. T. Act, as to fair

and equitable rent does not operate as *res judicata* in subsequent suit for establishing *niskar* rights. A. I. R. 1934 Cal. 467.

**Decision must be a necessary one.**—A finding not necessary to the relief granted by the decree cannot operate as *res judicata*. A. I. R. 1924 Oudh. 205=10 O. L. J. 404=79 Ind. Cas. 666. An adverse finding against the defendants in whose favour a decree is passed is not *res judicata* but will lay onus on them of displacing the finding. A. I. R. 1922 P. C. 241=48 C. 460=30 M. L. T. 279=48 I. A. 45=54 Ind. Cas. 231 (P. C.). So a finding cannot be conclusive against a party if the decree is not based upon it but is made in spite of it. A. I. R. 1929 All. 910=1929 A. L. J. 1110=121 Ind. Cas. 102. However definite a finding may be, it will not operate as *res judicata* when it is not the basis of the decision. A finding in a suit will operate as *res judicata* in a subsequent suit against a party, when he has a right of appeal. 2 Pat. L. J. 189=38 Ind. Cas. 211; 30 C. W. N. 415=44 C. L. J. 399; 53 Ind. Cas. 558; A. I. R. 1927 Mad. 613. But an unfavourable finding on a necessary point may be appealed against though the decree is favourable and constitute *res judicata*. 40 Ind. Cas. 771. Finding against a party not necessary for a decree in his favour though given only to settle the main contentions of the parties is *res judicata*. A. I. R. 1922 Mad. 514=31 M. L. T. 430=(1922) M. W. N. 763. Finding as to *res judicata* cannot operate as *res judicata*, if decree is passed in spite of it, such a finding not being necessary for its decision. A. I. R. 1926 Cal. 672=43 C. L. J. 116=94 Ind. Cas. 844. Favourable decree with adverse finding may amount to *res judicata* under certain circumstances to the extent of the finding itself. A. I. R. 1924 Mad. 626=46 M. L. J. 515=34 M. L. T. 175=84 Ind. Cas. 799. Adverse finding in a decree in favour of a party is not *res judicata*. A. I. R. 1924 Mad. 469=47 M. 453=46 M. L. J. 198=84 Ind. Cas. 622; A. I. R. 1930 Cal. 5=56 C. 639=120 Ind. Cas. 710. Decision on an issue not necessary for final decision is not *res judicata*. 44 B. 321=22 Bom. L. R. 64=55 Ind. Cas. 322; 19 O. C. 69=3 O. L. J. 677=36 Ind. Cas. 643; 52 Ind. Cas. 258=25 M. L. T. 66; 2 Lah. L. J. 605. Where the finding on an issue is unnecessary but still it is embodied in the decree itself it operates as *res judicata*. 34 M. L. J. 431=28 M. L. T. 291=7 L. W. 482=45 Ind. Cas. 975. Finding not incorporated in the decree and not the basis of the decree cannot be held as finally decided and to operate as *res judicata*. 33 Ind. Cas. 620. Decisions arrived at in previous suit though dismissed operate as *res judicata*. A. I. R. 1929 Cal. 449=122 Ind. Cas. 547. Where the decree is in favour of a party an adverse finding in the judgment is not *res judicata*. 3 Pat. L. J. 178=44 Ind. Cas. 723. Unnecessary finding can not operate as *res judicata*. A. I. R. 1924 Oudh. 205=10 O. L. J. 404=79 Ind. Cas. 666. A question raised at the instance of a party and decided by the Court as necessary though in fact is not necessary operates as *res judicata*. A. I. R. 1921 Cal. 368=33 C. L. J. 317=63 Ind. Cas. 161. Plaintiffs excluded certain questions by the statement of his pleader. First Court expressly stated that it could not decide it but the defendant expressly urged in appeal to decide it and the Court did decide it: *Held* that the question was necessary for the decision of the suit. A. I. R. 1924 P. C. 144=26 Bom. L. R. 651=51 C. 631=51 I. A. 293=23 A. L. J. 76=29 C. W. N. 34=20 L. W. 770=47 M. L. J. 23=80 Ind. Cas. 827. To operate as *res judicata* finding must be material and necessary. A. I. R. 1934 Cal. 430; see also A. I. R. 1934 All. 465.

**Compromise and consent decree.**—This section does not apply in terms to consent decrees. A consent decree, however, has to all intents and purposes the same effect as *res judicata* as it raises an estoppel as much as a decree passed in *invitum*. A. I. R. 1930 Lah. 487=12 Lah. L. J. 157=126 Ind. Cas. 570; 43 C. L. J. 116=A. I. R. 1926 Cal. 672=94 Ind. Cas. 844; A. I. R. 1929 Mad. 96=(1928) M. W. N. 654; A. I. R. 1925 Oudh. 650=2 O. W. N. 684=90 Ind. Cas. 408; A. I. R. 1921 Pat. 131=2 P. L. T. 628=6 Pat. L. J. 208=62 Ind. Cas. 4; 57 Ind. Cas. 621; 14 N. L. R. 35=43 Ind. Cas. 962.

**Compromise decree constitutes *res judicata*.** A. I. R. 1924 Mad. 88=75 Ind. Cas. 336; see also A. I. R. 1929 Oudh. 63=5 O. W. N. 1081=8 Luck. 181=115 Ind. Cas. 294.

A compromise decree cannot be taken to decide every point that ought to have been pleaded, as a decree on the merits must. A. I. R. 1929 All. 243=51 A. 575=(1929) A. L. J. 344=116 Ind. Cas. 436. Where a compromise decree is passed on the basis of a Commissioner's map, the Court in subsequent suit cannot go into the correctness or otherwise of the map. A. I. R. 1928 Cal. 852=111 Ind. Cas. 1.

Where pre-emptor was party to suit by village landlords challenging sale to be pre-empted and sale was confirmed by a compromise decree, right of pre-emption cannot be exercised. A. I. R. 1928 P. C. 190=10 Lah. 75=55 I. A. 266=48 C. L. J. 158=33 C. W. N. 90=30 P. L. R. 1=110 Ind. Cas. 1 (P. C.). Where a previous petition for declaring the marriage a nullity has been dismissed by consent of parties a second petition is not competent. A party cannot approbate and reprobate. A. I. R. 1928 Bom. 279=30 Bom. L. R. 523=110 Ind. Cas. 266. An order by consent not discharged by mutual agreement and remaining unreduced is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. A. I. R. 1929 P. C. 289=(1929) A. C. 482=57 M. L. J. 429=30 L. W. 606=118 Ind. Cas. 7 (P. C.); see also A. I. R. 1930 Bom. 431=32 Bom. L. R. 389=126 Ind. Cas. 305. A decision in a former suit, unless tainted by fraud or procured by undue influence against the predecessor-in-title of the plaintiff will be binding on him. A. I. R. 1922 All. 19=44 A. C. 354=20 A. L. J. 193=67 Ind. Cas. 523. It is not essential in order to create *res judicata* that the matter should have been brought to its conclusion or indeed brought out at all. 63 C. 454. A consent decree or order is as effective as a decree or order passed on contest. 63 C. 550; see also A. I. R. 1936 Bom. 301=36 Bom. L. R. 593.

**Directly and substantially in issue.**—When a matter directly and substantially in issue in a subsequent suit has been directly and substantially in issue in a previous suit and has been finally heard and decided between the same parties, the issue cannot be re-opened in a subsequent suit notwithstanding the fact that the previous suit could have been decided independently of the decision upon that issue. A. I. R. 1927 Oudh 625=4 O. W. N. 307=101 Ind. Cas. 522. A fact can not be in issue directly when the judgment can be correct whether the fact exists or not. A. I. R. 1931 Cal. 353=34 C. W. N. 839=131 Ind. Cas. 562. In such cases *res judicata* by reason of a prior decision is not confined to the actual decision or finding in the case but extends to the common basis or facts accepted by both parties which are incorporated and made the foundation of the judgment and decree in the case. 36 L. W. 414=A. I. R. 1932 Mad. 519=139 Ind. Cas. 761=A. L. R. 1932 M. 1466. The rule of *res judicata* is inapplicable to matters in respect of which no controversy was raised and no express decision arrived at. 137 Ind. Cas. 606=A. I. R. 1932 Oudh 199=9 O. W. N. 488=A. L. R. 1932 Oudh 507 (F. B.) A judgment is conclusive only in respect of the matter necessarily consistent with it. 34 C. W. N. 839=A. I. R. 1931 Cal. 353=131 Ind. Cas. 562. So a judgment is not conclusive on matters brought incidentally during trial. *Ibid.* A judgment operates as *res judicata* as regards all the findings which are essential to sustain the judgment, though not as regards findings which did not form the basis of the decision or were in conflict therewith. A. I. R. 1926 Cal. 1003=43 C. L. J. 501=95 Ind. Cas. 1011. Even if a particular matter be not included in a formal issue, if it is directly and substantially in issue between the parties, and if there be a decision thereon it will operate as *res judicata*. A. I. R. 1926 Cal. 1022=30 C. W. N. 873=97 Ind. Cas. 73; see also A. I. R. 1926 Pat. 288=94 Ind. Cas. 553; A. I. R. 1927 Mad. 643=25 L. W. 797=103 Ind. Cas. 90. The finding on the real ground of decision in the case operates as *res judicata* even though there may have been other issues on which the case might equally well have been decided. A. I. R. 1925 Oudh 390=12 O. L. J. 248=2 O. W. N. 292=88 Ind. Cas. 985. Where a particular issue does not arise on the pleadings or in any case is so indistinct that it does not indicate that the parties knew that they had to adduce any evidence on it, any finding on such issue does not operate as *res judicata*. A. I. R. 1925 All. 794=85 Ind. Cas. 690. Observation not arising out of the issues which were before the Court for decision is not *res judicata*. A. I. R. 1924 All. 884=47 A. 17=22 A. L. J. 866=84 Ind. Cas. 631. The rule that a judgment or decree is not conclusive of anything not required to support it is an unyielding restriction of the power of parties and of the Courts. A. I. R. 1931 Cal. 353=34 C. W. N. 839=131 Ind. Cas. 562; 58 C. L. J. 196. Decision on issue in previous suit not necessary for decree, does not bar the issue in subsequent suit. A. I. R. 1930 Oudh 124=4 Luck. 404=6 O. W. N. 1320=122 Ind. Cas. 610; 34 P. L. R. 115=A. I. R. 1933 Lah. 412=142 Ind. Cas. 606; A. I. R. 1933 Lah. 404; A. I. R. 1930 Lah. 149=30 P. L. R. 744=120 Ind. Cas. 795. Decision of a co-lateral issue in the previous suit necessary for the purposes of that case operates as *res judicata*. 1930 A. L. J. 1309=130 Ind. Cas. 194. Although a finding upon an issue which is immaterial and unnecessary may not have the force of *res judicata*, yet where the parties go to trial, evidence is given and the Court at their invitation decides the point raised, a finding on one of the issues is conclusive between the parties in spite of the fact

that it is only one of the several grounds on which the judgment was based and even if that issue had been decided the other way the decree would have been the same. A. I. R. 1930 Cal. 810=57 C. 872=129 Ind. Cas. 310 ; see also 126 Ind. Cas. 176=31 P. L. R. 406=A. I. R. 1930 Lah. 690. A judgment operates as *res judicata* as regards all findings which are essential to sustain the judgment. A. I. R. 1930 Pat. 71=10 P. L. T. 630=120 Ind. Cas. 292. A useful test for considering whether a finding is *res judicata* is to see whether an appeal would lie against the finding. A. I. R. 1930 Pat. 71=10 P. L. T. 630=120 Ind. Cas. 292.

Suit dismissed on the ground that there is no cause of action is not a bar under the principles of *res judicata*. A. I. R. 1929 All 844=(1929) All. 919=118 Ind. Cas. 711. A stray remark not incorporated in operative portion of award cannot supersede previous decree. A. I. R. 1929 All. 521=1929 A. L. J. 540=117 Ind. Cas. 361. If in a previous suit brought by a person claiming to be next reversioner on the ground of an illegal relationship it is held that there is no relationship between him and the deceased and on that finding the alienation made by the female owner was not declared as invalid against the reversioner. Subsequent suit by the same person on inheritance opening by death of last female owner is barred. A. I. R. 1930 Pat. 71=10 P. L. T. 630=120 Ind. Cas. 292. A matter arising in a previous redemption suit which was dismissed for failure to pay decretal amount, and decided in that suit cannot be re-opened in a subsequent redemption suit. A. I. R. 1929 All. 409=(1929) A. L. J. 761=(1929) All. 1053=119 Ind. Cas. 525. Decision on a point not directly and substantially in issue cannot operate as *res judicata* in subsequent suit. A. I. R. 1928 Nag. 169=113 Ind. Cas. 225. A finding against a defendant who has joined only as a *pro forma* party and against whom no relief was claimed cannot operate as *res judicata*. A. I. R. 1928 Lah. 493=10 Lah. L. J. 239=11 Ind. Cas. 394. Issues raised by parties even improperly and admitted by the Court as relevant and argued by both parties and decided, is *res judicata*. A. I. R. 1927 All. 803=102 Ind. Cas. 28. Section 11 though not exhaustive is binding as far as it goes and, according to that section there is no bar of the *res judicata* unless there is a final decision. A. I. R. 1927 Lah. 804=102 Ind. Cas. 22.

In rent suits *res judicata* can be applied only when it can be shown in the previous suit right or liability or rate, not only for the period in suit, but for all times to come was decided. A. I. R. 1926 Cal. 650=43 C. L. J. 146=30 C. W. N. 593=94 Ind. Cas. 837. Previous decree awarding rent at a certain rate for the suit period is not *res judicata* as to rate of rent in a subsequent suit. A. I. R. 1925 Cal. 698=43 C. L. J. 135 ; see also A. I. R. 1927 Oudh 32=98 Ind. Cas. 77. Though one and the same person can combine in himself the status of an occupancy *raiyat* and a *raiyat* at a fixed rent still decision as to status is no bar to the consideration of the question as to fixity of rent as in the rent suit litigation will not be under the same title and that matter in issue will also substantially be different. A. I. R. 1926 Cal. 887=94 Ind. Cas. 310. Where in a rent suit the title of a person is in issue for the purpose of determining his share in the rent, the decision on the issue operates as *res judicata*. A. I. R. 1925 Cal. 1004=85 Ind. Cas. 804. A previous decree in a rent suit without the judgment cannot amount to more than a strong piece of evidence regarding the amount of rent realized from year to year. A. I. R. 1915 Cal. 1116=85 Ind. Cas. 770. So far as the rents of the years which were in contest in the previous suit were concerned, the decision no doubt is an absolute bar for the rents of those years. But so far as the rents or rates of rent of subsequent years are concerned, that judgment cannot be held to be an absolute bar. A. I. R. 1922 Pat. 213=77 Ind. Cas. 334. But it is plainly not open to the landlord, who was a party to the previous suit, to take up a position inconsistent with the decision in the previous litigation which was pronounced in his presence, *e. g.*, that the tract then in dispute was covered by the lease of one of his two tenants and not that of the other. A. I. R. 1924 Cal. 128=38 C. L. J. 291=76 Ind. Cas. 917. The decision in a previous rent suit that rent was payable as *Bhauji* rent, does not operate as *res judicata* in a suit for the rent of the subsequent years at the cash rent system. A. I. R. 1924 Pat. 371=1 Pat. L. R. 109=72 Ind. Cas. 138.

In order to see what was in issue in a suit, or what has been heard or decided, the judgment must be looked at. 37 Ind. Cas. 674=14 A. L. J. 1171. An incidental determination of an issue of title in a suit for rent is no bar to any issue of the title being raised subsequently. 34 Ind. Cas. 123. A decision as to rate of rent in previous suit is *res judicata* as to rate of rent in subsequent suit between the same parties for the same land for the same period. 41 Ind. Cas. 584. Though a finding may be unnecessary to sustain the ultimate decision of the case still if it is embodied in the

decree it will operate as *res judicata*. 33 M. L. J. 740. An *ex parte* decree in a rent suit decreeing the claim as prayed for, does not operate as *res judicata* as regards the rate of annual rent unless there was a prayer in the plaint for a declaration as to the rate of rent as part of the substantive relief claimed. 45 Ind. Cas. 416.

Where some of the *co-shebaits* of a deity filed a suit against other *shebaits* for a scheme for the better management of the *debutter* properties of the deity, and one of the defendants denied the *debutter* character of the properties, it was held, that the decision on the question of *debutter* was only incidental to the suit, and did not amount to *res judicata*. A. I. R. 1925 Cal. 996=41 C. L. J. 396=88 Ind. Cas. 616. Where a prior suit for share of profits was decreed and no question of right to partition was raised or decided in a subsequent suit, the question of partition was not *res judicata*. A. I. R. 1925 P. C. 184=21 N. L. R. 117=52 C. 971=30 C. W. N. 122=50 M. L. J. 136=23 A. L. J. 667=52 I. A. 294.

*Res judicata* is not confined to the judgment but extends to all facts involved in it as necessary steps or ground work, in other words, a judgment operates *res judicata* as regards all the findings which are essential to sustain the judgment even when one or more of the findings were based on issues not actually framed. A. I. R. 1924 Cal. 600=39 C. L. J. 40=79 Ind. Cas. 520. Decision on an issue, which is not necessary for the determination of the real question in controversy between the parties does not operate as *res judicata*. A. I. R. 1923 All 495=21 A. L. J. 393=45 A. 466=74 Ind. Cas. 656; see also A. I. R. 1923 Lah. 248=73 Ind. Cas. 854. Where a Court having the question before its mind decided that the issue did arise, that decision would be as much *res judicata* as the final determination of the issue on the merits. 33 C. L. J. 317=63 Ind. Cas. 161. In order that an adjudication be *res judicata* between plaintiffs and defendants or the latter *inter se*, there must be a conflict of interest between the defendants and a judgment defining their rights *inter se*. A. I. R. 1921 Lah. 47=2 Lah. 88=3 Lah. L. J. 223=62 Ind. Cas. 665.

Where a party seeks to set aside an *ex parte* decree on the ground that summons was not served upon him, but the Court disbelieves him and dismisses his application, a suit to set aside the decree on the same ground is barred. A. I. R. 1924 Rang. 119=76 Ind. Cas. 794; see also 74 Ind. Cas. 825=A. I. R. 1924 Pat. 238=2 Pat. 833. The judgment is *res judicata* concerning all facts involved in it as necessary steps on the ground work upon which it must have been founded. A. I. R. 1921 Cal. 750=33 C. L. J. 186=25 C. W. N. 106=62 Ind. Cas. 491.

In order that a decision in previous suit on a issue should operate as *res judicata* it is not necessary that the decision of the issue should have been the basis of the decree. It is enough that the issue had been finally heard and determined and that it arose directly and substantially (and not incidentally or collaterally) for determination, *i.e.*, that it was necessary for the determination of the suit though it may not have been ultimately made the basis of the decree. A. I. R. 1925 Cal. 985=85 Ind. Cas. 953. A Hindu widow cannot in a suit on a mortgage of the property executed by herself deems that she had power to alienate the property and, therefore, the question of her power to alienate it is not in issue in the suit so as to bar it from being agitated by her heirs in a subsequent suit for possession after her death. A. I. R. 1925 Pat. 625=88 Ind. Cas. 141=4 Pat. 510=6 P. L. T. 634. A prior suit determining a question of title regarding a certain land of which the present disputed land does not appear to form part, does not bar a subsequent suit between the same parties in respect of the land in dispute. A. I. R. 1923 Cal. 379=50 C. 475=72 Ind. Cas. 1041. In order that an incidental finding in one proceeding shall be *res judicata* in another, it is essential that the issue in the second proceeding should have been raised and decided clearly in the first. 69 Ind. Cas. 570=41 M. L. J. 437=14 I. W. 702. The doctrine of *res judicata* does not depend on the identity of the subject-matter of the dispute, but depends on the identity of issues, and the question to be considered is whether the matter in controversy in the latter suit, was substantially the matter in controversy in the previous suit. 63 C. 550. A mere suggestion by the Court in a judgment passed by it on a point which is not in controversy and in respect of which no issue has been framed does not operate as *res judicata* as it has not binding effect. A. I. R. 1936 Nag. 148. Where the matter was not directly and substantially in issue in the former suit, an incidental finding by the trial Court in that suit can not operate as *res judicata* in a later suit especially when the appellate Court, held, that the question did not arise at all in the former suit. 165 Ind. Cas. 213=17 Pat. L. T. 677. A finding on a question in a prior suit which was not necessary for the purpose of the litigation, does not operate as *res judicata*. A. I. R. 1936 Cal. 203. The dismissal of a suit which was previously one between a landlord

and tenant, does not bar a subsequent suit based on title, the plaintiff claiming in the second right, as against the defendants while it was not possible to raise in the prior suit. A. I. R. 1935 Bom. 131=37 Bom. L. R. 62=A. I. R. 1935 Bom. 147. It is well settled that the decision of an issue is *res judicata* when the issues arise directly and not incidentally having regard to the particular suit or proceeding. 14 Pat. 70=A. I. R. 1935 Pat. 306=157 Ind. Cas. 433; see also A. I. R. 1935 All. 208=153 Ind. Cas. 497; 61 C. L. J. 366=A. I. R. 1935 Cal. 607=159 Ind. Cas. 515. The decision as to the relationship of landlord and tenant in a rent suit operates as *res judicata* in the subsequent suit between the same parties on the same question. 17 Pat. L. T. 633=A. I. R. 1936 Pat. 556. But on other questions in a subsequent suit, such decision does not operate as *res judicata*. A. I. R. 1936 Cal. 772=62 C. L. J. 517.

**Question of law.**—A decision on a point of law will not operate as *res judicata* only if the matter in issue in the two suits is not the same or if the parties are not litigating under the same title, that is, when the requirements of s. 11 have not all been satisfied. 138 Ind. Cas. 161=A. I. R. 1932 Nag. 95=15 N. L. J. 1. The rule that an erroneous decision on a question of law is not *res judicata* is subject to the important qualification that the decision on the question in the subsequent suit should not in any way affect the operation of the former decree or take away any rights acquired by the parties thereunder. Though the former decision may be deemed to have been based on a wrong view of law, the decision arrived at, *i. e.*, the decree given can in no way be affected by giving a different finding in a subsequent suit on the same question. 36 L. W. 664=140 Ind. Cas. 326=1932 M. W. N. 1274=1. R. 1932 Mad. 854. Decision based on erroneous view of law does not operate as *res judicata* in subsequent proceedings for different relief. A. I. R. 1930 Lah. 907=12 Lah. 52=129 Ind. Cas. 12. In other cases, it was held that an erroneous decision on a point of law operated as *res judicata* in the same manner as correct decisions on a question either of law or of fact. A. I. R. 1930 Pat. 585=9 Pat. 674=128 Ind. Cas. 337; A. I. R. 1930 Bom. 135=53 B. 676=31 Bom. L. R. 778=122 Ind. Cas. 113; 56 C. 723=48 C. L. J. 327=33 C. W. N. 126; 32 C. W. N. 828=48 C. L. J. 184=A. I. R. 1928 Cal. 717=115 Ind. Cas. 588; 48 C. L. J. 590=A. I. R. 1929 Cal. 156=115 Ind. Cas. 269; 49 A. 543=25 A. L. J. 564=A. I. R. 1927 All. 297=100 Ind. Cas. 601; A. I. R. 1927 All. 206; A. I. R. 1926 Bom. 481=28 Bom. L. R. 879. Erroneous decision arrived at through an error in procedure operates as *res judicata*. A. I. R. 1930 Rang. 291=128 Ind. Cas. 838. A decision based on an erroneous conception of law cannot operate as *res judicata*. A. I. R. 1929 Rang. 55=6 Rang. 691=117 Ind. Cas. 52. A question of jurisdiction wrongly decided, operates as *res judicata* between parties if not objected. A. I. R. 1926 Bom. 481=28 Bom. L. R. 829=98 Ind. Cas. 341. An erroneous decision on a point of law can operate as *res judicata* between parties. A. I. R. 1926 Pat. 288=94 Ind. Cas. 553; see also A. I. R. 1926 Nag. 476=9 N. L. J. 183=9 Ind. Cas. 963; A. I. R. 1924 Pat. 265=2 Pat. 771=5 P. L. T. 7=74 Ind. Cas. 781; 79 Ind. Cas. 621=A. I. R. 1924 Nag. 422; 61 Ind. Cas. 603; 54 Ind. Cas. 202=37 M. L. J. 554=26 M. L. T. 364; but see A. I. R. 1922 Lah. 329=29 W. R. 1922=72 Ind. Cas. 177; 31 Ind. Cas. 269; (1916) 1 M. W. N. 223=30 M. L. J. 379=33 Ind. Cas. 9. Decision on a question of law in one proceeding does not bar later proceeding but the right which was the object matter of former proceeding and was established in favour of one party cannot be questioned in the subsequent proceeding. 40 M. 989=31 M. L. J. 513=20 M. L. T. 391=(1916) 2 M. W. N. 296=37 Ind. Cas. 741. Decision on a point of law does not operate as *res judicata* if the cause of action in a subsequent suit is different from that in the former suit. 87 Ind. Cas. 789=A. I. R. 1925 All. 761. Decision on the ground of limitation only does not operate as *res judicata*. A. I. R. 1923 Lah. 150=73 Ind. Cas. 705. Decision on a mixed question of law and fact operates as *res judicata*. A. I. R. 1926 Cal. 80=87 Ind. Cas. 811; A. I. R. 1926 Lah. 251=92 Ind. Cas. 769. The question of the personal liability of the mortgagor is not a substantial question of law. A. I. R. 1926 Nag. 245=91 Ind. Cas. 200. Decision on a particular question of law in prior suit does not operate as *res judicata* in subsequent suit on the same question if at the time of subsequent suit the law has altered. A. I. R. 1925 Cal. 1193=30 C. W. N. 83=87 Ind. Cas. 767.

**Competent Court.**—Previous decrees passed without jurisdiction being invalid altogether cannot be pleaded as *res judicata*. A. I. R. 1930 All. 681=52 A. 568=130 Ind. Cas. 801; A. I. R. 1929 Lah. 781=117 Ind. Cas. 83. Competency refers to jurisdiction of Court at the time. A. I. R. 1928 Lah. 928=30 P. L. R. 620=10 Lah. 528=113 Ind. Cas. 90; 108 Ind. Cas. 623; 107 Ind. Cas. 149; 28 Bom. L. R. 879=1926 Bom. 481=98 Ind. Cas. 341. The amount as well as the nature of the suit must be taken into consideration in deciding whether a subsequent suit is barred

under s. 11. A. I. R. 1926 Mad. 829=23 L. W. 653=51 M. L. J. 630=95 Ind. Cas. 968. Where a judgment has been delivered by a Court of incompetent jurisdiction that is to say, by a Court which had no jurisdiction to hear the case, the judgment cannot be pleaded as *res judicata*. A. I. R. 1926 All. 650=95 Ind. Cas. 406; A. I. R. 1926 Cal. 603=91 Ind. Cas. 1026; A. I. R. 1925 Mad. 1270=49 M. L. J. 430=22 L. W. 178=91 Ind. Cas. 497; 73 Ind. Cas. 874=5 Lab. L. J. 494=A. I. R. 1923 Lah. 141. Civil Court will not disturb a decree passed by competent Revenue Court of exclusive jurisdiction. A. I. R. 1923 All. 437=L. R. 5 A. 144=72 Ind. Cas. 276. Court trying former suit must have had jurisdiction to try later suit and not merely the issue. 29 C. L. J. 237=51 Ind. Cas. 127. The finding in the previous suits between the same parties are not *res judicata* in a subsequent suit not tenable by the previous Court though the judgment is admissible in evidence. 31 P. W. R. 1916=32 Ind. Cas. 504. The Court referred to in s. 11 of the C. P. Code is the original Court subject to the proviso that, that Court's judgment is not final until the time of appeal has elapsed or till the appeal has been decided. 48 P. R. 1916=34 Ind. Cas. 581. Decision of a Court without jurisdiction is void and cannot be *res judicata*. Consent of parties cannot confer jurisdiction. 24 C. W. N. 633=31 C. L. J. 272=56 Ind. Cas. 532. The test of determining the operation of a decree as *res judicata* in a subsequent suit is whether the Court that passed the decree in the previous suit should try the subsequent one or not. 58 Ind. Cas. 576=2 U. P. L. R. (A) 59; see also A. I. R. 1921 Bom. 434=45 B. 805=61 Ind. Cas. 276. Where the trial Court which tried the previous suit was by reason of the pecuniary limits of its jurisdiction incompetent to try the subsequent suit and the judgment in the former suit was binding on the defendant only in a representative capacity there would be no question of *res judicata*. 52 Ind. Cas. 545=87 P. R. 1919; see also A. I. R. 1922 Cal. 138; A. I. R. 1924 Oudh 147=10 O. L. J. 376=77 Ind. Cas. 340; A. I. R. 1924 All. 819=22 A. L. J. 745=83 Ind. Cas. 969. Pecuniary jurisdiction must be looked to, to determine competency. Competency to try one or the other of the issues is not enough. A. I. R. 1927 All. 297=49 A. 543=25 A. L. J. 564; see also 87 Ind. Cas. 705=A. I. R. 1925 Mad. 1167.

Title to land is to be directly determined not merely according to the laws of the country where the land is situate, but by the Courts of that country. So an adjudication by a Pondicherry Court with respect to law in British India is not *res judicata*. A. I. R. 1928 Mad. 327=54 M. L. J. 479=51 M. 720=29 L. W. 250=108 Ind. Cas. 305. So also a Court in British India is not competent to try a suit in respect of property which is situate in the Native State, and the judgment of the Court of British India could not operate as *res judicata* in the Court of the Native State. 20 C. W. N. 1213=(1916) 2 M. W. N. 153 (P. C.)=36 Ind. Cas. 710. Decision of Small Cause Court as regards actual subject-matter is *res judicata* although not as regards question of title. A. I. R. 1927 Mad. 96=98 Ind. Cas. 176; but see A. I. R. 1924 Bom. 452=48 B. 541=26 Bom. L. R. 672=83 Ind. Cas. 45. If the latter suit was not of a small cause nature, a decree for money made in a previous suit instituted in the Small Cause Court, does not operate as *res judicata* nor does the decision of the High Court refusing to interfere with that decree in revision. 28 C. W. N. 271=39 C. L. J. 532=80 Ind. Cas. 210. Civil Court decree in a suit for profit cannot operate as *res judicata* and for the suit which is suit for profits only tenable by a Revenue Court under the Tenancy Act. A. I. R. 1927 All. 397=65 Ind. Cas. 530. The trial of an issue by a Court which had no jurisdiction to try the subsequent suit can never be regarded as operating as *res judicata* when the same issue arises in such subsequent suit. 40 C. W. N. 174; see also A. I. R. 1936 Cal. 629; 156 Ind. Cas. 1031. Where property in two suits is identical, the mere fact that its value has arisen in the interval between the two suits and the subsequent suit is, therefore, beyond the jurisdiction of the former Court, cannot affect the question, of *res judicata*. A. I. R. 1936 Lah. 998; see also A. I. R. 1936 Mad. 951=71 M. L. J. 619=44 L. W. 530=1936 M. W. N. 1086.

There is no question of *res judicata* where the judgment has been delivered by a Court not competent to deliver it affecting the subject-matter of the suit A. I. R. 1935 Rag. 517. There is a distinction between the inherent want of jurisdiction in a Court and want of jurisdiction on grounds which have to be determined by the Court itself. The first makes the decree a nullity which can be ignored and need not be set aside. The second does not make the decree a nullity but only voidable; such a decree can be set aside by adopting the proper procedure, but cannot be collaterally impeached. A. I. R. 1935 Mad. 835=69 M. L.

J. 196=42 L. W. 446=1935 M. W. N. 677=157 Ind. Cas. 917. Where the previous suit relates to only a portion of the property which is the subject-matter in the subsequent suit, if the other conditions under s. 11 are satisfied, the finding in the previous suit that property therein is ancestral will be *res judicata* as regards that portion of the property which is the subject-matter in the subsequent suit. A. I. R. 1936 Lah. 391. Judgment of Court which had no jurisdiction to try latter suit is not *res judicata*. A. I. R. 1934 Pat. 270 ; see also A. I. R. 1934 Cal. 192. As regards question of title decision of Small Cause Court cannot act as *res judicata*. A. I. R. 1934 Lah. 324.

**Decision of Revenue Court.**—The decision of a Revenue Court in matters in which it has exclusive jurisdiction is *res judicata* in a subsequent suit in Civil Court. A. I. R. 1929 Lah. 589=11 Lah. L. J. 248=30 P. L. R. 427=121 Ind. Cas. 507 ; see also A. I. R. 1927 All. 613=102 Ind. Cas. 887 ; A. I. R. 1927 All. 717=25 A. L. J. 387=49 A. 606=101 Ind. Cas. 501. So the decision of the Revenue Court, in a matter with the exclusive cognizance of that Court is binding on the Civil Courts. A. I. R. 1927 All. 189=99 Ind. Cas. 299 ; see also A. I. R. 1924 All. 10=21 A. L. J. 330=72 Ind. Cas. 15. Decision of a Revenue Court on the status of tenant cannot be re-opened in a subsequent Civil suit. A. I. R. 1923 Cal. 433=50 C. 79=71 Ind. Cas. 307 ; see also A. I. R. 1922 All. 336=43 A. 724=20 A. L. J. 606=77 Ind. Cas. 139 ; 42 A. 191=18 A. L. J. 1030=58 Ind. Cas. 772. Decision passed by Revenue Court on question whether a land is an estate or not, will not be *res judicata* in a suit in a Civil Court for a declaration that the lands do not form an estate. 14 L. W. 251=69 Ind. Cas. 938. The decision in a question of proprietary title by Revenue Court under ss. 199 and 201 of the Agra Tenancy Act operates as *res judicata* in subsequent Civil suit. A. I. R. 1922 All. 95=20 A. L. J. 340=66 Ind. Cas. 915. Where a Revenue Court decides a suit brought before it, holding that it has jurisdiction and the parties accept the decree and it becomes final, one of them afterwards cannot ask a Civil Court to set aside the decree of the Revenue Court. 52 Ind. Cas. 98=52 Ind. Cas. 98 ; see also A. I. R. 1928 All. 343=118 Ind. Cas. 171 ; A. I. R. 1929 Oudh 362=4 Luck. 220=115 Ind. Cas. 837. Where plaintiff was recorded as owner of certain shares and defendants thereupon sued for correction of Record under s. 106, B. T. Act, plaintiff's suit for declaration of title and recovery of possession is not barred. A. I. R. 1927 Cal. 216=54 C. 114=44 C. L. J. 467=100 Ind. Cas. 293. Where on an application under s. 105, B. T. Act, the Revenue officer had jurisdiction to decide whether or not the applicants were joint landlords, and he did decide the question and his decision on this point was not questioned by appeal : *Held* that the applicants cannot challenge it subsequently by separate suit. A. I. R. 1926 Cal. 1180=30 C. W. N. 974=97 Ind. Cas. 702.

Dispute settled definitely by Revenue Court in partition proceedings, sitting as a Civil Court cannot be re-opened in a Civil Court. A. I. R. 1926 Oudh 72=12 O. L. J. 638=2 O. W. N. 539=89 Ind. Cas. 221. Revenue Court's decision in redemption proceedings bars Civil suit for redemption later on. A. I. R. 1924 Oudh. 245=10 O. L. J. 606=80 Ind. Cas. 698. Dispute between rival claimants once decided by Revenue Court cannot be re-opened in Civil Court. 78 Ind. Cas. 1008=A. I. R. 1924 All. 609 ; see also 77 Ind. Cas. 638=A. I. R. 1923 All. 527. But a Rent Court passing a decision on a question of tenancy in a previous suit for rent is not *res judicata* in a subsequent suit in the Civil Courts for a declaration of title. A. I. R. 1924 All. 163=21 A. L. J. 476=L. R. 4 A. 428. Question decided by Settlement Court in previous suit is *res judicata*. A. I. R. 1921 P. C. 131=23 O. C. 291=18 A. L. J. 1057=39 M. L. J. 115=28 M. L. T. 334=7 O. L. J. 439=25 C. W. N. 170 (P. C.)=57 Ind. Cas. 397. The decision by a Revenue Court on a question of title is no bar to the same question being litigated in a Civil Court. 45 P. R. 1918=77 P. W. R. 1918=84 P. L. R. 1918=46 Ind. Cas. 13. A decree by a Settlement Court passed with jurisdiction, and, in accordance with the directions contained in the Settlement circulars of the time, declaring the nature of a grant made by the Crown is not *ultra vires* and operates as *res judicata* in a subsequent Civil suit between the parties. A. I. R. 1936 Oudh 225=1936 O. W. N. 100=161 Ind. Cas. 158.

**Decision of a probate Court.**—Decision of a probate Court as to the genuineness of a Will is binding on Courts exercising other than testamentary jurisdiction in the country. A. I. R. 1916 P. C. 78=43 C. 694=43 I. A. 91=14 A. L. J. 466=20 C. W. N. 738=18 Bom. L. R. 397=23 C. L. J. 621=(1916) 1 M. W.



N. 419=20 M. L. T. 1=31 M. L. J. 77=33 Ind. Cas. 914; see also A. I. R. 1930 Oudh 29; A. I. R. 1936 Pesh. 39. In probate proceedings an adjudication as to distribution of estate is not binding on parties in subsequent litigation. A. I. R. 1923 Rang. 9=11 L. B. 331=68 Ind. Cas. 671. When a question of relationship of parties had been decided in a previous probate proceeding a subsequent suit between the same parties involving the same question is barred. A. I. R. 1930 P. C. 22=(1930) A. L. J. 750=51 C. L. J. 142=34 C. W. N. 201=58 M. L. J. 171=32 Bom. L. R. 505=57 Ind. Cas. 24; see also 31 C. W. N. 898; A. I. R. 1936 Rang. 401. Decision in letters of Administration case does not operate as *res judicata* in a suit for possession. 49 P. R. 1918=43 I. C. 723.

**Administration Suit.**—Directions given in an Administration suit, bind all parties, determine the construction to which the Will gives effect and is final and conclusive. A. I. R. 1922 P. C. 253=20 A. L. J. 625=43 M. L. J. 116=24 Bom. L. R. 937=16 L. W. 963=49 I. A. 100=49 C. 459=27 C. W. N. 174=36 C. L. J. 57 (P. C.)=67 Ind. Cas. 561. Where in an administration suit, a declaratory decree is passed, another suit praying that the shares declared by the previous decree be distributed is not barred by *res judicata*. 64 Ind. Cas. 813=11 L. B. R. 60. Where in an administration suit it is found that the plaintiff's claim against the administrator for a share in the estate is excluded by limitation the determination of that case is *res judicata* as regards an application by the same plaintiff for a revocation of the grant of administration. 12 Bur. L. T. 114=9 L. B. R. 273=51 Ind. Cas. 355.

**Land Acquisition proceedings.**—Decision as to title and apportionment of compensation between rival claimants operates as *res judicata* in subsequent suit between parties not by reason of s. 11 but by general principle of *res judicata*. A. I. R. 1922 P. C. 80=45 M. 320=43 M. L. J. 78=24 Bom. L. R. 963=16 L. W. 1=(1922) M. W. N. 359=20 A. L. J. 684=35 C. L. J. 545=30 M. L. T. 154=26 C. W. N. 713=49 I. A. 129 (P. C.)=67 Ind. Cas. 408. A prior decision in land acquisition case, though between the same parties and in respect of adjacent land, is not *res judicata* if land is acquired under different notification. A. I. R. 1928 Lah. 263=172 Ind. Cas. 797. The doctrine of constructive *res judicata* cannot apply to any person who is not a party to the land acquisition proceedings just as it could not apply to a person who is not a party to a civil suit. The Land Acquisition Act cannot go further than the Civil Procedure Code. A. I. R. 1936 Pesh. 29=160 Ind. Cas. 1010.

**Parties and their representatives.**—The whole policy of the Code is that if the proceeding originally instituted is right and proper any decision obtained therein is binding on all persons on whom the interest or right may devolve pending the disposal of the proceedings. A. I. R. 1928 Mad. 246=1927 M. W. N. 743=108 Ind. Cas. 401. A party is privy to decree and is bound by it irrespective of notice. 53 Ind. Cas. 143. But a judgment not *inter partes* does not operate as *res judicata* in subsequent suit. A. I. R. 1921 Mad. 246=41 M. L. J. 223=44 M. 778=67 Ind. Cas. 971. Where the very question raised in the suit was raised in a previous suit to which the predecessors-in-interest were parties, and a decision was given therein that decision will operate as *res judicata*. 44 M. L. J. 443=A. I. R. 1923 Mad. 519=72 Ind. Cas. 582. Persons, who were parties to a suit, but omitted in formal order by oversight are barred from suing again. A. I. R. 1930 P. C. 22=58 M. L. J. 171=51 C. L. J. 142=34 C. W. N. 201=32 Bom. L. R. 505=121 Ind. Cas. 200 (P. C.). If a deceased person's estate is represented sufficiently for an effective decree to be made against it, that decree will bind all the deceased's legal representatives in their capacity as such, whether they are on the record of the proceedings or not. A. I. R. 1928 Mad. 1199=117 Ind. Cas. 138. A suit which is dismissed on the ground that plaintiff has no right to continue the suit cannot operate as *res judicata* in favour of the sons of the plaintiff. A. I. R. 1929 All. 910=(1929) A. L. J. 1100=121 Ind. Cas. 102. Decision as to predecessor's title arrived at after the title had vested in the successor does not bind the successor. A. I. R. 1928 Mad. 635=110 Ind. Cas. 548. Where former suit was contested as daughter of her mother subsequent suit as sister of her brother is not barred by *res judicata*. A. I. R. 1934 Bom. 36. A decree between lessee and third person does not operate as *res judicata* in a subsequent suit by a lessor against that person. 155 Ind. Cas. 1087=1935 O. W. N. 674=A. I. R. 1935 Oudh 394. A decree-holder is a representative of the judgment-debtor so a decree against the judgment-debtor binds the future decree-holder and execution purchaser. 1935 A. L. J. 1001=A. I. R. 1935 All. 888=1935 A. W. R. 959. To

operate as *res judicata*, identity of parties is necessary. 1936 R. D. 345. Executors of a deceased person are not representatives of his heirs. A. I. R. 1936 Cal. 585. The decision in a previous suit in which the plaintiffs of the subsequent suit were merely *pro forma* defendants and in which no issues were decided between them and the plaintiff of that suit or between them and other defendants of that suit does not operate as *res judicata* in the subsequent suit. 40 C. W. N. 1208=64 C. L. J. 3; see also 40 C. W. N. 1205=165 Ind. Cas. 662. Where in a suit against mortgagor relating to mortgaged property, mortgagee is not impleaded, the mortgagee is not bound by the decision. A. I. R. 1931 Pat. 64=11 P. L. T. 900=10 Pat. 234=130 Ind. Cas. 257; 91 Ind. Cas. 1015=A. I. R. 1926 Oudh 6; see also A. I. R. 1935 Mad. 414=41 L. W. 600. Findings in a mortgage suit may be said to be binding on the auction-purchaser purchasing property in execution of the mortgage-decree though he is not a party to the mortgage suit as he in a sense represents the mortgagor and the mortgagee and so claims under the judgment-debtor. 119 Ind. Cas. 222=A. I. R. 1929 Rang. 183.

If in a litigation a decision, fair and square, is obtained against the adoptive mother, to the effect that she possessed no authority to adopt, that decision must be considered to be binding upon the adopted son by virtue of Expl. 6, s. 11. A. I. R. 1928 Oudh 155=1 Luck. 733=108 Ind. Cas. 817. Plaintiff sued the first defendant and purchasers through him for setting aside a sale in favour of first defendant. The sale-deed was held valid as between first defendant and plaintiff and the suit was dismissed. In appeal plaintiff joined the subsequent purchasers as respondents but not the defendant No. 1. It was held that the finding as to validity of sale-deed was *res judicata* as between plaintiff and defendant No. 1 and also as against the subsequent purchasers. A. I. R. 1927 P. C. 252=32 C. W. N. 281=30 Bom. L. R. 220=26 A. L. J. 371=54 M. L. J. 88 (P. C.)=107 Ind. Cas. 237. The judgment against a creditor who sought to attach the property cannot operate as *res judicata* as against the judgment-debtor in a suit brought by him against the claimant. A. I. R. 1928 C. 130=55 C. 448=32 C. W. N. 248=105 Ind. Cas. 647. Where a mortgagor dies and his property devolves upon an insolvent over whose estate a receiver has been appointed, a decree for foreclosure in favour of the mortgagee in a suit to which the receiver has not been made a party, is not *res judicata* against him, even though he has been heard on petitions and objections against the decree. 31 C. W. N. 741=A. I. R. 1927 P. C. 108=52 M. L. J. 734=54 C. 595=54 I. A. 190=29 Bom. L. R. 882=45 C. L. J. 544=25 A. L. J. 621. A previous decision in a suit by the lessee against a third person cannot operate as *res judicata* in a subsequent suit by the lessor against the same person. A. I. R. 1927 Bom. 270=29 Bom. L. R. 274=101 Ind. Cas. 340. Where some new parties are added to a subsequent suit in addition to all the parties to the prior suit, the decision in the previous suit is not *res judicata*. A. I. R. 1927 Lah. 259=100 Ind. Cas. 849. An execution purchaser is the representative of the judgment-debtor so as to bring him within the rule of estoppel and the principle of *res judicata*. A. I. R. 1926 Pat. 478=1926 Pat. 249=97 Ind. Cas. 205.

A suit brought by widow in possession of the whole estate holding as widow's estate to challenge an alleged adoption is a representative suit and all persons having a common interest (namely the reversioners in the case) must be deemed to have been represented through her under s. 11, Expl. VI. A. I. R. 1925 All. 79=46 A. 637=22 A. L. J. 690=87 Ind. Cas. 938; see also 73 Ind. Cas. 284=18 L. W. 491. Dismissal of suit by certain reversioners for setting aside alienation by sonless proprietor bars another suit for the same purpose by other reversioners who had been co-defendants in previous suit. A. I. R. 1925 Lah. 89=5 Lah. 421=84 Ind. Cas. 477. A decision in a suit by a widow or a limited owner, in respect of and for the protection of her own rights in certain property, bars a subsequent suit by reversioners in respect of that property even though such a suit may not be of a representative character. A. I. R. 1936 All. 422; see also A. I. R. 1924 P. C. 247; 42 I. A. 125. A lessee who claims under a title previously created by a lessor is not bound by subsequent finding between the lessor and third parties. A. I. R. 1924 Mad. 576=19 L. W. 369=34 M. L. T. 160=(1924) M. W. N. 378=83 Ind. Cas. 965. Decision against insolvent after insolvency is no bar as against Official Assignee who is not made a party. A. I. R. 1924 Mad. 689=20 L. W. 63=(1924) M. W. N. 491=47 M. 633=83 Ind. Cas. 960. In a proceeding by or against the *benamidar* the person beneficially entitled is fully affected by the rule of *res judicata*. A. I. R. 1924 Lah. 703=75 Ind. Cas. 1048. A decree passed against the widow as representing the estate in previous suit operates as *res judicata* against the reversioners in a subse-

quent suit. A. I. R. 1922 M. 233=43 M. L. J. 95=31 M. L. T. 129=70 Ind. Cas. 387. But widow's suit for recovery of possession of property in her own right on being dispossessed does not bar subsequent suit by reversioner. A. I. R. 1923 Cal. 204=35 C. L. J. 348=68 Ind. Cas. 322. A decision against one reversioner does not operate as *res judicata* against another. 19 A. L. J. 514=43 A. 558=63 Ind. Cas. 524. A lessor as such is not a person claiming under lessee within the meaning of s. 11. A. I. R. 1921 Mad. 306=44 M. 514=41 M. L. J. 288=63 Ind. Cas. 205. Permanent lessee or mortgagee is not bound by adjudication against owner after creation of mortgage or lease unless party to suit. 28 C. L. J. 223=22 C. W. N. 721=47 Ind. Cas. 315; 24 C. W. N. 746 (P. C.). A decision in a suit by or against a *benamidar* is *res judicata* against the real owner. 46 C. 566=28 C. W. N. 521=36 M. L. J. 68 (P. C.).

**Personal decree in mortgage suit.**—No doubt a mortgagee is entitled in his original suit on a mortgage to ask for a personal decree against the mortgagor, but where a claim for a personal decree is made but is rejected upon its merits, the decision whether right or wrong operates as *res judicata* and is binding on the parties to the suit, when, it being open to the party aggrieved to object to or appeal against the portion of the decree refusing a personal decree against the mortgagor, it does not do so. A. I. R. 1937 All. 54=1936 A. L. J. 1228; see also A. I. R. 1937 Lah. 6.

**Minor**—Where it was not shown that a guardian *ad litem* acted in fraud of the minor's interest or that his or her interest was adverse to the minor, the minor is bound by the decree in the prior suit. 51 Ind. Cas. 724=25 M. L. T. 154=9 L. W. 479; see also 41 Ind. Cas. 479=13 P. R. 1918; A. I. R. 1925 Oudh 633=87 Ind. Cas. 238; 53 Ind. Cas. 412; A. I. R. 1927 Oudh 354=4 O. W. N. 748=105 Ind. Cas. 59. Where there was no proper appointment of a guardian *ad litem*, and therefore, the minor was not properly represented in the former suit, the decree passed in the suit does not operate as *res judicata*. A. I. R. 1928 All. 447=26 A. L. J. 777=114 Ind. Cas. 743. When one of the defendants in the previous suit was a minor, and his guardian *ad litem* was grossly negligent in that she did not produce the document supporting the minor's title to the property in dispute, which it was plainly her duty to do, the decree in the prior suit would be of no effect and would not operate as *res judicata* so as to bar a subsequent suit by the minor to enforce his just rights. 40 L. W. 823=67 M. L. J. 927.

**Res judicata between Co-defendants.**—*Res judicata* as between parties arrayed on same side does not arise in the absence of active controversy between them and of the necessity for adjudication between them for granting relief to plaintiff. 80 Ind. Cas. 389=20 N. L. R. 197; 79 Ind. Cas. 22=A. I. R. 1924 Nag. 168. A judgment can operate as *res judicata* between co-defendants whose interests are conflicting. 57 Ind. Cas. 594; 62 Ind. Cas. 665=A. I. R. 1921 Lah. 47=2 Lah. 88=3 Lah. L. J. 223=72 P. L. R. 1921; 49 Ind. Cas. 369=8 L. W. 473; 35 C. L. J. 173=64 Ind. Cas. 603; 67 Ind. Cas. 881=3 Lah. L. J. 295; 70 Ind. Cas. 769=31 M. L. T. 370; 77 Ind. Cas. 862. Where there is no conflict between co-defendants and the point is not necessary for disposal of plaintiff's suit, the decision on the point is not *res judicata* between co-defendants. A. I. R. 1924 Mad. 711=34 M. L. T. 147=47 M. L. J. 20=78 Ind. Cas. 1055; see also A. I. R. 1924 Nag. 142=78 Ind. Cas. 987; A. I. R. 1924 Mad. 604=46 M. L. J. 298=34 M. L. T. 301=78 Ind. Cas. 921; 73 Ind. Cas. 912=47 B. 534=25 Bom. L. R. 268=A. I. R. 1923 B. 203; A. I. R. 1922 A. 19=44 A. 334=20 A. L. J. 193=67 Ind. Cas. 523; 50 Ind. Cas. 802; 41 Ind. Cas. 468=2 P. L. W. 108; A. I. R. 1931 P. C. 114=35 C. W. N. 661 P. C.; 88 Ind. Cas. 130=A. I. R. 1925 All. 546=47 A. 778=23 A. L. J. 453; 51 C. 997=84 Ind. Cas. 846; 46 A. 220=22 A. L. J. 91=79 Ind. Cas. 803; 40 B. 210=17 Bom. L. R. 1106=33 Ind. Cas. 423; 21 C. W. N. 693=34 Ind. Cas. 929; A. I. R. 1926 Pat. 578. Decision between co-defendants collusively or fraudulently obtained is not *res judicata*. A. I. R. 1930 Cal. 787=34 C. W. N. 1129=53 C. L. J. 91=130 Ind. Cas. 369. If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains. Three conditions are necessary for the applicability of the rule of *res judicata* between co-defendants: (1) there must be a conflict of interest between the defendants concerned, (2) it must be necessary to decide this conflict

in order to give the plaintiff the relief he claims, and (3) the question between the defendants must have been finally decided. *Per Lord Russel of Killowen* in 59 I. A. 247=10 Rang. 322=36 C. W. N. 726=34 Bom. L. R. 1040=1932 A. L. J. 735=63 M. L. J. 64=A. I. R. 1932 P. C. 161=A. L. R. 1932 P. C. 260 (P. C.); A. I. R. 1933 Lah. 274=34 P. L. R. 313=14 Lah. 31; A. I. R. 1933 Pat. 146; see also 59 C. 636=35 C. W. N. 1203=A. I. R. 1932 Cal. 271; 1932 A. L. J. 1063=A. I. R. 1932 A. 520; A. I. R. 1933 All. 206; A. I. R. 1933 Lah. 325; A. I. R. 1933 Rang. 255. There is no principle or authority which justifies the contention that the doctrine of *res judicata* cannot apply as between co-defendants to a previous suit, if no relief had been granted to the plaintiff in that suit. The adjudication would not any less be an adjudication because its consequence was the dismissal of the suit than it would have been if its tenor had been the other way. 10 Rang. 322=55 C. L. J. 403=36 C. W. N. 726=33 P. L. R. 519=137 Ind. Cas. 328=34 Bom. L. R. 1040=59 I. A. 247=A. I. R. 1932 P. C. 161.

Where in a suit there were two sets of defendants one set being merely impleaded *pro forma* and no question fell to be determined between the two sets of defendants, no matter raised in a subsequent suit between the descendants can be *res judicata* A. I. R. 1928 Pat. 603=7 Pat. 566=109 Ind. Cas. 287. An issue raised by a defendant which is not strictly appropriate to the pleadings in the plaint cannot be held to have been a matter substantially in issue so as to operate as *res judicata* between that defendant and another defendant who elected to remain *ex parte* after perusal of the plaint alone. A. I. R. 1928 Mad. 630=(1928) M. W. N. 321=110 Ind. Cas. 596. The principle of constructive *res judicata* is not applicable between co-defendants *inter se* jointly defending plaintiff's case. A. I. R. 1926 Cal. 568=44 C. L. J. 399=39 C. W. N. 415=94 Ind. Cas. 235. Where a suit is dismissed, findings in judgment as between co-defendants not embodied nor implied in decree are not *res judicata* nor appealable. A. I. R. 1924 Mad. 858=47 M. L. J. 612=(1924) M. W. N. 867=22 L. W. 384=85 Ind. Cas. 868.

In a partition suit all the parties who are interested in the property to be partitioned occupy much the position whether they are plaintiffs or defendants and a party claiming or resisting partition whether he is plaintiff or defendant is bound by the decision of the Court. A. I. R. 1923 Bom. 203=25 Bom. L. R. 268=47 B. 534=73 Ind. Cas. 912; see also A. I. R. 1931 All. 29=(1930) A. L. J. 1281=130 Ind. Cas. 382; 22 O. C. 300=6 O. L. J. 529=54 Ind. Cas. 325. But decision would not operate as *res judicata* where the question was not expressly decided in the previous suit. 20 C. W. N. 1177=39 Ind. Cas. 259; see also 43 Ind. Cas. 860=33 M. L. J. 740. Decision of an issue incidentally raised in a previous suit cannot be treated as *res judicata* when the question is directly and substantially in issue between co-defendants in a subsequent suit. 96 Ind. Cas. 625. If there is a conflict of interests amongst the co-defendants and the judgment, defines their real rights and obligations *inter se*, the decision is *res judicata* between them. A. I. R. 1926 Sind 282=96 Ind. Cas. 406; see also A. I. R. 1927 Nag. 369=103 Ind. Cas. 701; A. I. R. 1928 Oudh 155=1 Luck C. 733=108 Ind. Cas. 817; A. I. R. 1926 Oudh 281=29 O. C. 336=13 O. L. J. 303=3 O. W. N. 304=1 Luck. 367=98 Ind. Cas. 542.

The general rule is that necessary issues should not be determined after the plaintiff's suit has been dismissed. A. I. R. 1927 Rang. 156=6 Bur. L. J. 52=101 Ind. Cas. 637. Notwithstanding the dismissal of the plaintiff's suit, the decision can be held to operate as *res judicata* as between co-defendants if it was final and necessary to decide on the conflict between co-defendants. A. I. R. 1926 Cal. 568=44 C. L. J. 399=30 C. W. N. 415=94 Ind. Cas. 235. If the decision was not necessary to give relief to the plaintiff in former suit, it would not operate as *res judicata* A. I. R. 1926 Rang. 71=4 Bur. L. J. 250=93 Ind. Cas. 197.

In order to see whether the rights of partition between co-defendants amongst themselves have not been determined the nature of the partition suit should be considered. A. I. R. 1926 Sind 282=96 Ind. Cas. 406. Where in prior suit for partition certain parties were arranged as co-defendants and that suit did not decide any question of partition amongst them *inter se*, that decision does not operate as *res judicata*. A. I. R. 1926 Cal. 568=44 C. L. J. 399=30 C. W. N. 415=94 Ind. Cas. 235. "If a plaintiff cannot get at his right without trying and deciding a case between the co-defendants; the Court will try and decide the case and the co-defendants will be bound by the decision. But if the relief given to the plaintiff does not require or involve a decision of any case between the co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree, the plaintiff obtains." *Collingham*

*v. Earl of Shrewsbury*, 3 Have, 627=15 L. J. Ch. 441; A. I. R. 1932 P. C. 161=137 Ind. Cas. 329=59 I. A. 247=10 Rang. 322 (P.C.) "In such a case" said *Sir George Lowndey* "therefore three conditions are requisite: (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided." 53 A. 103=A. I. R. 1931 P. C. 114=132 Ind. Cas. 598=58 I. A. 158; see also 164 Ind. Cas. 468=A. I. R. 1936 Rang. 308; 14 Pat. 611=16 Pat. L. T. 589=152 Ind. Cas. 485=42 L. W. 279=37 P. L. R. 624=37 Bom. L. R. 794=1935 A. L. J. 1147=1935 M. W. N. 841=39 C. W. N. 1124=A. I. R. 1935 P. C. 139; 37 P. L. R. 274=A. I. R. 1935 Lah. 544; A. I. R. 1935 Mad. 649; A. I. R. 1935 Lah. 605=37 P. L. R. 89. A. I. R. 1934 Lah. 688; A. I. R. 1934 Oudh. 437=11 A. W. N. 1180; 36 Bom. L. R. 694=A. I. R. 1934 Bom. 329; 58 B. 544=A. I. R. 1934 Bom. 313=36 Bom. L. R. 612; 4 O. L. W. 823; 67 M. L. J. 927; 1932 A. L. J. 605=A. I. R. 1932 All. 643; A. I. R. 1933 Oudh. 415=10 O. W. N. 988; 1936 O. W. N. 982. But in order that a decision may operate as *res judicata* between co-defendants, it is not necessary that there should first be a decision of the conflict between the co-defendants *inter se* before deciding the plea of the plaintiff. Although the plea by the main contesting defendant and that of the plaintiff is identical, if there is really a conflict between the co-defendants and there is a decision of the conflict, the decision would operate as *res judicata* between the co-defendants. A. I. R. 1935 Lah. 102=157 Ind. Cas. 771. Finding recorded against a co-defendant is not *res judicata* as against non-appearing defendant. A. I. R. 1935 All. 678. Where parties in present suit were arranged as respondents in previous suit in which same issue was finally decided, present suit is barred by *res judicata*. A. I. R. 1934 Pat. 270.

**Resjudicata between co-plaintiffs.**—The conditions which are necessary to give rise to the plea of *res judicata* between co-defendants are also necessary to bar a suit by *res judicata* between the co-plaintiffs. 11 B. 216; 21 M. 8; 36 B. 207; 8 A. L. J. 807; 38 Ind. Cas. 213; A. I. R. 1933 Lah. 569; 57 B. 488=145 Ind. Cas. 262=35 Bom. L. R. 418=A. I. R. 1933 B. 287; 90 Ind. Cas. 124=A. I. R. 1925 Mad. 645. Where there is no conflict of interest between co-plaintiffs, the decision cannot be held binding as *res judicata* on their successors. A. I. R. 1921 Pat. 218=70 Ind. Cas. 232. The decree passed in a partition suit in which for giving relief to plaintiff, if a question has to be decided as between the different parties, whether as plaintiff or defendant, must be binding on all. A. I. R. 1930 All. 287=1929 A. L. J. 883=118 Ind. Cas. 175.

**Litigating under same title.**—The word litigating under the same title means that the demand should have been of the same quality in the second suit as in the first. 33 C. W. N. 876=57 C. 258=124 Ind. Cas. 161. When personnel of plaintiff in two suits are different the principle of *res judicata* is not applicable. A. I. R. 1931 Lah. 161; 117 Ind. Cas. 167=A. I. R. 1929 Pat. 173. The term 'title' refers to the capacity or interest of a party, personal representative or a combination of the two. It has nothing to do with the particular cause of action on which he sues or is sued. A. I. R. 1929 All. 400=116 Ind. Cas. 738. Where relief claimed by plaintiffs in the previous suit was based on a right inherited by them from their father, but the title upon which the plaintiffs instituted the second suit was a reversionary heirs of the last full owner: *Held* the principle of *res judicata* cannot apply. 89 Ind. Cas. 207=A. I. R. 1925 Cal. 1195=29 C. W. N. 861. Different capacities of the persons suing in the two suits renders section inapplicable though cause of action is the same. A. I. R. 1924 All. 355=46 A. 230=78 Ind. Cas. 402; 130 Ind. Cas. 13=1930 A. L. J. 254=A. I. R. 1931 All. 21. Previous suit in private capacity, does not bar a second suit by the same person in representative capacity under s. 92. A. I. R. 1922 Mad. 43=16 L. W. 122=31 M. L. T. 125=43 M. L. J. 418=69 Ind. Cas. 15; 69 Ind. Cas. 528=A. I. R. 1924 Lah. 275; see also 24 C. W. N. 690=47 C. 866=58 Ind. Cas. 705; 31 C. L. J. 163=55 Ind. Cas. 767.

Suit as reversioner does not bar a suit as owner, the two titles being quite different. A. I. R. 1930 Lah. 384=120 Ind. Cas. 532. Where prior suit is contested in private capacity and subsequent suit in public capacity, decision is not *res judicata*. A. I. R. 1926 Oudh 528=3 O. W. N. 645=1 Luck. 489=13 O. L. J. 696=97 Ind. Cas. 853. Suit for redemption as donee of mortgagor if dismissed does not bar a subsequent suit for redemption by the same plaintiff as heir of mortgagor. A. I. R. 1927 Bom. 87=28 Bom. L. R. 1507=99 Ind. Cas. 814. Where the plea is one of *justitii*, decision thereon is not *res judicata* since it is generally raised merely as

defence. A. I. R. 1927 Mad. 844=50 M. 877=26 L. W. 115=53 M. L. W. 864=104 Ind. Cas. 468. The decree in favour of a reversioner in a former suit operates as *res judicata* in the subsequent suit brought by other reversioners against the same defendants if they have a right in common arising out of the same cause of action. A. I. R. 1928 Lah. 371=110 Ind. Cas. 725. Where a Muhammadan widow was in possession of her husband's estate in lieu of dower and a suit was brought by the nephew for possession of his share and was decreed on payment of a certain sum within certain time and on his failure to pay anything, he was kept out of possession, a subsequent suit by the daughter of the deceased nephew claiming her share of the property is not barred by *res judicata*. A. I. R. 1927 All. 39=48 A. 803=24 A. L. J. 910=98 Ind. Cas. 928.

Former suit brought to establish personal right and dismissed is not a bar to subsequent suit on behalf of guild. 18 A. L. J. 150=75 Ind. Cas. 673. Former suit on the basis of gift does not bar a second suit on the basis of heirship. 43 Ind. Cas. 395. Where a person is not litigating under the same title in both the cases, judgment in the prior suit does not bind him in the subsequent suit as *res judicata*. 37 Ind. Cas. 881; see also 151 P. W. R. 1915=68 F. R. 1915=31 Ind. Cas. 159; A. I. R. 1923 Lah. 16=84 Ind. Cas. 257; A. I. R. 1924 Pat. 624=2 Pat. L. R. 125=6 P. L. R. 303=83 Ind. Cas. 951; 71 Ind. Cas. 808=A. I. R. 1923 Nag. 177; A. I. R. 1921 Lah. 17=3 Lah. L. J. 215=63 Ind. Cas. 717; 42 Ind. Cas. 895; A. I. R. 1922 Lah. 44=4 Lah. L. J. 400=67 Ind. Cas. 485.

"Same title" means same capacity. When a party occupies different positions in the two suits, the decision in the prior suit will not operate as *res judicata*. 153 Ind. Cas. 585=11 O. W. N. 1571=A. I. R. 1935 Oudh. 121; see also A. I. R. 1935 Nag. 61=31 N. L. R. 165=156 Ind. Cas. 180; A. I. R. 1936 Nag. 71=31 N. L. R. Sup. 202=163 Ind. Cas. 179; 1936 M. W. N. 1154=71 M. L. J. 823.

Application of the doctrine in insolvency proceedings—General principles underlying rule of *res judicata* can be invoked owing to insolvency proceedings, although section 11 does not in terms apply. A. I. R. 1937 Lah. 4=163 Ind. Cas. 515=38 P. L. R. 761. Decision of Insolvency Court on a question of fraudulent transfer cannot be re-opened in a suit in Civil Court. 16 N. L. R. 201=57 Ind. Cas. 612; see also 41 A. 378=17 A. L. J. 374=49 Ind. Cas. 540.

*Explanation I*.—The rule of *res judicata* so far as relates to the trial of an issue refers, "not to the date of the commencement of the litigation but to the date when the Judge is called upon to decide the issue." A. I. R. 1927 All. 189=99 Ind. Cas. 299.

*Explanation II*.—The competency of Court for the purposes of s. 11 is to be determined irrespective of any provision as to right of appeal from the decision of such. A. I. R. 1927 All. 189=99 Ind. Cas. 299; see also 32 A. 67=3 Ind. Cas. 707=6 A. L. J. 991.

*Explanation IV*.—Where a matter which ought to have been made a ground of defence in the previous suit was not made, it must be presumed that the matter was constructively in issue in that case and as such is *res judicata* in the subsequent suit. 11 Lah. L. J. 97=117 Ind. Cas. 805. Where a question has been necessarily decided in effect though not in express terms between the parties to a suit they cannot raise the same question as between themselves in any other suit in any other form. 24 C. W. N. 223=54 Ind. Cas. 952. Point ought to have been raised in previous suit is *res judicata*. A. I. R. 1927 Mad. 120=24 L. W. 812=99 Ind. Cas. 525. A ground of attack which must have been but was not referred to in plaint cannot be the basis of another suit. A. I. R. 1925 P. C. 55=48 M. L. J. 64=52 I. A. 100=47 A. 158=27 O. C. 334=27 Bom. L. R. 725=29 C. W. N. 749=23 A. L. J. 739=91 Ind. Cas. 280; A. I. R. 1923 Lah. 560=5 Lah. L. J. 163=74 Ind. Cas. 577. Explanation IV, cannot be given effect to bar a suit, unless all the requisite conditions laid down in the body of the section are also fulfilled. A. I. R. 1930 Mad. 264=127 Ind. Cas. 139. Whether a particular matter should have been made a ground of defence or attack must depend upon the particular facts of each case. A. I. R. 1928 Oudh. 411=112 Ind. Cas. 266=5 O. W. N. 653. Explanation IV would not apply to a point which the Court may or may not decide in its discretion. A. I. R. 1927 Mad. 120=24 L. W. 812=99 Ind. Cas. 525. Where it is not certain that a matter would have affected the result of the suit it cannot be said that it ought to have been made a ground of attack within s. 11. 46 Ind. Cas. 929. In regard to execution proceedings what is binding upon the parties is the point actually decided.

The principle of Explanation IV of s. 11 has no direct application but in determining the exact effect of the point decided on the subsequent proceedings the principle cannot be altogether ignored. Where point of limitation was not raised in previous proceeding : *Held* it could not be raised in another proceeding on same application. A. I. R. 1924 Bom. 495=48 B. 638=26 Bom. L. R. 817=83 Ind. Cas. 155 ; see also A. I. R. 1936 Rang. 218=9 R. R. 43=163 Ind. Cas. 671. The principle of *res judicata*, in s. 11, Explanation IV applies to interlocutory proceedings in the same suit. A. I. R. 1930 Bom. 431=54 B. 696=32 Bom. L. R. 389. A subsequent suit based on a claim of title, which the plaintiff owing to want of knowledge of it, could not put forth as a ground of attack in a prior suit, is not barred under Explanation IV of s. 11, C. P. Code and under Order II, r. 2. 94 P. R. 1916=37 Ind. Cas. 119. Where in an appeal by the plaintiffs from a suit which has been dismissed, although it is open to the defendants to support the order of dismissal on the ground of *res judicata*, they do not do so and the suit is rendered to be passed on merits they are precluded from raising the plea of *res judicata* subsequently. A. I. R. 1936 Cal. 454. In a case where a person fails to appear in the original suit or if he appears fails to raise the issue of jurisdiction, the decision of the Court will be binding upon him as *res judicata*, and it will not be open to him to reargue the same point in another suit. A. I. R. 1936 Sind 34=161 Ind. Cas. 324. Explanation IV to s. 11, C. P. Code, embodying the rule of constructive *res judicata* applies to execution proceedings as well. A. I. R. 1936 Nag. 123=19 N. L. J. 129=165 Ind. Cas. 948. To sustain a plea of *res judicata* on the basis of Explanation IV, it must not only be shown that on the ground of attack or defence taken in the subsequent suit might or ought to have been raised in the prior suit but also that the parties were litigating under the same title. A. I. R. 1935 Cal. 753=156 Ind. Cas. 543 ; see also 62 C. L. J. 153 ; A. I. R. 1935 Mad. 786 ; A. I. R. 1935 Lah. 487=37 P. L. R. 65 (consent decree) ; A. I. R. 1935 Lah. 825. Where the defendant in an earlier suit against him was not bound to counter-claim, the mere mention by him in his written statement of a debt due to him by the plaintiff without attempting to convert the matter into a counter-claim cannot operate as *res judicata* so as to bar a separate suit by him to recover the debt. 1935 A. L. J. 37.

**Might and ought.—constructive rejudiciata.**—Where subject-matter is not the same in both the suits, doctrine of constructive *res judicata* does not apply. A. I. R. 1929 Cal. 201=116 Ind. Cas. 637. The refusal of a Court to try extraneous issues in a case is not a bar to a subsequent suit. A verdict between parties upon one question does not bind them in an issue on another, unless the point in issue was clearly the same in both cases. The two questions should not simply be allied but should be identical. 36 Ind. Cas. 650. Where the present plaintiffs were defendants in the original suit in the sense that they were members of the firm, the matter is *res judicata* if the plea now taken could have been taken by their respective fathers and grandfathers whose names were shown in the plaint. A. I. R. 1924 Lah. 26=43 P. L. R. 1922=69 Ind. Cas. 783.

**Might and ought—alternative claims and reliefs.**—The question as to whether a plaintiff can or cannot bring a second suit depends upon whether : (1) he could have based his former suit upon the same cause of action, and (2) whether he ought to have so based it. In the first case he can escape from the operation of s. 11 and from Order II, r. 2, if he can show that he was, when he instituted the first suit, actually unaware of his second cause of action. In the second case he can similarly escape from the operation of those sections if he can show that he could not unite his two causes of action in a single suit without inconsistency and confusion. 71 Ind. Cas. 1009. A person is not bound to sue on an alternative cause of action and failure to so sue in the former suit does not bar subsequent suit. A. I. R. 1927 Nag. 322=103 Ind. Cas. 888. In a pre-emption suit plaintiff is not bound to plead alternatively that he is the sole owner of the property. Decision on his failure to do so will not operate as *res judicata*. An alternative cause of action for an alternative relief is not a matter which should be made a ground of attack within the meaning of Explanation IV. A. I. R. 1926 Oudh 545=96 Ind. Cas. 71. Where title by purchase is raised and negated, subsequent suit on title by heirship is barred. 46 M. 135=17 L. W. 188=(1922) M. W. N. 845=72 Ind. Cas. 207 ; see also A. I. R. 1923 Rang. 122=2 Bur. L. J. 34=11 L. B. R. 451=72 Ind. Cas. 14. Where a person failed to assert in the alternation a claim to share and his claim for the whole is dismissed he or his heirs are precluded from claiming the share. 47 M. L. J. 20=78 Ind. Cas. 1055=(1924) M. W. N. 569=A. I. R. 1924 Mad. 711. If

the effect of the decision in a former suit is necessarily inconsistent with the defence that ought to have been raised but has not been raised, the defence must be deemed to have been finally decided against the person who ought to have raised it. A. I. R. 1923 Rang. 239=2 Bur. L. J. 109=76 Ind. Cas. 612. Dismissal of prior suit for damages for non-delivery bars a suit for delivery of goods. 22 A. L. J. 745=83 Ind. Cas. 969.

**Might or ought—relief not claimed.**—Relief claimable in prior suit but not claimed cannot be claimed in a subsequent suit. A. I. R. 1925 P. C. 280=24 A. L. J. 33=5 Pat. 135=7 P. L. T. 97=28 Bom. L. R. 1126=30 C. W. N. 482=52 I. A. 418=42 C. L. J. 592=50 M. L. J. 1 (P. C.)=91 Ind. Cas. 1033 ; see also A. I. R. 1930 P. C. 177=34 C. W. N. 653=(1930) A. L. J. 873=125 Ind. Cas. 430. Omission to claim personal decree will bar mortgagee for suing therefor afterwards. A. I. R. 1922 Pat. 450=1 Pat. 506=3 P. L. T. 709=66 Ind. Cas. 945. When a mortgage has ripened all claims relating to the mortgage between parties thereto, must be determined in one suit whether for sale, foreclosure or redemption. Where in a mortgage suit, the defendants omits to put forward a counter-claim due to him by the mortgagee, arising out of the mortgage transaction a separate suit for such recovery is barred. 12 L. W. 173=60 Ind. Cas. 226. Where the suit is for mere declaration, subsequent suit for possession is barred. A. I. R. 1922 Nag. 129=4 N. L. J. 192=21 N. L. R. 124=65 Ind. Cas. 194. Where previous suit was confined to a particular right, plea claiming general right in subsequent suit is barred. A. I. R. 1930 Mad. 701=(1930) M. W. N. 520=58 M. L. J. 703=125 Ind. Cas. 554. Explanation IV applies even where the matter in dispute was not heard and finally decided in the former suit. The question whether the person ought to have raised a point in a suit so that his failure to raise it should preclude him from raising it in a subsequent suit is a question of fact. 56 Ind. Cas. 193. All grounds of attack or defence which can be joined without embarrassment must be put forward. (1916) 1 M. W. N. 286=34 Ind. Cas. 456 ; see also 43 Ind. Cas. 221 ; A. I. R. 1931 Lah. 217=32 P. L. R. 214.

**Might or ought—Omission to plead**—Plea that ought to have been raised barred. A. I. R. 1927 Rang. 333=6 Bur. L. J. 26=101 Ind. Cas. 327 ; 24 Bom. L. R. 1281=70 Ind. Cas. 103=A. I. R. 1913 Bom. 145. Pleas if raised would have been fatal to the prior suit cannot be raised in the subsequent suit. 5 Lah. L. J. 251=24 P. W. R. 1923=72 Ind. Cas. 91. Omission to plead in previous suit bars subsequent suit. A. I. R. 1923 All. 115=79 Ind. Cas. 486. Where a matter which ought to have been raised was not raised it must be held to be a matter which also must have been heard and finally decided in the previous suit. A. I. R. 1925 Cal. 427=40 C. L. J. 507=29 C. W. N. 253=85 Ind. Cas. 123. Section 11 creates what may be called a statutory waiver of the objection to jurisdiction so far as it relates to the place of suing and where there was no consequent failure of justice the validity of a decree passed in such suit cannot be challenged by a separate suit. A. I. R. 1929 Lah. 449=11 Lah. L. J. 306=120 Ind. Cas. 279. The failure by a defendant to raise a ground of defence which he cannot lawfully raise in a particular suit does not debar him from subsequently suing on that ground. A. I. R. 1925 Oudh 719=87 Ind. Cas. 1017. The fact that plaintiffs might have raised a certain plea in the alternation in a former suit but which cannot be said they ought to have so raised, does not preclude a fresh suit in respect of the plea. A. I. R. 1921 Lah. 17=3 Lah. L. J. 215=63 Ind. Cas. 717.

**Might or ought—Partition suit.**—Partition suit is not a bar to suit for share of gifted property. 40 Ind. Cas. 255=121 P. L. R. 1917=87 P. W. R. 1917. Plea not raised in partition proceedings cannot be raised in a subsequent suit between the same parties. 42A. 91=17 A. L. J. 1072=52 I. C. 779. A separate suit is not maintainable if the claim in respect of which the suit was filed is a matter which should have been dealt with in partition proceedings. A. I. R. 1922 Bom. 119=46 B. 327=23 Bom. L. R. 1171=64 Ind. Cas. 995. Where suit for possession was brought by a co-sharer on the allegation of partition but the allegation was not proved, a subsequent suit for partition is not barred. A. I. R. 1921 L. B. 13=11 L. B. R. 1=64 Ind. Cas. 174. Where first suit for partition was brought for partition of some items of family properties a subsequent suit for other items is not maintainable even if properties lay in different jurisdictions. 72 Ind. Cas. 430=44 M. L. J. 652=17 L. W. 740=(1923) M. W. N. 294. But where properties not included in the first suit were not known to the plaintiff, a subsequent suit for partition of omitted properties is not barred. A. I. R. 1927 Mad. 213=38



M. L. T. 82=98 Ind. Cas. 538. Members of a joint-family partitioned part of the property among themselves in 1875 and kept undivided two pieces of land which were left in the possession of defendants, one in that of defendants 1 to 4 and other in that of 5 to 6. Defendants 1 to 4 sued plaintiffs and defendants 5 to 6 for partition of the piece of land in possession of defendants 5 and 6. The plaintiffs raised a plea of inclusion of the other piece of land. The point left undecided. Then subsequently a suit was brought by the plaintiffs to recover their shares in the land in possession of defendants 1 to 4 : *Held* that the suit was not barred by *res judicata* under s. 11 (4) for the plaintiffs could not be said to have been to bring the land in suit for partition in the previous suit in as much as that suit was brought by one tenant in common to recover his proportionate share of the property. A. I. R. 1929 Bom. 323=31 B. 640=119 Ind. Cas. 779. Where a co-sharer has been in possession of a plot of land under an irredeemable mortgage it is incumbent on him during the course of partition proceedings to set up his proprietary rights with regard to the plot and if he does not raise such a title then it is no more open to him to gain it in a Civil Court after the partition proceedings have become complete and final. A. I. R. 1926 Oudh. 509=1 Luck. 210=13 O. L. J. 260=96 Ind. Cas. 75. Where in a suit for partition the defendants pleaded an independent right and the suit was dismissed without a definite finding as to their rights *inter se* : *Held* in a subsequent suit for partition among co-defendants that the decision in the prior suit did not operate as *res judicata*. A. I. R. 1929 Rang. 162=117 Ind. Cas. 587. In a prior suit for partition in 1904 a house mortgaged to the family by one S was not included. Court ordered in 1910 that S's house on possession being taken should be divided half and half. Plaintiff sued in 1922 to recover a half portion of the house recovered from the debtor : *Held* that the suit was not barred by *res judicata*. A. I. R. 1928 Bom. 365=30 Bom. L. R. 912=113 Ind. Cas. 173. A prior suit by the plaintiff for partition under a partition deed and a Will was dismissed. The plaintiff brought the present suit after the death of his father for partition of joint-family property : *Held* that the plaintiff's subsequent suit was not barred by *res judicata* because the cause of action in the prior suit was the partition deed executed by his father and there was no obligation on him to sue in the alternative for a partition of the property as joint-family property, though he certainly might have done so if he liked. A. I. R. 1923 Bom. 467=25 Bom. L. R. 797=77 Ind. Cas. 92.

**Might and ought—Mortgage suit.**—In case of two mortgages over same property, suit on one only is no bar to suit for redemption. A. I. R. 1930 Rang. 197=127 Ind. Cas. 477. Omission by sub-mortgagee to claim amount due on, sub-mortgage does not bar fresh suit. A. I. R. 1929 Oudh 456=6 O. W. N. 851=124 Ind. Cas. 353. Where prior mortgagee was made party to suit by *puisne* mortgagee question of *res judicata* cannot arise in subsequent suit unless prior mortgagee's right is attacked and adjudicated upon adversely with reference to prior mortgagee. A. I. R. 1930 All. 163=124 Ind. Cas. 27 ; see also A. I. R. 1920 P. C. 81=47 C. 662=47 I. A. 11=38 M. L. J. 424=25 C. W. N. 417=22 Bom. L. R. 557=55 Ind. Cas. 959=(1920) M. W. N. 308 (P. C.). As a general rule a paramount title cannot be drawn in controversy in a mortgage action. But if a defendant in a mortgage suit sets up a paramount title and without objection goes to trial upon that issue, neither party can afterwards say that the issue was irrelevant. A. I. R. 1929 Pat. 678=10 P. L. T. 645=121 Ind. Cas. 353. Subsequent incumbrancer in a mortgage suit is not bound to set up a prior title. A. I. R. 1929 Pat. 678=10 P. L. T. 645=121 Ind. Cas. 353. The plea of *res judicata* in respect of a paramount title cannot be set up against a person who happens to be a party in a mortgage suit in a different capacity unless the paramount title has been expressly the subject of controversy and there has been an actual decision in respect of it. A. I. R. 1930 Oudh 97=7 O. W. N. 25=121 Ind. Cas. 277 ; A. I. R. 1929 Cal. 622=33 C. W. N. 659=122 Ind. Cas. 215 ; 78 Ind. Cas. 118=A. I. R. 1924 Nag. 408. To raise the plea of *res judicata* against prior mortgage it is necessary for subsequent mortgagee as plaintiff in the former suit to allege a distinct claim in the plaint in derogation of the prior mortgage. 117 Ind. Cas. 820. Where a prior mortgagee who is also *puisne* mortgagee was impleaded in suit by *mesne* mortgagee as subsequent mortgagee. There was no contest as to prior mortgage. Prior mortgagee's rights are not barred by *res judicata*. A. I. R. 1929 Oudh. 463=4 Luck. 250=6 O. W. N. 1=115 Ind. Cas. 833.

A person claiming adversely to the mortgagor and mortgagee is not a necessary party to a mortgage suit but if he is made a party, the Court has discretion whether

to adjudicate on his title or not and therefore, if such party fails to assert his title he is not barred by s. 11, Explanation IV from doing so in a subsequent suit. A. I. R. 1927 Mad 301=52 M. L. J. 52=25 L. W. 238=38 M. L. T. 20=99 Ind. Cas. 468; see also A. I. R. 1927 Mad. 945=106 Ind. Cas. 574. Where in a suit on a mortgage certain persons who had purchased the mortgaged property in execution of a single money decree, and who happened to be also the heirs and legal representatives of the mortgagor, were made parties as such heirs and failed to plead their purchase, held that they cannot subsequently claim to redeem the properties by a separate suit subsequently. A. I. R. 1922 All. 463=20 A. L. J. 641=73 Ind. Cas. 920. If the prior mortgagee is impleaded in a suit by the *puisne* mortgagee without his priority being recognised, he is bound to set up his prior charge as a ground of defence under Explanation IV. A. I. R. 1924 All. 927=75 Ind. Cas. 108; see also 4 Pat. L. T. 108=2 Pat. 435=71 Ind. Cas. 948. Unless relief is claimed against the prior mortgagee, the latter need not set up his prior mortgage and his subsequent suit on the prior mortgage will not be barred under s. 11. 1 Pat. L. T. 629=58 Ind. Cas. 33.

A subsequent mortgagee need not set up his right of redemption as defence in a suit for ejectment. He can rely upon his right of redemption in a subsequent suit for possession. 54 Ind. Cas. 276. If a mortgagor admits as a fact in proceedings under s. 84 of the T. P. Act that the deposit was of the full amount due on the date it was made, but refuses to receive it on some other ground, he cannot in a suit on the mortgage subsequently, be heard to say that the deposit was insufficient. A. I. R. 1922 Nag. 174=67 Ind. Cas. 324. Ordinarily a redemption suit by a mortgagor is not barred by *res judicata* by a previous suit by a second mortgagee to redeem the first. 36 Ind. Cas. 551=4 L. W. 184. A subsequent mortgagee claiming title as owner of a portion in a prior mortgage suit may set up his title in a separate suit as the question cannot be raised in the former suit. 16 A. L. J. 639=40 A. 584=46 Ind. Cas. 559. Under the Explanation of Order 34, Rule 1, Civil Procedure Code, it is not necessary for a *puisne* mortgagee to implead a prior mortgagee and he may without impugning such a mortgagee claim to sell the property subject to such a mortgage. Consequently a person who has taken a subsequent mortgage and also possesses prior mortgagee's rights by satisfaction of the decree on the prior mortgage has a dual capacity; he is a necessary party in his capacity as a subsequent transferee but not necessary party in his capacity as a prior mortgagee or as possessing prior mortgagee's rights. If, therefore, the validity of the prior mortgage is admitted in the plaint and he has been professedly impleaded as a subsequent transferee there is no reason to require that such subsequent mortgagee must of necessity appear in Court and set up rights under the prior mortgage which is not disputed by the plaintiff. And in the circumstances a decree in such a suit *ex parte* against such subsequent mortgagee does not operate as *res judicata* in a suit on the basis of the prior mortgagee's rights as such by satisfaction of the prior mortgage-decree. A. I. R. 1936 All. 576=1936 A. L. J. 774 (F. B.).

Where a mortgagee in possession resists the right of the mortgagor to get release of the mortgaged property and to give up possession even after invalid tender made by the latter has been refused by the former or a deposit made by the latter under s. 83 has not been accepted by the former and the mortgagee refused to withdraw the same, the suit which the mortgagor has to institute is a suit for redemption, and the mortgagor must include in such a claim his claim for over payments to the mortgagee or excess profits received by him; and if he does not include the said claim he would be debarred from claiming the same in a subsequent suit. A. I. R. 1936 Cal. 200=40 C. W. N. 627.

**Might and ought—Mesne profits**—In a suit for possession and *mesne* profits, where the decree is silent as to *mesne* profits, subsequent suit for *mesne* profits is not barred. A. I. R. 1929 Cal. 566=33 C. W. N. 945=124 Ind. Cas. 65; see also (1915) II. U. B. R. 81=31. 'Relief' is one which has accrued at the date of suit. Therefore, suit for *mesne* profits from the date of suit to the date of delivery of possession is not barred by a previous decision awarding past *mesne* profits but being silent as to future *mesne* profits. 41 M. 188=22 M. L. T. 484=33 M. L. J. 697=6 L. W. 784=(1917) M. W. N. 847 (F. B.); see also A. I. R. 1925 Pat. 145=6 P. L. T. 78=80 Ind. Cas. 710. Omission to sue for *mesne* profits prior to the date of the suit where plaintiffs sue for possession of immovable property does not bar the second suit against the same defendants for those *mesne* profits. A. I. R. 1924 Bom. 368=26 Bom. L. R. 288=80 Ind. Cas. 259. Where in a prior suit for possession and future *mesne* profits the Court did not purport to decide the question of

future *mesne* a subsequent suit for *mesne* profits *pendente lite* is not barred. 16 A. L. J. 182=40 A. 292=44 Ind. Cas. 88. When claim for partition and possession is made and decree is silent as to the claim of future *mesne* profits it will be taken to have been refused and a separate suit will be barred by the Explanation IV to s. 11 of the Code. 58 Ind. Cas. 419=44 B. 954=22 Bom. L. R. 982. *Mesne* profits from the date subsequent to the decree when the money is paid into Court by the mortgagor cannot be had in the redemption suit itself. When in a redemption suit, a claim for *mesne* profits is withdrawn a subsequent suit for *mesne* profits from the date of payment after the decree up to the date of delivery of possession is not barred by Order XXIII, r. 1, or Order VI, r. 1, or s. 11 of the Civil Procedure Code. A. I. R. 1926 Cal. 178=85 Ind. Cas. 547.

**Might and ought—Defence.**—Defendant in possession must resist claim on all possible grounds. A. I. R. 1926 Lah. 162=7 Lah. 40=27 P. L. R. 209=94 Ind. Cas. 27. *Ex parte* decree in prior suit in which no issue was raised as to the rate at which the rent was payable by defendant and there was no decision with regard to such rate do not operate as *res judicata* in favour of the plaintiffs' landlords. 65 Ind. Cas. 581. Where prior suit for possession on basis of gift decreed, subsequent suit questioning donor's right to make gift is barred. A. I. R. 1927 Oudh 234=1 Luck. Cas. 78=101 Ind. Cas. 812. But where the law forbids a certain thing being done in suit, no amount of failure by a defendant in previous suit to plead the positive bar created by Legislature will prevent its being taken up in a subsequent suit. A. I. R. 1927 All. 505=49 A. 918=25 A. L. J. 582=L. R. 8 A. 225 Rev.=103 Ind. Cas. 379. Where the plaintiff sued the judgment-debtor for specific performance of the contract to sell it, it was open to the latter to plead that the agreement was void because the property was under attachment or in the hands of the Collector at the time. Explanation IV of s. 11 of the Civil Procedure Code will bar him from taking that plea in a subsequent suit and it will equally bar the appellant who claims under him and is litigating under the same title. A. I. R. 1922 Nag. 81=66 Ind. Cas. 850. Where the want of jurisdiction is not apparent on the face of the proceedings but the absence of jurisdiction depends on a fact in the knowledge of a party, then, if he does not bring the fact forward but allows the Court to proceed with the judgment he ought not to be permitted to impeach the jurisdiction in any collateral proceeding. A. I. R. 1922 Pat. 322=67 Ind. Cas. 686.

**Might and ought—set off.**—Where a person who could put forward a counter claim or plead an equitable set off does not do so, his subsequent suit for such a claim, or claim to set off would not be barred by reason of his not having put forward in the suit against him. A. I. R. 1926 Mad. 1020=24 L. W. 282=97 Ind. Cas. 488. The fact that a defendant omitted to claim a set off in a suit brought against him by the plaintiff would not bar his claim in a subsequent suit as he was under no obligation to avail himself of the right to claim a set off in the former suit. 74 P. R. 1919=52 Ind. Cas. 850.

**Explanation V.**—To support a plea of *res judicata* it is not enough that the parties to both the suits are the same and that the same matter is in issue. The matter must have been heard and finally decided in the previous suit. Where a declaration of title in a suit is claimed merely as a step towards the decree sought, namely, a decree for possession, and the suit with regard to the relief for possession is dismissed on the ground of limitation and no finding is given on the question of title, the mere fact that the relief as to declaration has not been granted will not, under Exp. V to s. 11 operate to render the question of title *res judicata* in a subsequent suit. *Nripendra v. Basanta*, 89 Ind. Cas. 207=29 C. W. N. 861. Explanation V apparently has a reference to what has been adjudicated by the Court and not to the result arrived at by a compromise, in which the parties have omitted to settle a part of their dispute. A. I. R. 1930 All. 619=123 Ind. Cas. 448. An application under Order 34, rule 6, Civil Procedure Code is not an application in execution but substantive original application for a new decree in the suit. The procedure applying to this application would be governed by s. 141, Civil Procedure Code. Where therefore, a definite application had been made for a decree under Order 34, rule 6 and no prayer were granted by the Court for passing of a personal decree, the provisions of Explanation 5, s. 11, Civil Procedure Code, would apply with the result that the relief which was not expressly granted shall be deemed to have been refused. A. I. R. 1936 Lah. 388=163 Ind. Cas. 119=38 P. L. R. 700. Where the right of the plaintiff to obtain a personal decree has been decided, the

parties will be bound by such decision. But where there has been no decision on the point, even though plaintiff had claimed for such a relief in the plaint, the plaintiff is not barred from claiming it under Explanation V, s. 11. Explanation V would not apply unless the relief claimed was such as it was obligatory on a Court to grant. A. I. R. 1935 All. 411=1935 A. L. J. 279=157 Ind. Cas. 533.

**Expl. VI—Representative suit.**—Findings in a representative suit enure for the benefit of the entire family. They are *res judicata*. A. I. R. 1929 All. 775=122 Ind. Cas. 673. Application of Expl. VI, implies a community of interest claimed and the claim should be made in good faith. A. I. R. 1925 Oudh 75=77 Ind. Cas. 1028 ; 75 Ind. Cas. 626=10 O. L. J. 535=26 O. C. 133. In the absence of fraud and collusion the decree in a suit in the interest of the whole estate and for the benefit of all persons operates as *res judicata* in a subsequent suit. A. I. R. 1923 All. 338=75 Ind. Cas. 593. A decision against a managing member of a Hindu family is binding on all members of the family in subsequent suit. 42 A. 359=18 A. L. J. 326=55 Ind. Cas. 846. A decree fairly and properly obtained against a Hindu widow in possession of her husband's estate is in the absence of fraud or collusion, binding on the reversionary heir. A. I. R. 1918 P. C. 87=40 A. 593=28 C. L. J. 519=23 C. W. N. 326=36 M. L. J. 597=21 Bom. L. R. 511=45 I. A. 168=48 Ind. Cas. 553. The expression "private right claimed in common" in Explanation VI is not merely confined to the rights of joint Hindu family, etc., but extends to village communal rights. 31 M. L. J. 26=35 Ind. Cas. 116. Decision in a winding up proceeding of a company against the official liquidator representing the debenture-holders and creditors is binding on all. A. I. R. 1920 P. C. 56=43 M. 550=47 I. A. 33=38 M. L. J. 444=22 Bom. L. R. 568=18 A. L. J. 489=56 Ind. Cas. 163. A decision against a *karnavan* when he has litigated in good faith is binding on *tarward*. A. I. R. 1921 Mad. 520=40 M. L. J. 338=62 Ind. Cas. 558. Decision in a suit by some reversioners in the interest of the whole body is binding on the entire reversionary body. 7 O. L. J. 342=23 O. C. 238=57 Ind. Cas. 541 ; see also 64 Ind. Cas. 980=49 C. 45=33 C. L. J. 421=25 C. W. N. 585 ; 64 Ind. Cas. 248=19 A. L. J. 749 (F. B.)=44 A. 19. Explanation VI to s. 11 is not confined only to cases when leave of the Court has been granted under Order I, rule 8. A. I. R. 1924 Mad. 88=18 L. W. 177=(1923) M. W. N. 545=75 Ind. Cas. 336 ; A. I. R. 1928 M. 77=51 M. 128 (F. B.). A decree passed in a suit under s. 92 is binding also on all the worshippers at the temple. A. I. R. 1925 Mad. 1070. *Bona fide* litigation implies every attempt to bring all interested persons before the Court. A. I. R. 1927 Mad. 645=52 M. L. J. 641=110 Ind. Cas. 58. Unless the cause-title shows that the suit is brought in a representative capacity the suit cannot be treated as one brought in a representative capacity. A. I. R. 1929 Mad. 445=54 M. L. J. 587=27 L. W. 769=109 Ind. Cas. 199. The plaintiffs in a second representative suit relating to the same right cannot avoid the bar of *res judicata* except by proving fraud or collusion on the part of the former plaintiffs, as under s. 44 of the Evidence Act, or their want of *bonafides*. Mere negligence or gross negligence is not fraud or collusion and the principles of section 44 of the Evidence Act cannot be extended thereto. Omission to produce certain evidence or to place certain other evidence before the appellate Court, though it may amount to gross negligence, cannot establish collusion or want of *bonafides* in the absence of proof of that there was intentional suppression. *Talwari v. Thadi Kanda*, 41 C. W. N. 257 (P. C.)=A. I. R. 1936 P. C. 1. The expression "claimed in common for themselves and others" in Explanation VI does not also govern a claim in respect of public right. With regard to such public right if the litigation is *bonafide* on the part of the plaintiff the decision would be *res judicata* against others who claim to be entitled to the right. A. I. R. 1937 Lah. 70. Explanation VI is applicable where there is a community of interest claimed on common title and where the claim is in good faith for enforcing or defending that common interest. Such common interest may have been vested in a joint-family which may form its basis or it may rest on joint title obtained in some other way. 4 U. P. L. R. (O. C.) 47. In the absence of fraud and collusion a decision against the *Mohunt* of a *Mutt* operates as *res judicata* against his successor. A. I. R. 1935 All. 255=157 Ind. Cas. 1092 In a representative suit, instituted under Order I, rule 8, the decision in a former suit does not operate as *res judicata*, unless the former suit was instituted in compliance with this rule, *vis.*, by permission of the Court, the Court giving notice to all persons interested. An exception to this principle is where the former suit having been litigated *bonafide* on behalf of the plaintiff and others was a common right, the omission to comply with rule has been inadvertent and no injury therefore has been sustained by the plaintiff in the second suit. A. I. R. 1936 Lah. 965. Explanation

VI applies to those suits only which are instituted in a representative capacity. 157 Ind. Cas. 1006=A. I. R. 1935 Lah. 537. Where the parties are different in two suits the findings in the previous suit cannot be *res judicata* in the subsequent suit unless it is shown that the plaintiffs in the subsequent suit are claiming under the plaintiffs in the previous suit and the plaintiffs in the previous suit had claimed the right in common for themselves and for the plaintiffs in the subsequent suit. A. I. R. 1935 Lah. 391.

**Fraud and collusion.**—It is always open to a party to a suit to show that a judgment was obtained by fraud or collusion or that there was want of jurisdiction and in such cases s. 11 would not apply. No doubt in the case of a joint Hindu family, it is impossible to allow each member of the family to litigate the same point over and over again and s. 11, Explanation 6 applies, but where there is a finding in the subsequent suit that the father in a joint Hindu family who was a party to the previous suit was in collusion with the opposite party, s. 11, Explanation (6) would not apply and his son is not bound by the decision in the previous suit. *Parbati v. Gajraj* A. I. R. 1937 All. 28=1936 A. L. J. 1162. Judgment set up as *res judicata* can be impeached on the ground of fraud and collusion in the same suit. Separate suit is not necessary. A. I. R. 1929 Cal. 685=114 Ind. Cas. 407. Where the question of alleged fraud has been in effect adjudicated upon an attempt to re-open the case cannot be allowed. A. I. R. 1923 Rang. 82=1 Bur. L. J. 129=74 Ind. Cas. 278.

**Execution proceedings.**—The principle of constructive *res judicata* applies to orders in execution. A. I. R. 1928 Mad. 746=28 L. W. 895=114 Ind. Cas. 545; see also A. I. R. 1930 Oudh 305=7 O. W. N. 363=123 Ind. Cas. 881; 121 Ind. Cas. 702=A. I. R. 1930 All. 628; 47 A. 86=22 A. L. J. 928=80 Ind. Cas. 722; 24 Bom. L. R. 1291=A. I. R. 1923 Bom. 36=76 Ind. Cas. 148; A. I. R. 1924 Pat. 265=2 Pat. 771=5 P. L. T. 7=74 Ind. Cas. 781. A decision in the course of execution proceedings is final between the parties, though as to the some of the parties it was based on agreement and as to others on an adjudication. 47 C. 446=30 C. L. J. 496=24 C. W. N. 269=55 Ind. Cas. 189. Where a decision of the Executing Court is that no property of the judgment-debtor can be attached, that decision is final. 4 Pat. L. W. 279=44 Ind. Cas. 654. A judgment-debtor is barred by *res judicata* from contending in the course of execution proceeding, that a particular person is not the legal representative of a deceased plaintiff while at his instance the particular legal representation was recorded as such and final decree passed. 45 Ind. Cas. 657. Objection to application for execution proceedings once dismissed operates as *res judicata*. A. I. R. 1930 Oudh 65=124 Ind. Cas. 445. Order passed in execution proceedings and not appealed against is final. A. I. R. 1922 P. C. 341=31 M. L. T. 219=21 A. L. J. 195=27 C. W. N. 279 (P. C.)=73 Ind. Cas. 882. Decree-holder applied for partial execution but subsequently applied for amendment for executing the whole decree. The judgment-debtor objected to the amendment but his objection was overruled. No appeal was made by the judgment-debtor. The decision operates as *res judicata*. A. I. R. 1926 Cal. 1019=53 C. 582=43 C. L. J. 596=96 Ind. Cas. 562. Where in a prior execution case of the same decree the Judge dismissed the objection by A, an attorney of B on the ground that it was vague but did not raise the question whether A was authorized to appear for B in his personal capacity and when A subsequently made an application to have his order reviewed, the application was dismissed on the ground that it was incompetent, A having no power to represent B personally: *Held* that the decision could not operate as *res judicata* in the subsequent execution case. A. I. R. 1937 Lah. 21. The principle of *res judicata* applies to execution proceeding. A. I. R. 1928 All. 527=51 A. 346=26 A. L. J. 1160=112 Ind. Cas. 534. But the special rules laid down in the explanation to that section which go beyond the ordinary doctrine of *res judicata* ought not to be applied generally in execution cases. A. I. R. 1922 Pat. 289=3 P. L. T. 403=1 Pat. 593=67 Ind. Cas. 656; see also A. I. R. 1923 Rang. 119 (2)=70 Ind. Cas. 530. A prior order under Order XXI, rule 23 for execution is not *res judicata* but is vacated by a subsequent order of dismissal of execution application under rule 57. To be a bar the previous order must be in force. 2 L. W. 1055=31 Ind. Cas. 293. The principle of *res judicata* must be applied wherever it is relevant, and a decision between the parties in execution proceedings operates as *res judicata* in a subsequent suit between them. 37 Bom. L. R. 123=A. I. R. 1935 Bom. 174=158 Ind.

Cas. 1059; see also A. I. R. 1935 Lah. 966; A. I. R. 1935 Lah. 949; 1935 A. L. J. 1189 (F. B.)=1935 A. W. R. 1371.

**Execution proceedings—Decision when binding.**—Decision in execution proceedings that certain property is liable for payment of decree cannot operate as *res judicata* when the liability of another property is under consideration. A. I. R. 1926 All. 220=48A. 245=24 A. L. J. 273=91 Ind. Cas. 785. Order *ultra vires* does not operate as *res judicata* in same proceeding. A. I. R. 1925 Pat. 807=4 Pat. 440=7 P. L. T. 456=93 Ind. Cas. 257. Decision that order on application to set aside execution sale is under s. 47 is binding. 26 Bom. L. R. 817=48 B. 638=83 Ind. Cas. 155. Earlier order not deciding the point raised in the latter application is not *res judicata*. A. I. R. 1924 Mad. 145=18 L. W. 652=33 M. L. T. 64=76 Ind. Cas. 761. An erroneous decision in prior execution proceedings is not *res judicata* in subsequent proceedings in execution. 45 Ind. Cas. 201. The judgment-debtor is not debarred in a subsequent execution application from objecting to amount claimed in a previous application, if no opportunity was given to object in the first application. 34 Ind. Cas. 144. Plea decided against impliedly in suit cannot be raised again in execution proceedings. A. I. R. 1923 Bom. 36=24 Bom. L. R. 1291=76 Ind. Cas. 148. Decision that former execution petition was invalid is *res judicata*. 40 M. L. J. 556=A. I. R. 1921 Mad. 315=13 L. W. 529=63 Ind. Cas. 189. Where an order of attachment is intended to be attacked on the ground that certain pleas were not taken originally the propriety of the order can be questioned only in subsequent proceedings other than those in which it was passed. 35 M. L. J. 312=(1918) M. W. N. 143=44 Ind. Cas. 4. On an application for execution by sale of properties the Court inspite of the judgment-debtor's objections to such an execution ordered issue of sale proclamation but did not in express terms pass by order for sale or decide that execution could be so enforced: *Held*, that the orders of the Court would not operate as *res judicata*. 45C. 73=41 Ind. Cas. 73. Order of attachment before judgment does not operate as *res judicata*. A. I. R. 1934 Lah. 153. Decision under Order 22, rule 5, does not operate as *res judicata*, but should be considered and due weight should be given to it in subsequent title suit. A. I. R. 1934 Cal. 60.

**Execution proceedings—Exparte Orders**—Order is not *res judicata* unless passed after notice to parties. A. I. R. 1921 Mad. 532=13 L. W. 289=62 Ind. Cas. 480. *Exparte* order is not *res judicata* on the point that application for execution was time-barred. 54 Ind. Cas. 933. If after notice to the other party the execution Court passes an order for sale and the order is not appealed against any subsequent application to reconsider the order is time-barred. 113 Ind. Cas. 93 (Mad).

**Execution proceedings—Heard and finally decided.**—Execution Court has no jurisdiction to entertain a second application of objection to the attachment and sale, when one has failed though grounds are different. A. I. R. 1929 Lah. 470=117 Ind. Cas. 816. Dismissal of a former objection to attachment is a bar to fresh objection. A. I. R. 1927 Lah. 872=26 P. L. R. 151=105 Ind. Cas. 693. Objection once decided cannot be again raised in execution of the same decree. A. I. R. 1927 Lah. 179=99 Ind. Cas. 1006. Where an objection petition in an execution proceeding is dismissed for non-prosecution there is no adjudication on the merits and hence it cannot be *res judicata*. A. I. R. 1923 Cal. 287=67 Ind. Cas. 663. If an executing Court expressly decides a point *inter parties* that becomes final according to the general principles of law, though the question whether the law of *res judicata* applies would be irrelevant. A. I. R. 1922 All. 413=44A. 159=19 A. L. J. 954=65 Ind. Cas. 377. An order passed in execution of decree, against a party without notice, is not binding on that party. 31 C. L. J. 382=56 Ind. Cas. 801. Order made at one stage of the execution proceedings to which the judgment-debtor is a party is binding in all subsequent stages. 48 Ind. Cas. 226=8 L. W. 519=(1918) M. W. N. 748=24 M. L. T. 483.

An order delivering possession of property on an execution application is an adjudication that the application is in time and judgment-debtor cannot question the legality of that order in proceedings on a subsequent execution. 54 Ind. Cas. 924. Where a Court executing a decree passes an order after notice to the parties, that decision is unless set aside on appeal, binding upon the parties. 1 Pat. L. R. 145=73 Ind. Cas. 359. Executing Court's decision as to title of one of rival claimants is *res judicata* and bars suit for possession by one of the claimants on the ground of his subsequent purchase from the municipality. A. I. R. 1927 Lah. 112=26 P. L. R. 171=7 Lah. L. J. 198=92 Ind. Cas. 131. Where at one stage of an execution proceeding an order

is made disallowing the objections of the judgment-debtor, the order is binding in all subsequent stages of the same execution. 64 Ind. Cas. 724. Where the judgment-debtor does not object to the first application for execution of a decree on the ground of illegalities in relation to the execution proceedings, he cannot raise such an objection when a subsequent application for execution is made. 5 Pat. L. J. 639=1 P. L. T. 504=57 Ind. Cas. 707. Once a judgment-debtor's application to set aside a sale on the ground of fraud is rejected by the executing Court, the decision bars the plea of fraud in subsequent proceedings. 38 Ind. Cas. 47. The conclusive character of the adjudication in a former execution proceedings as to a party's right to execute the decree cannot be affected by the subsequent dismissal of that application for default. 3 L. W. 339=(1916) 2 M. W. N. 64=33 Ind. Cas. 443. A *durkhast* disposed of for default of appearance as the plaintiff's pleader was absent cannot be said to have been heard and decided on merits. It does not operate as *res judicata*. A. I. R. 1929 Bom. 217=31 Bom. L. R. 400=118 Ind. Cas. 700. Where point as to whether anything is still due under a decree not raised and decided by an appealable or judicial order in an execution proceeding, mere order passed on an application to bid at the same execution proceedings is not *res judicata*. A. I. R. 1929 Mad. 903=122 Ind. Cas. 161. But matter decided in prior application cannot be re-opened. A. I. R. 1924 All. 34=45 A. 735=21 A. L. J. 641=74 Ind. Cas. 513. Where an order releasing property from attachment is not appealed against, the order becomes final and so fresh application for the attachment of the same property does not lie. A. I. R. 1927 Lah. 85=28 P. L. R. 6:7=9 Lah. L. J. 193=100 Ind. Cas. 23. The question at issue in a prior execution petition and appeal to High Court being only about the re-opening of a partition and not as to whether there was or was not a decision of particular items of property, a subsequent execution petition for decision of the same item is not barred. (1916) 2 M. W. N. 118=4 L. W. 101=37 Ind. Cas. 354. An order made at an earlier stage of the execution proceedings cannot be questioned at a later stage unless the party to be bound has had no notice of the proceedings. 21 C. W. N. 945=26 C. L. J. 109=37 Ind. Cas. 66; see also 38 A. 289=14 A. L. J. 370=35 Ind. Cas. 234; 93 Ind. Cas. 833=A. I. R. 1926 Oudh 291=1 Luck. 171=13 O. L. J. 111=3 O. W. N. 241; 65 Ind. Cas. 295=19 A. L. J. 923=44 A. 130. But a party aggrieved may challenge by an appeal against the final order the propriety of the interlocutory orders made in the course of the proceedings. A. I. R. 1927 Lah. 232=100 Ind. Cas. 653.

**Execution proceedings—might and ought have.**—Omission to object to execution application being not in accordance with law operates as *res judicata*. A. I. R. 1928 Cal. 861=32 C. W. N. 1107=118 Ind. Cas. 337; see also A. I. R. 1929 Bom. 279=31 Bom. L. R. 320=118 Ind. Cas. 694; A. I. R. 1926 Nag. 164=89 Ind. Cas. 1009; 72 Ind. Cas. 397=A. I. R. 1923 Mad. 649=45 M. L. J. 71=17 M. L. W. 566; A. I. R. 1922 All. 27=44 A. 350=20 A. L. J. 170=65 Ind. Cas. 769; 4 Pat. L. J. 213=48 Ind. Cas. 245. Omission to object in prior execution proceedings to executability of the decree precludes J. D. from objecting that the decree is inexecutable when a subsequent application for execution is made though the subsequent application relates to different items of property. A. I. R. 1923 Mad. 649=45 M. L. J. 71=72 Ind. Cas. 397. Failure to raise an objection on the ground of limitation operates as *res judicata*. 45 Ind. Cas. 404=3 P. L. W. 218. Omission to raise an objection to the non-transferability of a holding in execution proceeding in which the holding is attached is a bar to its being raised in a subsequent execution proceedings in execution of the same decree. 47 Ind. Cas. 790.

In some of the cases it was held that the doctrine of constructive *res judicata* should be carefully applied to execution proceedings. 40 M. 1016=38 Ind. Cas. 627; see also 40 M. 780=5 L. W. 267=38 Ind. Cas. 806; 21 Bom. L. R. 344=50 Ind. Cas. 972. Objection as to amount of decree though not raised in previous proceedings can be raised in subsequent proceedings. A. I. R. 1929 Mad. 903=122 Ind. Cas. 161; see also 32 Ind. Cas. 754=20 L. J. 611. Failure to object at one stage of execution proceedings does not bar objection at later stage. A. I. R. 1924 Mad. 518=32 M. L. T. 118=70 Ind. Cas. 329; see also A. I. R. 1923 Mad. 212=43 M. L. J. 293=69 Ind. Cas. 465; 91 Ind. Cas. 772=A. I. R. 1925 Lah. 552=7 Lah. L. J. 343; A. I. R. 1925 Pat. 588. But point raised at one stage of execution proceedings and decided against J. D. after notice can not be objected at a later stage. A. I. R. 1926 All. 71=48 All. 201=24 A. L. J. 91=90 Ind. Cas. 83; see also 91 Ind. Cas. 443=A. I. R. 1926 Mad. 12=49 M. L. J. 40. Where surety was ordered to be arrested but asked for time for settlement, he cannot later plead his non-liability to decree-holder under the decree. A. I. R. 1930 Lah. 80=129 Ind. Cas. 689. The

doctrine of constructive *res judicata* applies in execution proceedings. A. I. R. 1936 Lah. 167 ; see also A. I. R. 1936 Lah. 942 ; 165 Ind. Cas. 59=1936 M. W. N. 1037=44 L. W. 460=A. I. R. 1936 Mad. 812=71 M. L. J. 317 ; A. I. R. 1936 Lah. 246=38 P. L. R. 723=163 Ind. Cas. 97. The principle of constructive *res judicata* as embodied in Explanation IV to section 11 of the C. P. Code also applies to execution proceedings. 15 Lah. 869=155 Ind. Cas. 286=A. I. R. 1935 Lah. 200 ; A. I. R. 1935 Pat. 485. Omission to object as regards jurisdiction does not operate as *res judicata*. 158 Ind. Cas. 811=1935 M. W. N. 1116=42 L. W. 856=A. I. R. 1935 Mad. 935=69 M. L. J. 466.

**Execution proceedings—parties and representatives.**—Where matter in execution is *res judicata* against Hindu father the plea of *res judicata* is effective against son. A. I. R. 1930 Mad. 257=(1929) M. W. N. 776=120 Ind. Cas. 375. Official Assignee is not the representative of a judgment-debtor who has been adjudged insolvent. A. I. R. 1925 Mad. 688=48 M. L. J. 530=88 Ind. Cas. 85. An order refusing an application in execution proceedings for substitution under Order XXII does not operate as *res judicata* as against an application for execution under Order XXI, r. 1. A. I. R. 1925 Oudh 417=2 O. W. N. 352=10 O. L. J. 538=29 O. C. 98=88 Ind. Cas. 1016. Decision in execution proceedings binds the assignee of the decree-holder. A. I. R. 1926 Nag. 200=21 N. L. R. 159=92 Ind. Cas. 47. A widow of a judgment-debtor who has been brought on record after the death of her husband can extend that property against which execution was sought was gifted to her by judgment-debtor. A. I. R. 1931 Mad. 303=(1931) M. W. N. 48=33 L. W. 359=131 Ind. Cas. 610. Judgment-debtor not a party to prior proceedings is not precluded from showing that the said proceedings were barred by limitation. A. I. R. 1923 Cal. 322=67 Ind. Cas. 878.

**Execution proceedings—Sale-proclamation.**—Decision under Order XXI, r. 66 is not *res judicata* in a later suit. A. I. R. 1924 All. 480=78 Ind. Cas. 582 ; 88 Ind. Cas. 332=4 Pat. 731=6 P. L. T. 843=3 Pat. L. R. 118. But decision that notice under Order XXI, r. 66 is not necessary to party bars a plea of want of notice even after sale. A. I. R. 1924 Pat. 628=92 Ind. Cas. 326. Omission to appear to settle terms does not bar plea that property was not liable to attachment. A. I. R. 1924 Mad. 1=46 M. 768=(1923) M. W. N. 571=18 L. W. 757=45 M. L. J. 346=74 Ind. Cas. 155. Where settlement of sale proclamation is made after notice, Court cannot go behind the subsequent proceedings. A. I. R. 1923 Pat. 134=1 Pat. L. R. 52=72 Ind. Cas. 863. A party who is sought to be affected by the bar of *res judicata* should have notice of the point which is likely to be decided against him and should have an opportunity of putting forward his contention against such a decision. Where a question of want of attachment is available to the judgment-debtor, the notice of settlement of proclamation gives him the opportunity of putting forward that ground, and that he must put it forward then, if he wants to do so and should not be allowed to reserve it for later occasion because if the objection succeeds it makes further execution proceedings fertile. *Sashayya v. Sattiraya*, A. I. R. 1930 Mad. 414=120 Ind. Cas. 863 ; see also A. I. R. 1922 Nag. 320=21 N. L. R. 23=88 Ind. Cas. 831.

**Execution proceedings—limitation.**—Where the plea of limitation was raised *inter alia* in the defence to an execution application and the application was granted the plea was barred although the judgment did not expressly refer to it. A. I. R. 1921 P. C. 23=48 Ind. Cas. 45=19 A. L. J. 168=23 Bom. L. R. 701=13 C. L. J. 218=25 C. W. N. 581=40 M. L. J. 197=29 M. L. T. 345 (P. C.)=59 Ind. Cas. 880 ; see also 63 Ind. Cas. 844=46 B. 269=23 Bom. L. R. 1013 ; A. I. R. 1927 Oudh 488=1 Luck. Cas. 543=105 Ind. Cas. 545. Question of bar of limitation for execution of a decree, arises when (1) notice requiring the judgment-debtor to show cause why the decree should not be executed against him has been served on him ; and (2) he has thus been in a position to raise that plea of limitation, and (3) that a Court has expressly or impliedly decided by its order the question of limitation in favour of the decree-holder. 33 Ind. Cas. 663. It is only when the point of limitation is concluded by proceedings in a previous execution that the judgment-debtor is not allowed to take that objection in a subsequent execution. 53 Ind. Cas. 85=1920 Pat. 109. Point of limitation cannot be raised after sale. A. I. R. 1921 Cal. 606=34 C. L. J. 163=64 Ind. Cas. 594. Where intermediate execution proclamation was ordered on notice to the judgment-debtor, he cannot on a subsequent execution application plead that the intermediate application was time-barred and therefore the subsequent application was also barred. 22 Bom.



L. R. 1389=45 B. 453=59 Ind. Cas. 747. Even in an application for transfer of a decree the judgment-debtor can and ought to plead limitation. If he fails the point is barred. A. I. R. 1924 Mad. 673=47 M. L. J. 4=19 L. W. 65=47 M. 641=(1924) M. W. N. 527=80 Ind. Cas. 103. Failure to plead bar of limitation when execution was proceeded with bars the plea at a subsequent stage. A. I. R. 1926 Oudh 261=1 Luck. 171=93 Ind. Cas. 833=13 O. L. J. 111=3 O. W. N. 291.

Order allowing execution to issue operates as *res judicata* on the question of limitation. Subsequent dismissal of execution application does not imply that the order has become ineffective. A. I. R. 1928 Mad. 1052=116 Ind. Cas. 363; see also A. I. R. 1922 Oudh. 117=25 O. C. 13=68 Ind. Cas. 267; 74 Ind. Cas. 130=2 Pat. 759; but see A. I. R. 1928 Pat. 471. Dismissal of an application for execution as out of time does not prevent the executing plaintiff from filing another *darkhast* and seeking to bring it within limitation on new grounds. A. I. R. 1922 Bom. 238=24 Bom. L. R. 97=46 B. 467=66 Ind. Cas. 940. Where notice was issued to the judgment-debtor and the judgment-debtor did not raise the plea that the execution of the decree was barred: *Held* that the decision is *res judicata*. 113 Ind. Cas. 92. Plea that a previous execution was time-barred and hence the subsequent application was not valid should be raised at the earliest opportunity. A. I. R. 1926 Mad. 77=22 L. W. 747=(1926) M. W. N. 33=91 Ind. Cas. 1017.

**Execution Proceedings.—Whether decree is executable.**—An order of a Court directing execution of a barred decree to proceed after due notice to the judgment-debtor precludes the judgment-debtor from raising the same objection in a subsequent execution. 3 P. L. W. 13=41 Ind. Cas. 675. An order in execution to the effect that the decree is not executable is *res judicata*. 4 Pat. L. J. 330=5 Pat. L. W. 208=47 Ind. Cas. 154. The fact that execution has been ordered as regards a certain sum does not operate as *res judicata* with regard to the amount due under the decree. A. I. R. 1926 Rang. 172=120 Ind. Cas. 664. Waiver of objection as to executability of a decree, by judgment-debtor creates *res judicata*. A. I. R. 1928 Mad. 203=27 L. W. 20=1928 M. W. N. 67=109 Ind. Cas. 866. Judgment-debtor raising objections as regards the executability of the decree on application to transfer it for execution passed on service of proper notice to the judgment-debtor, which raised a question about the executability of the decree operates as *res judicata*. A. I. R. 1927 Lah. 149=98 Ind. Cas. 702; 59 Ind. Cas. 161=12 L. W. 34; A. I. R. 1927 Mad. 813=26 L. W. 481. Judgment-debtor can plead at a later stage non executability though not previously pleaded where assignee of decree-holder was *benamidar* of judgment-debtor. A. I. R. 1924 Mad. 189=18 M. L. W. 453=75 Ind. Cas. 845; see also 17 L. W. 319=73 Ind. Cas. 213. Where a preliminary decree under Order XXXIV, r. 4 is, as such, incapable of execution unless made absolute under Order XXIV, r. 5 but the judgment-debtor fails to raise such objection at the first application for execution he cannot raise it later on. A. I. R. 1925 Lah. 640=7 Lah. L. J. 397=26 P. L. R. 784=92 Ind. Cas. 254.

**Execution proceedings—separate suit.**—Where objection that land of judgment-debtor could not be attached as he was agriculturist dismissed, no separate suit lies for declaration that judgment-debtor is agriculturist. A. I. R. 1930 Lah. 628=31 P. L. R. 191=127 Ind. Cas. 858. But an order passed in execution proceeding as to the nature of land which is sought to be sold is not final and separate suit lies. A. I. R. 1931 Oudh 62=7 O. W. N. 1162=130 Ind. Cas. 115. Against order allowing legal representative to execute decree an appeal lies but separate suit is barred. A. I. R. 1926 Mad. 536=92 Ind. Cas. 377.

**Execution proceedings—Dismissal for default**—The doctrine of *res judicata* applicable to execution proceedings does not rest on s. 11, C. P. Code and distinction are sometimes made between positive decisions and mere dismissal for default. A. I. R. 1936 Pat. 616=163 Ind. Cas. 38; see also A. I. R. 1936 Pesh. 41=160 Ind. Cas. 835; 1936 M. W. N. 840=71 M. L. J. 490=44 L. W. 565; 39 C. W. N. 1206=A. I. R. 1935 Cal. 664; A. I. R. 1935 All. 238=1935 A. L. J. 278=153 Ind. Cas. 508.

**12. [New.]** Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute Bar to further suit.

a suit in respect of such cause of action in any Court to which this Code applies.

**Notes.**—A decree against a supposed legal representative does not bar a fresh suit on the same cause of action against the real one. A. I. R. 1928 Pat. 362=108 Ind. Cas. 558=9 Pat. L. T. 807.

**13 [S. 14.]** A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the

When foreign judgment not conclusive.

same title except—

(a) where it has not been pronounced by a Court of competent jurisdiction ;

(b) where it has not been given on the merits of the case ;

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognise the law of [British India] in cases in which such law is applicable ;

(d) where the proceedings in which the judgment was obtained are opposed to natural justice ;

(e) where it has been obtained by fraud ;

(f) where it sustains a claim founded on a breach of any law in force in [British India].

**Amendment in Burma.**—For words within brackets, substitute "British Burma" in Burma.

**Scope.**—This section applies to plaintiffs as well as defendants. A. I. R. 1928 Rang. 319=6 Rang. 552=116 Ind. Cas. 465 ; A. I. R. 1928 Mad. 327=51 M. 720=54 M. L. J. 479. Section 13 refers to cases where for one reason or another, the controversy raised in the action has not been the subject of direct adjudication by the Court. 40 M. 112=44 I. A. 6=32 M. L. J. 35=A. L. J. 92=19 Bom. L. R. 206=21 C. W. N. 358 P. C. A judgment of a foreign Court granting probate of a Will is conclusive evidence that the instrument passed was testamentary according to the law of the foreign country. It proves nothing else. A. I. R. 1936 Mad. 197=1936 M. W. N. 82=43 L. W. 75.

**Clause (a).**—Decision of a foreign Court under the authority of the state on a subject-matter of *res* is conclusive. A. I. R. 1928 P. C. 83=47 C. L. J. 263=30 Bom. L. R. 753 (P. C.)=107 Ind. Cas. 352. Foreign judgment in connection with the land outside the jurisdiction of the Court are not binding on the British Indian Courts. A. I. R. 1929 Lah. 627=119 Ind. Cas. 482. Foreign judgment passed without jurisdiction is not binding. 144 Ind. Cas. 557=1933 M. W. N. 657=37 L. W. 410=A. I. R. 1933 Mad. 393=64 M. L. J. 531. A foreign Court clearly has no jurisdiction to pass a decree against a defendant in a personal action for money where the defendant on the date of the suit is not a resident of the foreign state at all, but a resident of British India. 59 M. 918=162 Ind. Cas. 904=1936 M. W. N. 478=43 L. W. 607=A. I. R. 1936 Mad. 552=71 M. L. J. 93 ; see also *Chormal v. Kasture*, 63 C. 1033=63 C. L. J. 175=40 C. W. N. 591. A question under section 13 (a) of the C. P. Code as to whether the foreign Court was a Court of competent jurisdiction must be determined in regard to the personal actions, not by the territorial law of the foreign state but by the rules of Private International law. In a personal action, a foreign Court has jurisdiction in an international sense ; if (i) the defendant is the subject of the foreign country in which the judgment has been delivered ; or (ii) he was a resident in that foreign country when the action began ; or (iii) he, in the character of a plaintiff, has selected the forum in which he is afterwards sued ; or (iv) he had voluntarily appeared in that Court and submitted to its jurisdiction ; or (v) he had contracted to submit himself to the foreign forum in which the judgment is obtained ; or (vi) (simple)—he has real estate within the foreign jurisdiction in respect of which the cause of action arose while he was within that jurisdiction. 63 C. 1033=63 C. L. J. 175=40 C. W. N. 591 ; see also 158 Ind. Cas. 24. A foreign judgment to be valid cause of action for a suit upon it in British India must be final and conclusive in the Court in which it is passed. 158 Ind. Cas. 547=A. I. R. 1935 Rang. 284. Foreign judgments stand upon a different footing and the considerations which apply to the

judgments of ordinary Courts in British India, do not apply to them in their entirety. Therefore the executing Court can enter into the question. Whether the foreign Court had jurisdiction to pass a decree against the judgment-debtors and if it finds that the judgment-debtor was not amenable to the jurisdiction of that foreign Court, the decree passed against him is not pronounced by the Court of competent jurisdiction. A. I. R. 1935 Lah. 551=37 P. L. R. 240=158 Ind. Cas. 232. The concluding words of s. 44 namely, "as if they had been passed by the Court of British India" do not in any way control the operation of the provisions of s. 3, clause (a). *Ibid.* It is not open to the Court trying the suit on foreign judgment to decide whether the decision of the foreign Court on the materials put before it is right or not. The duty of the Court is merely to see that the foreign Court has applied its minds to the facts and the law on the point. A. I. R. 1934 Bom. 390=36 Bom. L. R. 844. A person whose interest was in conflict with that of a minor was appointed a guardian *ad litem* in a suit against the minor in a foreign Court. That Court decided against the minor and upon this decision the minor sued the plaintiff in a British Court; *Held* that since that person was not a fit person to be appointed a guardian and that the foreign Court did not follow the rules and procedure under order 32 or the rules of natural justice in appointing him a guardian, the minor was not properly represented in the suit in the foreign Court, and the appointment has prejudicial to the defence of the minor there, and the foreign Court decree against the minor was not binding on the minor and did not avail the plaintiff. *Ibid.*

Clause (b).—In *Derby v. Martin*, 62 C. 682=39 C. W. N. 557=61 C. L. J. 20 *Cunliff J.* observed: "Section 13 deals with the principles of *res judicata* in relation to a foreign judgment; but whilst giving general effect to the principle, the section contains six provisos in the form of exceptions.....Section (b) has been the subject of considerable judicial interpretation. The leading case in this regard is the decision of the Privy Council in *Reymer v. Visvanatham Reddi*, (L. R. 44 I. A. 6=40 M. 112=21 C. W. N. 358)....Endeavouring to deduce the principles contained in this body of decisions, it seems to me that they deal with three different categories of case. *Firstly*, there is the category in which the defence is put in, but is struck out and judgment is artificially given by default without any judicial consideration of the plaintiff's evidence at all. *Secondly*, there is the class of case where no defence has ever been on the file and again there is no consideration of the plaintiff's evidence by the Court, judgment being given by default under summary procedure. *Thirdly*, we have the position in which there is no defence again, but where the plaintiff's evidence is considered in some manner or another. The case before me now is clearly within the second category and in my opinion is also clearly within the ambit of *Reymer v. Visvanatham Reddi* (44 I. A. 6=40 M. 112=21 C. W. N. 358) ... If the query had been put to me, I should have said that, in my view, primarily, this sub-section was not meant to British Courts at all. I should have argued that it was a sub-section of a special nature deliberately inserted as a proviso to the ordinary rules of *res judicata* in the Code, for the purpose of protecting persons in India from unfair and unmeritorious judgments of Courts outside the British Empire where procedure and principles were followed in no way compatible with ideas of British justice." Foreign judgment is not binding on the British Indian Courts if it was not decided on merits. A. I. R. 1930 Mad. 146=123 Ind. Cas. 600. An *ex parte* decree of a foreign Court is not a decree on merits and as such not binding on the British Indian Courts. A. I. R. 1930 Mad. 149=57 M. L. J. 459=123 Ind. Cas. 579; A. I. R. 1928 Mad. 133=26 L. W. 803=107 Ind. Cas. 810; 82 Ind. Cas. 425=47 M. 877=47 M. L. J. 356; but see 92 Ind. Cas. 491=A. I. R. 1926 Mad. 259=22 L. W. 820.

*Ex parte* judgment of foreign Court passed only on plaintiff's pleading is no judgment on merits. A. I. R. 1928 Rang. 319=6 Rang. 552=116 Ind. Cas. 465; A. I. R. 1927 Mad. 265=52 M. L. J. 240=50 M. 261=100 Ind. Cas. 555. A. I. R. 1933 Mad. 544=38 L. W. 232. Decision of a foreign Court is conclusive if the defendant filed his written statement but his solicitor reported no further instruction. 11 L. W. 609=57 Ind. Cas. 742; 17 A. L. J. 501=50 Ind. Cas. 780. Judgment is a judgment on merits if evidence is taken although there is default. A. I. R. 1925 Mad. 788=21 L. W. 330=86 Ind. Cas. 492; see also A. I. R. 1935 Rang. 284=158 Ind. Cas. 547. An *ex parte* decree is none the less a decree on the merits, when the defendant, after proper service fails to appear. Such default of appearance amounts to admission of the plaintiff's claim. 16 Lah. 768=158 Ind. Cas. 113=A. I. R. 1935 Lah. 396=37 P. L. R. 852. But decision against a party due to default on his part is not judgment

given on merits of the case. A. I. R. 1927 All. 510=25 A. L. J. 887=105 Ind. Cas. 186; see also 140 Ind. Cas. 82=A. I. R. 1932 Lah. 649=A. I. R. 1932 Lah. 689.

**Clause (c).**—International law governs rules of jurisdiction of foreign Courts. Submission to jurisdiction of foreign Court creates jurisdiction. A. I. R. 1925 Mad. 788=21 L. W. 330=86 Ind. Cas. 492. Execution of power of attorney in favour of another empowering him to conduct litigation in foreign Court amounts to submission to its jurisdiction. A. I. R. 1925 Mad. 155=47 M. L. J. 356=47 M. 877=20 L. W. 677=82 Ind. Cas. 425; A. I. R. 1926 Mad. 259=92 Ind. Cas. 491. Section 13 should be determined by the International Law and not by the law of the country. 39 M. 733=3 L. W. 90=19 M. L. T. 68=30 M. L. J. 148=(1916) M. W. N. 83=32 Ind. Cas. 597. Where the Supreme Court of Penang in the inquiry before it refuses to recognize the law of British India applicable to deceased's immovable property in India, the judgment of the Supreme Court is not one on which the plaintiff can successfully sue in India. 148 Ind. Cas. 297=1934 M. W. N. 658=39 L. W. 58=A. I. R. 1934 Mad. 145=66 M. L. J. 207.

**Clause (d).**—Proceedings against minor defendant without appointing guardian *ad litem* are opposed to natural justice. A. I. R. 1927 Lah. 200=8 Lah. 54=102 Ind. Cas. 523. Suits based on foreign judgments should not be dismissed although they are merely contrary to natural justice. 13 P. W. R. 1916=34 Ind. Cas. 255. Mistake of law in a foreign judgment does not vitiate it unless the procedure is opposed to natural justice. 41 M. 205=34 M. L. J. 295=45 Ind. Cas. 703.

**Clause (e).**—*Vide* A. I. R. 1922 Lah. 175.

**Clause (f).**—Foreign judgment cannot be challenged even if opposed to Indian law. 9 Bur. L. T. 106=35 Ind. Cas. 741.

**British India.**—For meaning of British India in its application to British Burma. Burma General Clauses Act of 1898, s. 2 (5) given under s. 29 of this book.

**Objection to jurisdiction when can be taken.**—Objection as to jurisdiction of foreign Court can be raised even in execution proceeding. A. I. R. 1925 Cal. 955=89 Ind. Cas. 347=41 C. L. J. 503=30 C. W. N. 785=98 Ind. Cas. 740; see also A. I. R. 1925 Mad. 788=21 L. W. 330=86 Ind. Cas. 492. A Court which entertains a suit on a foreign judgment cannot institute an enquiry into the merits of the original action or the propriety of the decision. A. I. R. 1924 All. 161=46 A. 119=21 A. L. J. 890=79 Ind. Cas. 332.

**Submission.**—What is submission is a question of some nicety. Submission need not be by some overt act in Court. Part payment towards decree is an important circumstance from which submission may be inferred. (1931) A. L. J. 653. If a non-resident defendant appears in a foreign Court, and pleads that that Court has no jurisdiction, and also pleads to the merits, he submits to the jurisdiction of that Court voluntarily. *Chormal v. Kasturi*, 40 C. W. N. 591=63 C. 1033=63 C. L. J. 175. A person who has filed suits in a Court having jurisdiction to try them cannot thereby by implication be taken to submit to the jurisdiction of the same Court in cases when the Court has no jurisdiction. *Oomer v. Thirce*, A. I. R. 1936 Mad. 552=1936 M. W. N. 478=59 M. 918=162 Ind. Cas. 904=43 L. W. 607=71 M. L. J. 93; see also 1936 M. W. N. 1165=44 L. W. 752=71 M. L. J. 838. The British Courts will not recognise the judgment of the Courts of a foreign country passed in an action *in personam* against a British subject, not resident in that country at the date of the action, who has neither appeared in the suit nor submitted to the jurisdiction of the foreign Court. 63 M. L. J. 761=1932 M. W. N. 1314=36 L. W. 756=140 Ind. Cas. 588. The effect of the decision of the Judicial Committee in *Sirdar Gurdial Singh v. The Raja of Faridkote*, (1894) A. C. 670 is that the mere fact that a person enters into a contract in a foreign country, does not lead to the inference that he agrees to be bound by the decisions of that Courts of that country. 63 M. L. J. 761=1932 M. W. N. 1314=36 L. W. 756=140 Ind. Cas. 588.

**14. [S. 13, Exp. IV.]** The Court shall presume, upon the production

Presumption as to foreign judgments. of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.

**Notes.**—In a suit on foreign judgment every presumption is made in favour of foreign judgment. 24 M. L. T. 244=49 Ind. Cas. 202. The jurisdiction of the Court trying the previously instituted suit depends upon allegations made in a plaint. 43 C. 144=33 Ind. Cas. 288. A judgment of a foreign Court obtained against a defendant cannot be enforced in British India where he at the time of the commencement of the suit was not a subject of, nor resident in, the country in which the judgment was obtained. A. I. R. 1927 All. 510=25 A. L. J. 887=105 Ind. Cas. 186.

#### PLACE OF SUING.

**15. [S. 15.]** Every suit shall be instituted in the Court of the lowest grade competent to try it.

**Scope of the section.**—This section is a proviso to ss. 19 and 20 of the Bengal Civil Courts Act. The word “shall” in this section is imperative on the suitor and not upon the Court for whose benefit it is intended. 7 A. 230=A. W. N. 1885, 1 (F. B.) *per Petheram C. J.* This section is a rule of procedure and not of jurisdiction. *Ibid*; *per Brodhurst and Mahmood J.* A subordinate Judge trying a Munsiff’s Court suit does not act without jurisdiction; and his decree cannot be reversed on appeal on the ground of want of jurisdiction. 7 A. 230 (F. B.)=A. W. N. 1885, 1; see also 15 M. 241; 17 C. 155.

Even where two Courts have concurrent jurisdiction to try the same suit, in view of the imperative wording of s. 15, C. P. Code, every suit must be instituted in the Court of the lowest grade having jurisdiction to try the same. 4 S. L. R. 264; but see 184 P. R. 1888. The trial of the suit by a Court of higher grade is merely an irregularity. A. I. R. 1927 Mad. 568=52 M. L. J. 323=24 L. W. 367. The Sub-Judge should not have returned the plaint to the Court of Munsiff even if it was afterwards found that the value of the subject-matter was below Rs. 5,000. (1930) A. L. J. 386=122 Ind. Cas. 187. *Prima facie* the plaintiff’s claim determines the jurisdiction unless some other principles come into operation to prevent such a result. A. I. R. 1924 Cal. 783=51 C. 737=28 C. W. N. 710=78 Ind. Cas. 747; see also A. I. R. 1933 Pat. 246=145 Ind. Cas. 294. The party should file his suit in the Court of lowest grade. The higher Court can try a suit triable by the Court of lower grade. A. I. R. 1925 Rang. 278=4 Bur. L. J. 104=90 Ind. Cas. 728. Date of presentation to the proper Court is the date of institution of the suit. A. I. R. 1928 Bom. 421=52 Bom. 548=30 Bom. L. R. 970. The section is exhausted once the institution takes place in accordance with its provision. 54 Ind. Cas. 655. The value put by a plaintiff *prima facie* determines jurisdiction. 9 S. L. R. 164=32 Ind. Cas. 629. Where a Judge receives plaints for distributing to proper Courts, he acts ministerially. His discretion overrides the provisions of s. 15, in so far as he can direct a suit which might be tried by a Court of lower jurisdiction to be tried by a Court of higher jurisdiction. But a suit is barred by the provision of this section. 110 Ind. Cas. 293=A. I. R. 1928 Lah. 484. Section 15 is not one of the sections excepted by s. 120 but clearly it cannot apply to the High Court in the exercise of its original civil jurisdiction. A. I. R. 1935 Rang. 517. In the case of under valuation of relief it is the duty of the Court on the motion of either party or *Ex proprio motu* to order that the plaint be returned for presentation in the proper Court. 3 A. W. R. 405.

**16. [S. 16.]** Subject to the pecuniary or other limitations prescribed by any law, suits—  
Suits to be instituted where subject-matter situate.

- (a) for the recovery of immovable property with or without rent or profits,
- (b) for the partition of immovable property,
- (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,
- (d) for the determination of any other right to or interest in immovable property,
- (e) for compensation for wrong to immovable property,
- (f) for the recovery of movable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate :

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

*Explanation.*—In this section “property” means property situate in British India.

**Scope of the section.**—Non-compliance with provisions of ss. 16 to 20 is not fatal to jurisdiction of Court and does not render decree passed by Court of competent jurisdiction mere nullity and the executing Court cannot refuse to execute it. A. I. R. 1931 Sind 47=131 Ind. Cas. 182. Once the Court has seisin of the case it has jurisdiction to try it to its conclusion unless there is any reason for holding that that jurisdiction has been removed. A. I. R. 1925 Mad. 117=47 M. L. J. 448. A suit for a declaration that the probate proceedings shall not affect the plaintiffs and for the administration of the estate left by the testator, does not fall under s. 16. A. I. R. 1926 Lah. 456=94 Ind. Cas. 1046. Where the properties are situate in different jurisdictions these sections are no bar to parties bringing successive suits. 32 Ind. Cas. 423=(1916) 1 M. W. N. 146=3 L. W. 107. Section 16 applies only to suits determining rights in immovable property. A. I. R. 1923 Mad. 109=16 L. W. 785=43 M. L. J. 615=72 Ind. Cas. 920. An agent of plaintiff's firm at Delhi obtained an order from the defendant who had a shop in Nasik District. The parties had agreed that all claims should be settled at Delhi. Further the goods were sent by rail from Delhi : Held that both Courts had jurisdiction, that the Delhi Court had jurisdiction as the goods were made over to railway company in Delhi and that section 39, Sale of Goods Act, would apply. A. I. R. 1934 Lahore 44=144 Ind. Cas. 828. The Province of Berar is a foreign territory and a British Indian Court has no jurisdiction to pass a decree upon a mortgage for sale of property situate in Berar. A. I. R. 1935 Nag. 250=159 Ind. Cas. 739 (F. R.) ; see also A. I. R. 1935 Nag. 193 ; 4 N. L. R. 61. In suit relating to movable property a Court, within whose jurisdiction the movable property is kept, has jurisdiction to try the case. A. I. R. 1934 All. 226=47 Ind. Cas. 591=A. L. R. 1934 All. 721=3 A. W. R. 11. The Courts in India like the English Courts have a limited jurisdiction to entertain suits relating to foreign immovable property. These Courts have power to exercise a jurisdiction in *personam*, in respect of foreign immovables against person locally within the jurisdiction, in case where there is an equity between the parties arising from contracts, fraud or trust provided that the decision of title be not directly involved. But such an equity must be of a personal nature, *i.e.*, there must be either a fiduciary relationship or privity of some other kind between the parties. A. I. R. 1934 Sind 123=28 S. L. R. 54.

**Clause (a).**—The object of the detailed provisions of s. 16, C. P. Code, 1882, is to limit jurisdiction in respect of claims to immovable property to Court within whose local jurisdiction such property may be situated ; and as a rule, Indian Courts have no power to decide on rights and interests in immovable property lying outside the local jurisdiction. 23 B. 22. A suit for rent can be brought where property is situate or where the tenant resides. But a suit for ejectment can be brought only where property is situate. A. I. R. 1923 Cal. 619=27 C. W. N. 542=77 Ind. Cas. 253. Suit for administration of the estate of the deceased is cognizable by the Court in the jurisdiction of which a portion of the immovable property is situate. A. I. R. 1926 Lah. 503=27 P. L. R. 398=96 Ind. Cas. 691. Ss. 16 and 17 apply both to movable and immovable properties the latter must be situate wholly or in part within the jurisdiction of the Court. A. I. R. 1926 Lah. 506=27 P. L. R. 398=96 Ind. Cas. 691. Courts in British India cannot entertain a suit with respect to property outside its jurisdiction. A. I. R. 1928 Nag. 295=24 N. L. R. 95=111 Ind. Cas. 135. A suit for specific performance of contract to sell land is a suit for land under this section. 143 Ind. Cas. 759=A. I. R. 1933 Mad. 436. A suit for setting aside the Boards' decision under the Madras Religious Endowment Act that a temple is a public temple lies only in the Court where the temple is situate, A. I. R. 1928 Mad. 1272=28 L. W. 535=55 M. L. J. 605=116 Ind. Cas. 561. A suit for

declaring that a Will set up is a forgery and for its cancellation can be instituted under s. 20 (c) in a Court having jurisdiction over any part of the properties dealt with by the Will. A. I. R. 1923 Mad. 109=43 M. L. J. 615=(1922) M. W. N. 834=16 L. W. 785=72 Ind. Cas. 920.

**Clause (b).**—Where the property in respect of which a partition suit is filed, consists of both movable and immovables, the immovable property being outside the jurisdiction of the Court and the movable within jurisdiction, the Court may grant relief so far as movable property is concerned, but must decline jurisdiction with regard to immovable property. 25 S. L. R. 275=A. I. R. 1931 Sind 50=131 Ind. Cas. 186.

**Clause (c).**—This section does not apply to a suit for declaration, that a mortgage-decree in respect of properties at Patna passed by the Court at Benares is in operation against the plaintiff. A. I. R. 1924 Pat 831=75 Ind. Cas. 469.

**Clause (d).**—Section 16 (d) includes a charge on immovable property, A. I. R. 1931 Sind 47=131 Ind. Cas. 182. A suit for maintenance with a prayer for a charge on property within jurisdiction of a Court is cognizable by the Court. 18 Bom. L. R. 67=40 B. 337=32 Ind. Cas. 985. A suit for specific performance is not a suit for land or for the determination of any right to or interest in immovable property 9 Bur. L. T. 119=36 Ind. Cas. 431. A suit to enforce a charge created of the land, can be instituted in the Court where the land is situated. 29 M. L. J. 639=42 M. 795=2 L. W. 1046=18 M. L. T. 464=31 Ind. Cas. 255. A suit on a promissory-note and also for declaration that the decretal amount is a charge on a certain property mortgaged as security for payment of the amount on promissory-note falls under clause (d). A. I. R. 1926 Lah. 660=96 Ind. Cas. 752. A suit for accounts cannot be considered to be a suit in respect of an interest in immovable property within the meaning of s. 16 (d), C. P. Code, merely because the accounts relate to a factory. 32 P. L. R. 464. Where to a suit for maintenance by a Hindu widow is added a further claim for a declaration that the past and future maintenance due to the plaintiff and costs of the suit are a charge on a certain immovable properties in the hands of the defendant, the suit falls within the purview of s. 16 (d), C. P. Code. A. I. R. 1935 Mad. 1043=158 Ind. Cas. 1012=1935 M. W. N. 1135=42 L. W. 647. Where the dispute submitted to arbitration involves the determination of a right to or interest in immovable properties situated outside the jurisdiction of the Court, the Court would have no jurisdiction to file the award. A. I. R. 1934 Sind 183.

**Clause (f).**—Court in whose jurisdiction movable property is kept has jurisdiction to try suit relating to movable property. A. I. R. 1934 All. 226=1934 A. L. J. 254=147 Ind. Cas. 441.

**Proviso.**—The Court cannot in the case of immovable property situate without the jurisdiction, give relief *in rem*, still it can entertain a suit in respect of it when the relief sought can be entirely obtained through the defendant's obedience. (1885) A. W. N. 195. A suit for dissolution of partnership can be instituted in the Court within whose jurisdiction the parties reside or the cause of action arises. 17 A. L. J. 567=50 Ind. Cas. 156. A suit that the defendant should execute and register a deed of surrender of the occupancy holding or should pay back to the plaintiffs the consideration of his promise, is triable in a Court within whose jurisdiction the defendant resides. A. I. R. 1926 Nag. 313=93 Ind. Cas. 103. When business is carried on in two places, Court in both places can entertain a suit for dissolution of partnership. A. I. R. 1926 Mad. 427=50 M. L. J. 298=23 L. W. 361. "Defendant" means "all the defendants." A. I. R. 1924 Cal. 443=73 Ind. Cas. 405. A suit for *mesne* profits of land situate outside British India can be instituted in British India if the decree can be executed by the personal obedience of the defendant. A. I. R. 1922 Bom. 188=46 B. 108=23 Bom. L. R. 903=68 Ind. Cas. 510. In administration-suit, where property is partly outside jurisdiction, the Court cannot order delivery of such property to administrator but can order person in possession to account for the portion as condition to his obtaining his share, if any, in the estate. A. I. R. 1921 L. B. 82=11 L. B. R. 188=66 Ind. Cas. 530. A British Indian Court will not adjudicate on questions relating to the title to, or the right to the possession of, immovable property out of British India. But the Code does not forbid the institution of a suit for *mesne* profits of immovable property outside British India where the decree of the Court can be effectively enforced by the personal obedience of the defendant.

within the jurisdiction. A. I. R. 1928 Nag. 56=10 N. L. J. 232=23 N. L. R. 170=106 Ind. Cas. 7.

**17. [S. 19.]** Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate :

Provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court.

**Scope.**—Under this section, the plaintiff's right is absolute to institute his suit in any of the districts, in which his property is situate, without getting the sanction of a Superior Court. 10 P. R. 1891 ; see also A. W. N. 1894, 4. "Courts" means Courts to which C. P. Code applies. 51 Ind. Cas. 185=A. I. R. 1919 P. C. 150. Suits for price of goods sold lie at the place where part of cause of action arose. A. I. R. 1924=Mad. 789=46 M. L. J. 371=19 L. W. 499=34 M. L. T. 116=(1924) M. W. N. 336=84 Ind. Cas. 691. Suit for price of goods sold lies at the place where it was agreed to be paid. A. I. R. 1922 Lah. 56=3 Lah. L. J. 499=69 Ind. Cas. 424. The words "a suit to obtain relief respecting immovable property" covers suits for foreclosure, sale or redemption but the words in s. 17 "within the jurisdiction of the different Courts", must mean within the jurisdiction of different Courts to which the Code applies. British Indian Courts have no jurisdiction to try a suit on mortgage so far as it relates to property situate outside British India. A. I. R. 1930 P. C. 185=59 M. L. J. 379=57 I. A. 194=34 C. W. N. 854 (P. C.)=126 Ind. Cas. 417. A Court having jurisdiction to try the question as to who the successor of the *wakf* is, has jurisdiction also to decide as to the *mutwaliship* of the *wakf* property A. I. R. 1928 Oudh 67=109 Ind. Cas. 835. Jurisdiction once vested cannot be taken away even though the portion of the property which gave it the jurisdiction does not belong to the plaintiff unless its inclusion was not *bonafide*. A. I. R. 1930 Nag. 189=26 N. L. R. 103=124 Ind. Cas. 703. There is no jurisdiction for bringing the suit in respect of the trust property elsewhere than in the Court of the district where the property is situate such justification cannot be found in s. 17. 59 I. A. 268=7 Luck. 324=36 L. W. 146=1932 A. L. J. 691=137 Ind. Cas. 539=56 C. L. J. 36=36 C. W. N. 937=34 Bom. L. R. 1299=63 M. L. J. 336=A. I. R. 1932 P. C. 172=A. L. R. 1932 P. C. 322 (P. C.). The Courts in British India have no jurisdiction over immovable property outside British India, and the assumption of jurisdiction by a British Indian Court over such property cannot be justified by virtue of the provision of s. 17 of the Code even if a part of the property in suit be situated in British India. A. I. R. 1931 Rang. 252=9 Rang. 480 (F. B.) ; see also 42 M. 813 (P. C.). Immovable property in a suit which confines distinct causes of action against different defendants, if situate within jurisdiction of different Courts, suit may be instituted under s. 17. 37 M. L. W. 681. Where mortgaged property is situate in Native State, a Sub-Judge cannot order sale, even if mortgage is valid, because the Code cannot apply to such sales. 142 Ind. Cas. 130=57 B. 234=34 Bom. L. R. 1384=A. I. R. 1932 Bom. 642. The choice given by s. 17 can be utilised only if the Code applies to both the Courts. A. I. R. 1936 P. C. 189 ; A. I. R. 1919 P. C. 150. The Civil Procedure Code including s. 17, extends to Courts established under Bengal, Agra and Assam Civil Courts Act. 15 Pat. 567=163 Ind. Cas. 49=71 M. L. J. 60 (P. C.)=40 C. W. N. 1061=38 Bom. L. R. 768=44 L. W. 88=17 Pat. L. T. 461=63 C. L. J. 476 (P. C.). Where lands are situate both in the Santal Parganas and in the Gaya District the plaintiff by reason of s. 17, Civil Procedure Code, could elect to bring his action in the Gaya Court or in the Court of the Sub-Judge of the Santal Parganas. The Gaya Court has jurisdiction (but for s. 5 of the Regulation of 1872) within the meaning of s. 3(a) of the Regulation of 1872. A. I. R. 1934 Pat. 292=15 P. L. T. 237=13 Pat. 486=152 Ind. Cas. 301.

**18. [S. 16A.]** (1) Where it is alleged to be uncertain within the local limits of the jurisdiction of which two or more Courts any immovable property is situate, any one of those Courts may, if satisfied that there is ground for the alleged uncertainty,

Place of institution of suit where local limits of jurisdiction of Courts are uncertain.



record a statement to that effect and thereupon proceed to entertain and dispose of any suit relating to that property, and its decree in the suit shall have the same effect as if the property were situate within the local limits of its jurisdiction :

Provided that the suit is one with respect to which the Court is competent as regards the nature and value of the suit to exercise jurisdiction.

(2) Where a statement has not been recorded under sub-section (1), and an objection is taken before an appellate or revisional Court that a decree or order in a suit relating to such property was made by a Court not having jurisdiction where the property is situate, the appellate or revisional Court shall not allow the objection unless in its opinion there was, at the time of the institution of the suit, no reasonable ground for uncertainty as to the Court having jurisdiction with respect thereto and there has been a consequent failure of justice.

**Scope.**—In a suit by the proprietors of village B in the *Muzaffarnagrah* district for a declaration that certain land awarded to the proprietors of village K, in the Multan District by the Settlement Authorities in a boundary dispute, belongs to them, and should be included in their village, the Munsiff of *Muzaffarnagrah*, in whose Court the suit was filed, not being certain whether he had jurisdiction to try the case, determined the question before the merits were gone into, and decided that he possessed jurisdiction. The Divisional Judge on appeal set aside the decree passed by the Munsiff : *Held* that the Divisional Judge was wrong in setting aside the decree passed by the Munsiff for want of jurisdiction ignoring the provision of this section. 25 P. L. R. 1901 = 1 P. L. R. 1901.

**19. [S. 18.]** Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.

#### *Illustrations.*

(a) A, residing in Delhi, beats B in Calcutta, B may sue A either in Calcutta or in Delhi.

(b) A, residing in Delhi, publishes in Calcutta statements defamatory of B. B. may sue A either in Calcutta or in Delhi.

**Scope.**—Persons may be sued at the place where he carries on business though the cause of action arose at a different place. A. I. R. 1926 P. C. 88 = 1926 M. W. N. 592 = 31 C. W. N. 174 (P. C.). In this section the term "business" means commercial business. A. I. R. 1927 Mad. 689 = 50 M. 449 = 53 M. L. J. 355 = 39 M. L. T. 301 = 26 L. W. 558 = 105 Ind. Cas. 576. The place where the cause of action arises must be determined with reference to the terms of the original contract. 65 Ind. Cas. 65 = A. I. R. 1922 Nag. 127. This was suit for damages for wrongful seizure of two cargo boats of the plaintiff alleged to be seized in Rangoon by order of a Magistrate of some other place, where all the defendants resided. The question to be decided was, whether on the allegations in the plaint, "the wrong was done" in Rangoon so as to bring the suit within the jurisdiction of the Chief Court : *Held* that the seizure of the boats having been made at Rangoon, it was the place, where the 'wrong was done' within the meaning of this section and the Chief Court of Rangnon, consequently was competent to entertain the suit. 3 L. B. R. 164. Where the plaintiff has the option to file suit at two places, institution of suit at one of such places does not affect the question of jurisdiction of plaintiff's *bona fide*. A. I. R. 1933 Lah. 264.

**Sections 19 and 20.**—If a person wrongfully converts a bill and receives the amount, the owner of the bill may either sue in tort or may waive the tort and recover the money as received to his use in which case the jurisdiction to try the suit would be determined by s. 20. Where he does not so elect but bases his suit on tort the jurisdiction would be determined by s. 19. An owner of a

*Shahjog hundi* residing at K transmitted it to the drawee at B. The *hundi* was stolen at B before reaching drawee and was negligently received by a *Shahjog Behari*, who got it cashed from the drawee. The owner did not elect to base his suit on money had and received but based it on tort : *Held* that as the tort was committed by B, s. 19 applied and therefore K Court had no jurisdiction to try the suit. 30 S. L. R. 182=A. I. R. 1936 Sind 229.

Other suits to be instituted where defendants reside or cause of action arises. 20. [S. 17.] Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain ; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution ; or

(c) the cause of action wholly or in part, arises.

*Explanation I.*—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

*Explanation II.*—A corporation shall be deemed to carry on business at its sole or principal office in [British India] or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

#### *Illustrations.*

(a) A is a tradesman in Calcutta. B carries on business in Delhi. B, by his agent in Calcutta, buys goods of A and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where B carries on business.

(b) A resides at Simla, B at Calcutta and C at Delhi. A, B and C being together at Benares, B and C make a joint promissory-note payable on demand, and deliver it to A. A may sue B and C at Benares, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi where C resides ; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court.

**Amendment in Burma.**—For the words "British India" substitute "British Burma" in Burma.—*Vide* G. B. Order of 1937.

**Scope of the Section.**—*Prima facie* the question of jurisdiction must be decided on the averments contained in the plaint. 114 Ind. Cas. 507=A. I. R. 1929 Oudh 91=4 Luck. 347; see also 151 Ind. Cas. 726=36 P. L. R. 6=A. I. R. 1934 Lah. 803=A. L. R. 1934 Lah. 834. British Indian Courts cannot pass a partition decree with regard to the movable property with a defendant living out of British India. A. I. R. 1928 Nag. 295=24 N. L. R. 95=111 Ind. Cas. 135.

**Actually or voluntarily resides.**—The words "actually and voluntarily resides" refer only to natural persons and not to legal entities such as Limited Companies and Government, A. I. R. 1930 Lah. 818=126 Ind. Cas. 514. A person is deemed to reside at the place where he actually and voluntarily resides and carries on business ; he cannot be said to reside at a place where he has the family home and which he only occasionally visits. 2 Bom. L. R. 604 ; see also 34 P. L. R. 658=A. I. R. 1933 Lah. 851. But a defendant who has a permanent dwelling at one place and a temporary residence at another and where cause of action arose at the place of his temporary residence, he can be sued at both places. 143 Ind. Cas. 357=34 P. L. R. 908=A. I. R. 1933 Lah. 120. The Court within whose jurisdiction plaintiff ordinarily resides has jurisdiction to try a suit to set aside an *ex parte* fraudulent decree

obtained against plaintiff in another Court by suppressing summons. 41 Ind. Cas. 161. In a suit by a husband against his wife for restitution of conjugal rights the cause of action arises from the wife absenting herself from the husband's residence. The Court, within whose local jurisdiction such residence is situate, is competent to try such suit. 54 Ind. Cas. 120. The mere fact that the ancestral home of persons, who are really residing outside the jurisdiction, was within the jurisdiction, does not give jurisdiction. A. I. R. 1921 All. 193=19 A. L. J. 822=64 Ind. Cas. 688. Suit instituted in Court within whose jurisdiction defendant has permanent residence is properly instituted though he resides for business elsewhere. A. I. R. 1930 Cal. 347=57 C. 65=125 Ind. Cas. 320; see also 12 Bur. L. T. 120=54 Ind. cas. 65; A. I. R. 1936 Lah. 853.

**Carries on business.**—The meaning of the term "business" is commercial business and not the business of Government. A. I. R. 1930 Lah. 818=126 Ind. Cas. 514. The test of carrying on business is not the continuity or intermittency of the business but the fact of owning interest in the business and receiving profits. The expression "carrying on business" is used as distinct from personally working; it does not necessarily involve personal presence or personal effort. It only means having an interest in a business, at that place, a voice in what it is done, a share in the gain or loss, and some control, if not over the actual method of working, at any rate upon the existence of the business. 28 N. L. R. 118=A. I. R. 1932 Nag. 114=140 Ind. Cas. 63; see also 19 A. L. J. 696=3 U. P. L. R. 18=65 Ind. Cas. 93. A person can be sued at a place where he carries on business through an agent. 5 Bom. L. R. 494. Where a partnership was entered into to carry on business at a certain place a suit for its dissolution can be brought only at the place of business and not at any other place where capital for the concern might have been subscribed. 42 P. R. 1916=98 P. W. R. 1916=33 Ind. Cas. 953. It is doubtful whether the mere letting of house property through an agent can be said to be carrying on business. A. I. R. 1922 Lah. 164=66 Ind. Cas. 865. The term residence is naturally a flexible one, but in the case of trader, carrying on business it is manifestly the place where they have a living and do their daily work. A. I. R. 1924 All. 669=22 A. L. J. 457=79 Ind. Cas. 566. A firm having an office at a place at which a partner or manager is in control of the business carried on can be considered to carry on business at that place. 29 S. L. R. 292=164 Ind. Cas. 1015=A. I. R. 1936 Sind 121. A firm carries on business at a place where accounts are kept. 160 Ind. Cas. 353=A. I. R. 1936 Pat. 6.

**Leave of the Court.**—Clause (b) provides that a suit may be instituted within the local limits of whose jurisdiction each of the defendants, where there are more than one, at the time of the commencement of the suit, actually carries on business, and secondly in the alternative, within the limits of whose jurisdiction any of the defendant at the time of the commencement of the suit, carries on business, provided that in such a case either the leave of the Court is given or a defendant who does not carry on business acquiesces in the suit being brought. A. I. R. 1922 All. 397=19 A. L. J. 696=65 Ind. Cas. 93. Where leave granted without notice under s. 20 (b), Court can hear objection under s. 151 and pass necessary orders. A. I. R. 1933 Lah. 266. An application under this section can be made after the decision of the preliminary issue regarding jurisdiction. 145 Ind. Cas. 706=27 S. L. R. 232=A. I. R. 1933 Sind 179. Discretion used under this sub-section should not be lightly treated by the appellate Court. A. I. R. 1934 Sind 179=145 Ind. Cas. 706. Leave to sue may be granted without previous notice to the defendant. 11 L. B. R. 26=64 Ind. Cas. 794.

**Acquiescence in such institution.**—Not applying for stay of proceedings is acquiescence. 6 M. 344; 30 B. 81=7 Bom. L. R. 289. Where some defendants lived outside jurisdiction and leave to sue was refused by Court, the suit cannot go on unless outside defendant acquiesced. A. I. R. 1922 Bom. 152=46 Bom. 229=23 Bom. L. R. 1086=64 Ind. Cas. 919.

**Cause of action.**—Cause of action includes every fact necessary to be proved in order to enable plaintiff to sustain his action. *Bona fide* voluntary assignment affords cause of action. A. I. R. 1933 Sind 179=145 Ind. Cas. 706=27 S. L. R. 230; *Reed v. Brown*, (1889) 22 Q. B. D. 128; see also 57 B. 306=143 Ind. Cas. 335=35 Bom. L. R. 168=A. I. R. 1933 Bom. 179; A. I. R. 1921 Mad. 664=14 L. W. 311=70 Ind. Cas. 284; 65 Ind. Cas. 452=A. I. R. 1922 Oudh 109; 39 A. 506=41 Ind. Cas. 233; 34 P. L. R. 771=A. I. R. 1933 Lah. 940; A. I. R. 1934 Cal. 175; 147 Ind. Cas. 591=A. I. R. 1934 All. 226=147 Ind. Cas. 591; A. I. R. 1936 Sind

229=30 S. L. R. 182. Cause of action must be antecedent to the suit and so no cause of action can be founded on any allegations made in the proceedings. A. I. R. 1929 Cal. 830=50 C. L. J. 328=125 Ind. Cas. 289. A subsequent aggravation of damage caused by a tort without any act or omission on the part of the defendants does not furnish a cause of action. A. I. R. 1930 Pat. 528=11 P. L. T. 384=122 Ind. Cas. 153. The term "cause of action" means the cause of action as it was at the time when the right to sue arose for the first time. 31 M. L. J. 316=5 L. W. 246=37 Ind. Cas. 681. The cause of action has no relation to the defence set up or to the character of the relief prayed for in the plaint but refers to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. 46 Ind. Cas. 913. "Cause of action" means all facts which plaintiff must prove for his relief. A. I. R. 1934 All. 226.

**Cause of action in suits on contracts.**—"Cause of action" is correctly defined as meaning all the congeries of facts which is necessary for the plaintiff to establish before he can ask the Court to grant the relief which he claims in the suit. 61 C. 1023=155 Ind. Cas. 882=39 C. W. N. 293=A. I. R. 1935 Cal. 160. The words "cause of action" are not limited as to mean the whole cause of action but includes any material fact of it, not necessarily all the facts constituting the right to sue. 25 A. 48=A. W. N. 1902, 79. Where a plaintiff sues the drawer, acceptor and subsequent endorsers of a *hundi*, the cause of action arises out of the original contract, *i. e.*, *hundi*, in the place where it was made and payable, though the *hundi* might have been endorsed to him by some of the defendants at a different place. 57 P. R. 1900. Where a deed covenanting a contract of service provided that the service was to be performed at suit but was silent as to the place at which the salary was to be paid, the salary was held impliedly payable at the place where the plaintiff worked and resided. 2 Bom. L. R. 514. A place of suing is the place where the contract is to be performed. 7 C. W. N. 912; see also 145 Ind. Cas. 464=A. I. R. 1933 Lah. 599; 143 Ind. Cas. 335=57 B. 306=35 Bom. L. R. 168=A. I. R. 1933 Bom. 179; A. I. R. 1930 Rang. 216=127 Ind. Cas. 466. In a suit for damages for breach of a contract the cause of action consists of the making of the contract and of its breaches; so that the suit may be filed either at the place where it should have been performed and, not being performed, the breach occurred. 26 S. L. R. 167=139 Ind. Cas. 114=A. I. R. 1932 Sind 9=A. L. R. 1932 Sind 248. The cause of action for a contract, may arise wholly within jurisdiction, though in proving the terms of the contract it may be necessary to give evidence of some facts occurring outside the jurisdiction. 56 B. 324=34 Bom. L. R. 236=137 Ind. Cas. 381=A. I. R. 1932 Bom. 291=A. L. R. 1932 Bom. 458. If a contract is made by means of letters between the parties, part of the cause of action arises where some of the letters are written or sent and a suit can therefore be instituted at that place. 39 C. W. N. 174. Where the proposal and acceptance are made by letters, the contract is made at the time when and at the place where the letter of acceptance is posted. A. I. R. 1934 Mad. 581=67 M. L. J. 296=40 L. W. 498. Although the goods are sent per V. P. P. the contract is intended to be performed at the place where the goods are to be received and that Court has jurisdiction to try the suit. *Id.* If the parties to a contract for supply of goods agree that the delivery is to be made at a particular place, a cause of action would arise there in part at least because under the terms of the contract it is the place where a part of the contract is to be performed. 1934 A. L. J. 1093=A. I. R. 1934 All. 740. A suit by the lessor for the premium due can be instituted at the place where the lessor lives, since part of the cause of action arises there, though the lands may be situate and the lessee may reside in a different place. 18 R. D. 403. Where it cannot be said that payment under a contract was agreed or intended to be made at a particular place, the common law rule applies that the debtor must seek the creditor and pay him, and therefore the creditor can maintain a suit at the place where he resides. 32 P. L. R. 737. Where actual contract for despatch of goods was entered in Native State, but first item of performance namely, the entrusting of the goods by the consignor to the consignees was performed in British territory, the British Court has jurisdiction. A. I. R. 1931 Mad. 115=(1930) M. W. N. 816=130 Ind. Cas. 658. In suits on contracts the making of the contract is part of the cause of action. 126 Ind. Cas. 62=A. I. R. 1929 Sind 227; see also A. I. R. 1930 Nag. 30=12 N. L. J. 177=121 Ind. Cas. 667; A. I. R. 1929 All. 236=117 Ind. Cas. 824; A. I. R. 1928 Bom. 548=30 Bom. L. R. 1391=112 Ind. Cas. 734; 108 Ind. Cas. 51. An action for the recovery of the price of goods despatched by plaintiff by railway from Delhi to the

defendant at Meerut is triable at Delhi where the goods were delivered to railway, as delivery to the Railway Company as a carrier has the same effect as delivery to the buyer. A. I. R. 1925 Lah. 555=26 P. L. R. 498=7 Lah. L. J. 395=89 Ind. Cas. 751. A suit for damages for the breach of a contract to supply goods can be brought at the place where the price is made payable under the terms of the contract. A. I. R. 1925 Nag. 408=89 Ind. Cas. 181. The cause of action in suits arising out of a contract arises at the place where the contract was made or the place where the contract was to be performed or performance completed or at the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable. 7 N. L. J. 25=83 Ind. Cas. 309. In a suit for damages on a breach of contract the cause of action consists of the making of the contract and of its breach in a place where it ought to have been performed; thus where the contract was to be completed at *Karachi* though made at Lyallpur, suit for damages can lie in Karachi. A. I. R. 1925 Sind 132=19 S. L. R. 207=29 Ind. Cas. 30. Where a breach of a contract takes place outside a certain place still if the contract is to be performed or its performance is completed within that place or money is payable in that place in performance of the contract, a suit for recovery of damages for breach of that contract will be filed in a Court within the jurisdiction of which that place is situated. A. I. R. 1924 Sind 64=76 Ind. Cas. 353. Delivery by the seller of the goods sold to the Railway Company to be despatched to the buyer operates as delivery to the buyer under s. 91, Contract Act and a suit for breach of contract to deliver goods by the buyer would lie at the place where the goods were delivered to the Railway Company. A. I. R. 1922 Lah. 474=67 Ind. Cas. 888. Where the contract was made in Bengal and the goods were to be sent to Bengal and the only thing done in Azamgarh was that the goods were despatched from Azamgarh, it cannot be said that the cause of action wholly or in part arose in Azamgarh. A. I. R. 1922 All. 418=66 Ind. Cas. 501. The place where the cause of action arises in respect of a pledge must be determined with reference to the terms of the original contract and not by subsequent negotiations thereafter. A. I. R. 1922 Nag. 127=65 Ind. Cas. 65. In a suit upon a contract the offer is a part of the cause of action and the suit can be instituted in the Court within whose jurisdiction the offer is made finally. 10 L. W. 44=54 Ind. Cas. 260. Where the proposal and acceptance are made by letters, the contract is made at the time and at the place where the letter of acceptance is posted, though the contract is revocable before the acceptance reaches the proposer. Jurisdiction is determined by the place where the contract is made or in other words, where the cause of action arises. 17 N. L. R. 1=57 Ind. Cas. 636. In a contract for the sale of goods, payment for, and delivery of the goods, was to be made at a place other than the place where the purchaser was effected. It was held that a suit on account of non-delivery of a portion of the goods may be brought in a Court having jurisdiction over the place where delivery and payment were to be made. 42 A. 480=18 A. L. J. 566=56 Ind. Cas. 192. A contract is made when it is accepted and the buyer at Agra cannot sue at Agra for breach of a contract to sell goods concluded by acceptance at Delhi. 41 A. 602=17 A. L. J. 718=14 P. L. R. (H.C.) 120=51 Ind. Cas. 331. In the case of a proposal made from *Karachi* and accepted at Calcutta, the cause of action for breach of the contract arises at Calcutta. 12 S. L. R. 93. An action for damages for breach of contract for carriage of goods by a railway can be brought either where the breach was committed or where the contract was made. 43 P. W. R. 1919=50 Ind. Cas. 139.

The defendant a *Raja* wrote a letter from S to plaintiff at F calling upon him to go to S to treat the *Raja*. After plaintiff's arrival at S, agreement regarding the fees, payment, etc., was arrived at S and plaintiff was to be paid at S. Plaintiff sued for the fee fixed at F: *Held* that the cause of action arose at S as the whole contract was made at S. A. I. R. 1934 All. 549=148 Ind. Cas. 875. Where a suit for prompt dower by a Mahamedan wife against her husband is instituted in the Court, with whose jurisdiction the wife resides, the place of performance must be taken to be the place where the plaintiff resides and the Court has jurisdiction to entertain the suit. *Tustiman v. Abdul*, A. I. R. 1936 Cal. 97=40 C. W. N. 392=63 C. 726=161 Ind. Cas. 427.

**Commission agent.**—The suit against a commission agent must be instituted at the place where the commission agent carries on his business and not at a place, from where the principal sent his order. A. L. R. (1932) A. 143 Civ. The cause of action arises at the place where the contract of agency business is made or at the place, where the money due are to be paid. 56 B. 324=34 Bom. L. R. 236=137 Ind.

Cas. 381=A. I. R. 1932 Bom. 291=A. L. R. 1932 Bom. 498 ; A. I. R. 1928 Lah. 297 =9 Lah. 455=10 Lah. L. J. 87=29 P. L. R. 496=109 Ind. Cas. 28. A Court having jurisdiction at the place where in compliance with the orders of the principal, the commission agent works, is competent to entertain a suit for balance of accounts by the agent against his principal. 92 Ind. Cas. 273=A. I. R. 1926 Lah. 287 ; see also 88 Ind. Cas. 950=26 P. L. R. 335=A. I. R. 1925 Lah. 387=6 Lah. 153=7 Lah. L. J. 562. In the case of a commission agency business, a suit by the principal against the agent can be instituted under clause (c) of section 20, either where the contract was made or where the accounts are to be rendered and payment is to be made. A. I. R. 1936 Rang. 251=9 R. R. 9=163 Ind. Cas. 397.

**Suit against Insurance Company.**—A suit against an Insurance Company can be brought in a place where the insurer died, because there can be no claim unless the death has taken place. 34 Bom. L. R. 815=A. I. R. 1932 Bom. 392=140 Ind. Cas. 262=A. L. R. 1932 Bom. 779 ; A. I. R. 1934 Sind 76=28 S. L. R. 192=A. L. R. 1934 Sind 76 Where a Life Assurance Company has agency in Madras, but the Agency acts as a post-office not having any discretion in the matter either to conclude contracts or to vary them or to enter into them, it does not carry on business in Madras. A. I. R. 1929 Mad. 347=56 M. L. J. 299=29 L. W. 628=121 Ind. Cas. 155. The death of the assured being a part of the plaintiff's cause of action in a suit on an insurance policy the suit is maintainable at the place of his death. 22 C. W. N. 517=44 Ind. Cas. 694 ; 41 Ind. Cas. 392. For the purposes of s. 20 of the Code, the words "cause of action" in cases based on contract of insurance, do not include the loss or damage of the property insured, which is merely a cause of the cause, and is not even a proximate cause since the real cause of action is the failure to pay the money due under the contract and the primary cause of that cause is the contract itself ; the destruction of the property being only a secondary cause which is purely accidental being due merely to the nature of the particular kind of contract under consideration. A. I. R. 1924 Rang. 2=76 Ind. Cas. 482

**Suit against non-resident foreigner.**—The Civil Procedure Code empowers a British Court to pass judgment against a non-resident foreigner, provided that the cause of action has arisen within the jurisdiction of the Court pronouncing the judgment. 3 Bom. L. R. 82=25 B. 528 ; A. I. R. 1927 All. 413=49 A. 669=25 A. L. J. 356=101 Ind. Cas. 673 ; see also A. I. R. 1934 All. 740=1934 A. L. J. 1093. The Court cannot pass a decree against a person, subject to foreign Government which cannot be enforced against him by that Court. A. I. R. 1927 Sind 160=23 S. L. R. 46=101 Ind. Cas. 438.

**Suit for restitution of Conjugal rights.**—In a suit for restitution of conjugal rights the mere fact that the plaintiff has his home within the territorial jurisdiction of a certain Court, is not sufficient to give that Court jurisdiction and where the defendant does not reside within the jurisdiction of such Court and if the parties have never lived together there within such jurisdiction, the cause of action does not arise within jurisdiction and the Court therefore has no jurisdiction to try the suit. 149 Ind. Cas. 1199=1934 M. W. N. 1035=A. I. R. 1934 Mad. 407=67 M. L. J. 271 ; but see 59 Mad. 392=161 Ind. Cas. 485=43 L. W. 307=1936 M. W. N. 19=A. I. R. 1936 Mad. 288=70 M. L. J. 288.

**Suit between principal and agent**—In a suit for accounts based upon agency for collection of dues, it is the general contract of agency with liability to account and refund the balance which is the cause of action. A. I. R. 1930 Bom. 150=32 Bom. L. R. 171=54 B. 192=129 Ind. Cas. 586. Suit for accounts for agency is cognizable by Court having jurisdiction at a place where agency was or was not to be carried on. A. I. R. 1929 Lah. 605=11 Lah. L. J. 282=119 Ind. Cas. 481 ; see also A. I. R. 1935 Lah. 68=152 Ind. Cas. 802. In a suit between principal and agent the cause of action arises where the contract of agency is made or where it was to be performed, and where the refusal to account takes place. 94 Ind. Cas. 287=A. I. R. 1926 Sind 238 ; see also A. I. R. 1929 Sind. 227=126 Ind. Cas. 62 ; 80 Ind. Cas. 661=46 A. 465. Plaintiff was employed by the defendant to sale his goods at M, the defendant was not to sale the goods in the area allotted to the plaintiff. Defendant sold goods at M in contravention of the terms. M Court has jurisdiction to try a suit for damages. A. I. R. 1927 Mad. 1150=103 Ind. Cas. 37. When the plaintiff alleged that on account of defendant's dishonesty or negligent conduct and dereliction of his duty as agent, the plaintiff has suffered a loss, it was held that the cause of action accrued at the place where the conduct complained of occurred. A. I. R. 1924 Sind 22=76 Ind. Cas. 197. As a rule the princi-

pal cannot, where agent carries on business elsewhere call upon him to render an account at his own place of business on the ground that the money or goods were sent to the agent from such place. A. I. R. 1924 Lah. 593=75 Ind. Cas. 849. The cause of action in a suit for accounts against an agent arises at the place where the contract of agency took place or where it was to be performed and where account was refused. 12 Bur. L. T. 198=55 Ind. Cas. 266.

**Suit for money borrowed.**—Ordinarily where money is borrowed, the repayment of the money must be presumed to have been agreed to be made at the place of residence of the lender. A. I. R. 1929 Lah. 868=118 Ind. Cas. 898 ; 48 A. 510=24 A. L. J. 291=92 Ind. Cas. 492 ; see also 59 B. 365=37 Bom. L. R. 357=A. I. R. 1935 Bom. 283 ; A. I. R. 1935 Nag. 144. A suit based on *hundi* can be brought in the High Court in whose jurisdiction the *hundi* was endorsed and payment was made after default, because an endorsement on the *hundi* is a part of the cause of action. A. I. R. 1928 Sind 86=22 S. L. R. 305=107 Ind. Cas. 218. Where the creditor resided at P and the debtor had a permanent family house at P, but the loan was borrowed at B, where the debtor had a temporary residence, Court at P had jurisdiction to try the suit in respect of the loan. A. I. R. 1926 Mad. 1207=24 L. W. 576=97 Ind. Cas. 1027. Where the loan was borrowed at S but the defendants were residents of H and the loan was also repayable at H, the Court at S has no jurisdiction to entertain a suit for recovery of the loan. A. I. R. 1925 P. C. 290=49 M. L. J. 856=23 L. W. 3=43 C. L. J. 1=24 A. L. J. 48=27 Pat. L. R. 1=53 C. 88=28 Bom. L. R. 211=53 I. A. 58=30 C. W. N. 577 (P. C.)=92 Ind. Cas. 760. Ordinarily if goods are purchased, or money is borrowed, the payment for the goods or re-payment of money must be presumed to have been agreed to be made at the place of the residence of the seller or the lender as the case may be. A. I. R. 1923 All. 465=71 Ind. Cas. 431. Where money on a pro-note was intended to be paid in place A, the Court at A has jurisdiction to entertain a suit on the pro-note under this section. 20 P. R. 1916=10 P. W. R. 1916=31 Ind. Cas. 698. A suit on a *hundi* dishonoured after acceptance against the drawer and acceptor is brought in the proper forum if instituted in the Court having jurisdiction at the place of drawing. 3 O. L. J. 132=34 Ind. Cas. 191. The ordinary rule is that a debtor must seek his creditor to pay him. 15 A. L. J. 653=41 Ind. Cas. 890. If there is nothing as to the place where the money under a bond is payable, the Court must be guided by the intention of the parties and where this cannot be determined, a presumption as to the place may be drawn. 49 Ind. Cas. 950.

**Other cases.**—Where a person purchased a ticket for journey by railway at Agra but fell out of the train and was injured owing to the neglect of the Railway Company at B, the cause of action for a suit for damages arises at B and not at Agra. 41 A. 488=17 A. L. J. 506=50 Ind. Cas. 130. Defendants from Cawnpore sent a bale of cotton to the plaintiff at *Jhansi* without an order or direction from the latter. Plaintiff accepted to hold the goods on behalf of the defendant at defendant's risk. In a suit for recovery of charges the cause of action was held to arise at *Jhansi*. 15 A. L. J. 513=41 Ind. Cas. 904. Discovery of the fraud is no part of the cause of action. The cause of action is the fraud. A. I. R. 1923 Mad. 272.=(1922) M. W. N. 811=72 Ind. Cas. 982. Where *ex parte* decree obtained in one Court sent for execution to another Court, the latter Court can entertain a suit to set aside the decree on the ground of fraud. A. I. R. 1928 Oudh 88=3 Luck. 142=4 O. W. N. 1103=106 Ind. Cas. 541 ; see also A. I. R. 1927 Lah. 778=100 Ind. Cas. 164 ; 27 P. L. R. 517=A. I. R. 1926 Lah. 277. Where defendant is ordinarily a resident in the Punjab but carried on business at *Quetta* he can be sued in *Quetta* though the cause of action took place in Persia. 31 C. W. N. 174=A. I. R. 1926 P. C. 88=96 Ind. Cas. 887. The proper course to set aside a decree is to get it set aside by the Court that granted the decree. A. I. R. 1924 Pat. 831=75 Ind. Cas. 469. In a suit for damages for breach of contract to marry, part of the cause of action arises at the place where the marriage is to take place, though the agreement to marry is entered at another place. 65 Ind. Cas. 812. An assignment of a claim whether voluntary or by virtue of adjudication of the person in whom that claim resides form a part of the cause of action in a suit in respect of that claim and the Court within whose limits the said assignment takes place can entertain the suit. A. I. R. 1926 Sind 31=20 S. L. R. 209. In a suit for refund of over-charge demanded from a consignee by a foreign railway the cause of action arises in part at the place where the contract for carrying was made and so the Court at the latter place has jurisdiction to try

the suit. A. I. R. 1925 All. 823=L. R. 6 A. 395=88 Ind. Cas. 575. Where a thing is purchased at C and the property passes to the vendee, but part of the purchase money is paid at D, to which place the article is sent, a Court at D, has jurisdiction to try suit by vendee for return of purchase money on the ground of breach of warranty by the vendor. A. I. R. 1926 Cal. 100=86 Ind. Cas. 1046. Where payment was according to the contract to be made in one place but was made in another owing to the plaintiff's own default, advantage can not be taken of the fact to give him a choice of jurisdiction. A. I. R. 1921 Lah. 213=17 P. L. R. 1922=64 Ind. Cas. 387. If the plaintiff and defendant are within the jurisdiction of the Court the plaintiff can file a suit against the defendant for dissolution of partnership, even though that partnership commenced and was carried on in foreign territory. A. I. R. 1921 Bom. 460=45 B. 1228=23 Bom. L. R. 543=63 Ind. Cas. 959. Where payment for goods purchased by the plaintiff or on his behalf by somebody else, was to be made at place J by bills drawn against and presented to the plaintiff at place T, new part of the cause of action arose at T and therefore, a suit for an amount due for short fall in goods ordered and for damages on account of inferiority of quality of those goods lies in the Court in the jurisdiction of which place T is situated. A. I. R. 1935 Mad. 663=68 M. L. J. 504 (F. B.)=41 L. W. 519=1935 M. W. N. 554=156 Ind. Cas. 1041. In the absence of an agreement that account should be taken elsewhere, a suit for the taking of the accounts of a partnership should be instituted in the Court within whose jurisdiction the business of the partnership was carried on. 17 A. L. J. 1015=52 Ind. Cas. 655. In a suit on fire insurance, part of the cause of action arises where fire occurs and the suit is maintainable at that place. A. I. R. 1928 Nag. 305=11 N. L. J. 184=113 Ind. Cas. 896. In a suit for damages for conversion of land it is open to the plaintiffs to proceed against any one or more of the joint tort-feasors as they may elect. Therefore a suit started against one of the (tort-feasors), who resides in Calcutta, can be properly maintained in Calcutta. High Court either with previous leave of the Court or with the acquiescence of other tort-feasors. A. I. R. 1928 Cal. 887=32 C. W. N. 208=116 Ind. Cas. 727. Where the cause of action indubitably arises within the jurisdiction of the Court no leave under s. 20 (b) is necessary. A. I. R. 1929 Sind 170=23 S. L. R. 365=117 Ind. Cas. 150. A Court, where a suit was originally rightly instituted, continues to have jurisdiction over the suit even if the place where the cause of action arises ceases to be situate within its jurisdiction. A. I. R. 1928 Mad. 746=28 L. W. 885=114 Ind. Cas. 545. No hard and fast rule as to revision can be laid down in case of decisions as to jurisdiction under s. 2 and each case must be decided on its own merits. A. I. R. 1923 Lah. 565=77 Ind. Cas. 764. Where in order to bring a suit within the jurisdiction of a Court of a particular locality, the plaintiff makes false statements knowing them to be false that is fraud on the Court and cannot give the Court jurisdiction which it originally had not. A. I. R. 1923 All. 137=45 A. 193=71 Ind. Cas. 411.

*Explanation II.*—A corporation resides wherever it carries on its business, irrespective of the location of its head office and if a corporation such as Bank has 50 branch offices it has fifty separate and distinct jurisdictions, and a suit can be brought in any one of such Courts for the enforcement of a right in respect of which a cause of action exists within the limits of each independent jurisdiction. 4 Pat. L. J. 141=(1919) Pat. 155=48 Ind. Cas. 943. The whole of the Punjab Province cannot be said to be a single place for the purpose of Explanation II and so it cannot be claimed that the Punjab Government can be sued at any place within the limits of that Province. A. I. R. 1930 Lah. 818=126 Ind. Cas. 514.

**21. [New.]** No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice.

*Scope.*—This section has no application in case of inherent incompetency in a Court to deal with a cause which affects immovable property outside its jurisdiction. A. I. R. 1935 Nag. 250 (F. B.)=18 N. L. J. 295; see also 76 C. 193; A. I. R. 1930 P. C. 188; A. I. R. 1919 P. C. 150. Section 21 refers only to an objection made as to the place of suing and not as to the nature of the Court in which the suit has been filed. A. I. R. 1931 All. 406. Where a decree has been passed by a Court having no territorial jurisdiction over the matter in controversy and no objection was ;



taken as to the place of suing, an independent suit for its avoidance is not barred by s. 21 and it is not legitimate to extend the bar of the section. 1931 A. L. J. 240=A. I. R. (1931) A. 454=131 Ind. Cas. 248. Section 21 does not apply to the Chartered High Courts in the exercise of their original jurisdiction. It does not also apply to a case where the objection is not one to the place of suing, but one which goes to the root of the whole suit, such as an objection to the jurisdiction of the Court, which can be taken at any stage of the proceedings, even at the hearing of the suit and an appeal. 33 Bom. L. R. 1364=A. I. R. 1932 Bom. 42=135 Ind. Cas. 170. Where the point taken in the written statement related only to the want of jurisdiction based on the pecuniary value of the subject-matter of the suit, an objection, raised in appeal to the place of suing, on the ground that the defendant resided outside the jurisdiction of the trial Court, cannot be entertained, as the point was not specifically raised at the earliest possible opportunity. 33 Bom. L. R. 1437. This section is inapplicable to High Court in its ordinary original civil jurisdiction. 56 B. 324=34 Bom. L. R. 236=137 Ind. Cas. 381=A. I. R. 1932 Bom. 291=A. L. R. 1932 B. 498. Where there is no competency at all in the original Court to hear a case, objection to jurisdiction before the appellate Court is not barred by s. 21. 16 R. D. 279=12 U. D. 348. Where the Court has no jurisdiction over the subject-matter of the suit, mutual consent of the parties cannot confer jurisdiction. A. I. R. 1933. Mad. 471=38 L. W. 896=146 Ind. Cas. 204 ; A. I. R. 1933 Lah. 425. A Court cannot also acquire jurisdiction by the acquiescence of the parties. A. I. R. 1933 Mad. 346=1933 M. W. N. 208=142 Ind. Cas. 613. The principles underlying this section applies to proceedings other than original suits. 29 N. L. R. 342=A. I. R. 1933 Nag. 318. In a case under this section the defendant must prove that the land is within the territorial jurisdiction of another Court as well as there was no ground of uncertainty about the matter and that there has been a failure of justice thereby. A. I. R. 1933 Pat. 555. Initial jurisdiction should be determined only from allegations in the plaint. A. I. R. 1933 All. 298=141 Ind. Cas. 25. If the High Court in its original sile has no jurisdiction under clause 12 of the Letters Patent, the mere fact that objection as to the place of suing, as contemplated by s. 21, C. P. Code, was not taken at the earliest possible opportunity cannot confer on the Court that jurisdiction which it does not possess. 40 C. W. N. 65=164 Ind. Cas. 907 ; see also A. I. R. 1935 Rang. 517. It is an established principle of law that in a case which the Court is competent to try, if the parties without objection join issue and go to trial, the defendant cannot subsequently dispute its jurisdiction upon the ground that there were irregularities in the initial procedure which if objected to at the time would have led to the dismissal of the suit. S. 21, C. P. Code applies to such a case. But section 21, has no application to a case in which a Court which has no jurisdiction over the subject-matter of the action passes a decree which is wholly void and the maxim applies that consent cannot give jurisdiction. A. I. R. 1936 Nag. 1=31 N. L. R. (Sup.) 57=161 Ind. Cas. 877. Question of jurisdiction can be allowed to be raised on completion of proceedings if questions depend upon decision of some fact or point of law. 142 Ind. Cas. 113=12 Pat. 117=13 P. L. T. 737=A. I. R. 1933 Pat. 104. Questions of jurisdiction must be decided first. 17 R. D. 147=10 O. W. N. 143=A. I. R. 1933 Oudh 191. Question of jurisdiction cannot be raised collaterally except when there is absolute lack of jurisdiction in Court passing decree. 142 Ind. Cas. 113=12 Pat. 117=13 P. L. T. 737=A. I. R. 1933 Pat. 104 ; see also 34 C. W. N. 999=A. I. R. 1931 Cal. 327=131 Ind. Cas. 396. An objection as to the place of suing cannot be raised for the first time in appeal or second appeal. A. I. R. 1931 Oudh 136=7 O. W. N. 1079=129 Ind. Cas. 331 ; see also A. I. R. 1930 Mad. 541=126 Ind. Cas. 730 ; 48 Ind. Cas. 465 ; 41 Ind. Cas. 161.

Order in a mortgage suit for sale of land in a scheduled district can be set aside. Section 21 does not apply to such a case. 42 M. 813=46 I. A. 151=17 A. L. J. 694=37 M. L. J. 11=21 Bom. L. R. 914=30 C. L. J. 209=23 C. W. N. 1033=51 Ind. Cas. 185. Section 12, Letters Patent (Calcutta) is not controlled by s. 21 of C. P. Code. A. I. R. 1929 Cal. 358=49 C. L. J. 212=56 C. 940=120 Ind. Cas. 577. Decree passed cannot be challenged by a separate suit if objection as to jurisdiction is waived. A. I. R. 1929 Lah. 449=11 Lah. L. J. 306=120 Ind. Cas. 279. Section 21 applies also to an application for setting aside an *ex parte* decree. A. I. R. 1930 All. 873=(1930) A. L. J. 997=52 A. 947=132 Ind. Cas. 35 ; see also 37 M. L. J. 349=26 M. L. T. 186=10 L. W. 293=(1919) M. W. N. 636=53 Ind. Cas. 463. Section 21 applies to execution proceedings also. 43 M. 135=11 L. W. 232=37 M. L. J. 442=26 M. L. T. 271=53 Ind. Cas. 579 ; *contra* ; 27 C. W. N. 542=A. I. R. 1923 Cal. 619=77 Ind. Cas. 253 ; see also A. I. R. 1928 Mad. 746=28 L. W. 885=114 Ind. Cas. 545 (where it has been held

that the principle is applicable). This section does not apply to suit in British Indian Court against a non-resident foreigner on a cause of action which arose wholly outside British territory. A. I. R. 1928 Lah. 297=9 Lah. 455=29 P. L. R. 405=10 Lah. L. J. 87=109 Ind. Cas. 28. This section also has no application to cases of foreign judgments sought under the provisions of s. 44 to be executed in British Indian Courts. A. I. R. 1925 Mad. 788=21 L. W. 330=86 Ind. Cas. 492. Waiver of a right to object to jurisdiction before the passing of the final decree in a mortgage suit will not imply a waiver of the right to object in execution proceedings to a sale of the property. A. I. R. 1927 Mad. 627=50 M. 882=52 M. L. J. 605=38 M. L. T. 351=103 Ind. Cas. 245. All conditions under s. 21 must be fulfilled for setting aside decree. 96 Ind. Cas. 544. This section can be applied to cases which do not strictly fall within its terms. A. I. R. 1926 Mad. 421=49 M. 746=50 M. L. J. 161=95 Ind. Cas. 12. This section does not preclude the objection about jurisdiction being raised in a fresh suit. A. I. R. 1926 Bom. 481=28 Bom. L. R. 879=98 Ind. Cas. 341. Section 21 governs all cases of want of territorial jurisdiction. A. I. R. 1924 Mad. 697=34 M. L. T. 275=20 L. W. 467=87 Ind. Cas. 341. Objection as to jurisdiction cannot be raised in any subsequent proceeding if its absence was dependent upon a fact within the knowledge of the party. A. I. R. 1922 Pat. 322=67 Ind. Cas. 686. Party not objecting to irregularities in institution of suit cannot subsequently dispute jurisdiction of Court on ground of such irregularities. A. I. R. 1934 Sind 1. Question of jurisdiction can be considered by the appellate Court from a Revenue Court even though a plea of want of jurisdiction is not raised in the trial Court. A. I. R. 1934 All 139. Question regarding Court's jurisdiction to try suit should be decided by aid of Civil Procedure Code. A. I. R. 1934 All. 226.

The preliminary point that a suit will not lie in a British Indian Court can be raised at any stage of the suit notwithstanding s. 21 of the C. P. Code. A. I. R. 1934 Sind 123=28 S. L. R. 54. In appellate Court upheld the decision of the lower Court passed without jurisdiction in the absence of prejudice to the defendants. A. I. R. 1934 Lah. 233=36 P. L. R. 99=149 Ind. Cas. 1050. Section 21 only lays down that a defect as to territorial jurisdiction cannot be questioned on appeal or revision except in certain circumstances. A. I. R. 1934 Lah. 652=35 P. L. R. 482=A. L. R. 1934 Lah. 610=152 Ind. Cas. 135. The general principle underlying this section applies to execution proceedings although the section itself is not applicable to execution proceedings. 152 Ind. Cas. 891=1934 M. W. N. 878=A. I. R. 1934 Mad. 573=40 L. W. 284.

**Appellate Court when can Interfere.**—The question of jurisdiction should be raised in the Court of first instance and the appellate Court can hear it if prejudice is caused by the trial in the first Court. A. I. R. 1925 Mad. 171=79 Ind. Cas. 857; see also A. I. R. 1924 Pat. 527=2 Pat. L. R. 74 Civ.=80 Ind. Cas. 745; 136 Ind. Cas. 17=32 P. L. R. 874=A. I. R. 1932 Lah. 135. Appellate or revisional Court cannot entertain objections as to place of suing unless there has been a consequent failure of justice. A. I. R. 1931 Lah. 142=32 P. L. R. 50=131 Ind. Cas. 276; 128 Ind. Cas. 496=A. I. R. 1930 Lah. 1016, A. I. R. 1929 All. 236=117 Ind. Cas. 824; 32 P. L. R. 874; A. I. R. (1931) A. 556=131 Ind. Cas. 603; 136 Ind. Cas. 17=32 P. L. R. 874=A. I. R. 1932 Lah. 135=1 R. 1932 L. 193; 108 Ind. Cas. 321=A. I. R. 1928 Pat. 324=7 Pat. 216=9 P. L. T. 789; A. I. R. 1922 Oudh 124; 62 Ind. Cas. 399=A. I. R. 1921 A. 65=19 A. L. J. 305; 52 Ind. Cas. 801=42 A. 74=7 A. L. J. 1034, 49 Ind. Cas. 441=21 P. W. R. 1919=47 Ind. Cas. 764=(1918) M. W. N. 661; 22 C. W. N. 517=44 Ind. Cas. 694; 93 P. R. 1916=37 Ind. Cas. 114; 9 Bur. L. T. 119=36 Ind. Cas. 431; 128 Ind. Cas. 496=31 P. L. R. 616=A. I. R. 1930 Lah. 1016.

Objection to jurisdiction taken in lower Court at a later stage must be entertained in revision. A. I. R. 1930 All. 873=52 A. 947=132 Ind. Cas. 35=1930 A. L. J. 997; see also A. I. R. 1935 Pat. 160=16 Pat. L. T. 103=14 Pat. 414. The principle underlying s. 21 is that the objection to territorial jurisdiction is cured not merely for the purpose of the appellate and revisional Court, but cured entirely and for all purposes. A. I. R. 1925 Mad. 117=47 M. L. J. 441=87 Ind. Cas. 152. An objection as to territorial jurisdiction raised before appellate Court must be determined on merits. A. I. R. 1921 All. 66=19 A. L. J. 305=62 Ind. Cas. 399. Appellate Court need interfere even in case of absence of jurisdiction where there was no failure of justice within the meaning of section 21. 158 Ind. Cas. 252=A. I. R. 1935 Mad. 574.

**22. [S. 22.]** Where a suit may be instituted in any one of two or more

Power to transfer suits which may be instituted in more than one Court.

Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.

**Scope.**—It is only when a suit may be brought in one or other of two Courts, both of which have jurisdiction, that an application may be made for transfer. Where the jurisdiction of one of the Courts is denied an application cannot lie. 71 Ind. Cas. 268=A. I. R. 1923 Lah. 288. An application under section 22 not presented at the earliest opportunity must be rejected. A. I. R. 1925 Lah. 322=7 L. L. J. 93=26 P. L. R. 465=88 Ind. Cas. 531. Provisions being mandatory application must be made upon settlement of issue. A. I. R. 1925 Lah. 175=78 Ind. Cas. 608 ; 35 Ind. Cas. 616=11 P. R. 1917=150 P. W. R. 1916=16 P. L. R. 1917. Ss. 22 and 23 do not apply where transfer to the original side of a High Court from a Court subordinate to another High Court is desired. A. I. R. 1924 Lah. 306=69 Ind. Cas. 772. In the absence of bias for or against any party mere taking erroneous view is not sufficient for transfer. A. I. R. 1934 All. 37=1933 A. L. J. 1573=146 Ind. Cas. 791. In a suit pending before the original side of the High Court an application to transfer the case to the Court where the suit ought to be tried should be made under s. 22 on the original side of the High Court which has seisin of the case. A. I. R. 1934 Rang. 265=12 Rang. 548=151 Ind. Cas. 573=7 R. R. 88. Although the plaintiff has a right to choose the locus for the decision of his suit and the exercise of his right should be restricted except for cogent reasons, yet where two suits between the parties are instituted at two different places and the interests of the majority of the parties are such that the balance of convenience is undoubtedly that the two suits should be tried in the same place and the trial of the suit in the other place would cause so much inconvenience as would amount to an abuse of the process of the Court, an application for transfer of suit from such place to the place where the trial of both the suits would be more convenient should be allowed. A. I. R. 1936 Pesh. 5. When an application for transfer of a case under s. 22 does not challenge the jurisdiction of the Court in which the suit is pending, such application is maintainable. A. I. R. 1935 All. 979=1935 A. L. J. 1093=159 Ind. Cas. 644.

**Notice.**—Provisions as to notice, not being merely directory, bar application for transfer if not complied with. 107 Ind. Cas. 593. The words "after notice to other parties" mean notice prior to application. 11 P. R. 1917=150 P. W. R. 1916=16 P. L. R. 1917=35 Ind. Cas. 616. It is doubtful whether absence of notice contemplated by s. 22 is fatal to an application under s. 23. A. I. R. 1934 All. 14=1933 A. L. J. 1201 ; A. I. R. 1935 All. 979=1935 A. L. J. 1093.

**Matters to be considered in granting relief.**—Where the law allows a person to institute a suit in two different Courts, it is the plaintiff who has the right to choose his forum and his choice will not be interfered with by Court except under special circumstances. A. I. R. 1928 Lah. 183. In application for transfer of suits the defendants must show that consideration of convenience outweigh the plaintiff's right as *arbitrator* and one should rather look to the allegation of the plaintiff than that of the defendant in considering such applications. A. I. R. 1928 Mad. 15=39 M. L. T. 401=(1927) M. W. N. 607 ; see also A. I. R. 1928 Lah. 159=106 Ind. Cas. 896 ; A. I. R. 1927 Lah. 14=27 P. L. R. 831=8 L. L. J. 578=97 Ind. Cas. 390. Whether sufficient grounds exist depends upon the facts of each case, mere convenience is not sufficient ground for transfer. A. I. R. 1924 Lah. 304=69 Ind. Cas. 239 ; A. I. R. 1924 Lah. 249=73 Ind. Cas. 860. Defendants are, by showing clear balance of advantage in the way of convenience and expense entitled to have the case transferred to another Court. A. I. R. 1924 Oudh 410=11 O. L. J. 377=86 Ind. Cas. 495 ; see also 72 Ind. Cas. 592=A. I. R. 1923 Lah. 383 ; 48 C. 53=A. I. R. 1921 Cal. 210=62 Ind. Cas. 115 ; 3 O. L. J. 200=34 Ind. Cas. 636. Where the application is merely an attempt to get an order from the Court which would enable the petitioner to evade the question of jurisdiction decided against him, the application should not be allowed. A. I. R. 1927 Lah. 183=100 Ind. Cas. 67. Where it was

established that almost all the evidence would be available only at the place to which the transfer is applied for, the transfer should be allowed. Application for transfer should be made as early as possible. A. I. R. 1924 Lah. 304=69 Ind. Cas. 239; but see 167 P. R. 1919=54 Ind. Cas. 935. Fact that defendant's witnesses will be put to inconvenience is no ground for transferring a case. 21 O. C. 217=48 Ind. Cas. 105. In an application for transfer under ss. 22 and 23 the question of want of jurisdiction of trying Court could not be raised. 1 Pat. L. T. 277=56 Ind. Cas. 920. In an application for transfer under s. 22 the convenience of the parties alone should not be considered, but the locality of the circumstances should indicate that a suit should proceed in a Court different from the Court chosen by the plaintiffs. A. I. R. 1935 All. 979=1935 A. L. J. 1093=1935 A. W. R. 1125.

**23. [Ss. 22—24.]** (1) Where the several Courts having jurisdiction are

To what Court application lies, subordinate to the same appellate Court, an application under section 22 shall be made to the appellate Court.

(2) Where such Courts are subordinate to different appellate Courts but to the same High Court, the application shall be made to the said High Court.

(3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.

**Amendment in Burma.**—In sub-section (2) omit "but to the same High Court" and "said." Omit section (3)—G. B. Order, April, 1937.

**Scope**—For the purpose of transfer of a case, original side is subordinate to the High Court. A. I. R. 1928 Lah. 183; A. I. R. 1923 Rang. 22=1 Bur. L. J. 194=11 L. B. R. 446=77 Ind. Cas. 403; but see A. I. R. 1927 Cal. 290=45 C. L. J. 71=100 Ind. Cas. 331. Where it has been held that a Judge of the original side not being subordinate to the High Court an application for the transfer of a suit pending before him will not lie before a bench of the same High Court. High Court can direct case to be tried by Court subordinate to High Court other than making such direction A. I. R. 1928 Pat. 640=110 Ind. Cas. 693. Application to a High Court to transfer a suit pending in a subordinate Court to another High Court falls under s. 23 (3) of the Code. S. 24 does not lay down any provision for the transfer of suits from and to the Courts subordinate to different High Courts. The High Court can, however, determine whether the suit shall proceed which order shall be final. A suit can be transferred only upon two grounds, viz, (a) that there will not be an impartial trial by the trying Court or (b) that there is a manifest preponderance of convenience to the petitioner if the suit is transferred to the other Court. The convenience of the plaintiffs and their witnesses has also to be considered. 1 Pat. L. T. 277=(1920) Pat. 235=56 Ind. Cas. 920. The mere fact that it would be more convenient to the applicant to have the action tried elsewhere is no sufficient reason to force the plaintiffs summarily out of the Court in which they are entitled to sue and to deprive them of the substantial sum expended by them on Court-fees by the application of inherent powers not utilized in practice except for the purpose of preventing or remedying grave abuse. A. I. R. 1924 Lah. 306=69 Ind. Cas. 772. Under sub-section (3) High Court has jurisdiction to order the transfer of a suit even to a Court, outside its appellate jurisdiction. A. I. R. 1927 Bom 79=51 B. 26=28 Bom. L. R. 1442=100 Ind. Cas. 154. A case can be transferred from one Court to another, only when the Court is satisfied that the proceedings in the trying Court institute an abuse of the process of the Court. It is doubtful whether under s. 23 (3) a case can be transferred from the *Purnea* Court to the original side of the Calcutta High Court. 57 Ind. Cas. 649=1 Pat. L. T. 389. The Chief Court of Oudh is a High Court within the meaning of this section. 4 O. W. N. 1114=A. I. R. 1928 Oudh 89; see also A. I. R. 1934 All. 14. Where an *ex parte* decree was passed by the Calcutta Small Cause Court and the action was sought at Surat Court and a suit for declaring the decree null and void was brought in Surat Court: *Held* that an application ought to be made under s. 23 (3) for an order that the suit should be transferred to the Calcutta High Court. 51 B. 26=100 Ind. Cas. 154=28 Bom. L. R. 1442=A. I. R. 1927 Bom. 79 Ss. 22 and 23 have no application where the only question is whether a suit should be tried by a subordinate Court or a High Court or a Chief Court. But the High Court can exercise powers similar to those as contemplated by ss. 22 and 23 1933 A. L. J. 1507. A

Court of Small Causes is not competent to make a reference in a case under s. 23, Cl. (3) if the Court has no jurisdiction to hear the suit. And the Chief Court will not order transfer of the suit, when no great inconvenience will be caused to the defendant by the trial of the suit in the Court in which it is filed. 77 P. L. R. 1909. The Original side of a High Court is not subordinate to the Appellate side of the High Court within the meaning of sub-section (3). A. I. R. 1934 Rang. 265=7 R. R. 88=12 Rang. 548=151 Ind. Cas. 573.

**24. [S. 25.]** (1) On the application of any of the parties and after notice to the parties and after hearing such General powers of transfer of them as desire to be heard, or of its own and withdrawal. motion without such notice, the High Court or the District Court may at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same ; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same ; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes, shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

**Scope**—Where original Court finds that it has no jurisdiction to hear a suit the District Judge has no jurisdiction under s. 24 for that section contemplates only a transfer from one competent Court to another to transfer the suit. A. I. R. 1930 Lah. 195=125 Ind. Cas. 334. The power of transfer vested in the High Court or the District Court by s. 24 is untrammelled by any conditions. Section 24 is general in its terms, and the power of transfer and withdrawal defined by that section can be exercised even with respect to suits which can be entertained by one Court alone ; all that is necessary to bring into play the jurisdiction of the High Court or the District Court to exercise the power of transfer and withdrawal given under s. 24 is that the suit, appeal or other proceeding sought to be transferred should be "pending before it" or "pending in any Court subordinate to it". The mere fact, that the suit, appeal or other proceeding is pending in a Court not having jurisdiction to dispose of the same, cannot oust the jurisdiction of the High Court or the District Court to withdraw or transfer that suit, appeal or other proceeding from the Court in which it is pending to some other Court competent to try the same. A. I. R. 1934 All. 569=1934 A. L. J. 345=3 A. W. R. 690=A. L. R. 1934 All. 412=150 Ind. Cas. 942. It is competent to the Senior Subordinate Judge to make an administration order transferring a case from one of the Subordinate Judges attached to that Court to another. But when once a Judge has taken cognizance of a suit, any order removing the suit from his file is an order of transfer. It may be no serious inconvenience is occasioned by such an order if the Judge has not commenced to hear the evidence ; but that is not the point. If the order is an order for transfer, it can only be made by the District Judge or the High Court, and once a Judge has taken cognizance of a suit, any order removing the suit from his file is an order of transfer, and cannot be regarded as a mere administrative redistribution of business. A. I. R. 1935 Bom. 286=37 Bom. L. R. 255=59 B. 466=158 Ind. Cas. 382. Two suits raising same issue instituted in two different Courts may be ordered to be tried together. A. I. R. 1926 Cal. 326=87 Ind. Cas. 170. No Court has jurisdiction to transfer a suit from one Court to another unless both Courts are subordinate to it

and even a High Court has no power to compel its institution in any Court beyond its jurisdiction. This power is entirely different from that of an order returning plaint to be presented in the proper Court. 13 N. L. R. 81=40 Ind. Cas. 393. Transferring an application for review to a Court other than that which decide the case is illegal. 50 Ind. Cas. 910 ; see also 45 Ind. Cas. 910 ; see also 45 Ind. Cas. 13= (1918) M. W. N. 291=24 M. L. T. 32=8 L. W. 259. Where a suit has been instituted in a Court not having jurisdiction, the District Judge has no jurisdiction to transfer case so as to confer jurisdiction upon another Court. (1919) Pat. 409=53 Ind. Cas. 892 ; see also 5 P. L. J. 588=(1920) Pat. 274=1 Pat. L. T. 637=57 Ind. Cas. 522. Under s. 24, District Court to which an appeal has been remanded by the High Court has power to transfer it unless the High Court's order discloses a clear intention of limiting the powers. A. I. R. 1922 All. 35=44 A. 211=20 A. L. J. 44=66 Ind. Cas. 317. No Court can direct a transfer from one Court to another unless both Courts are subordinate to it. High Courts should not except under most exceptional circumstances transfer suit instituted in a Court subordinate to itself to another Court which is beyond its territorial jurisdiction even if the High Court is presumed to have such power. A. I. R. 1924 Nag. 152=75 Ind. Cas. 548. A Court which really had no territorial jurisdiction went into the case made local inspections and recorded evidence fully, when the defect was found out. The plaint was then returned to be presented to the proper Court : *Held* that under s. 24, the High Court should send it for disposal to the first Court itself. A. I. R. 1923 All. 249=21 A. L. J. 86=73 Ind. Cas. 495.

Application for transfer of suit by defendant raising issue as to jurisdiction of Court in which suit is pending is not maintainable. 26 S. L. R. 277=139 Ind. Cas. 496=A. I. R. 1932 Sind 215=A. L. R. 1932 Sind 241. District Judge can transfer suit remanded to one Court by Additional District Judge, to another Court of equal or competent jurisdiction under his control. 140 Ind. Cas. 238=33 P. L. R. 1015=13 Lah. 806=A. I. R. 1933 Lah. 29. It is no doubt true that proceedings on remand under Order 41, rule 25, C. P. Code were proceedings in appeal, which remained pending in the Court of the Additional District Judge, but this circumstance does not affect the power of the District Judge under s. 24, C. P. Code to transfer any suit, appeal or civil proceedings from one subordinate Court to another Court of equal or competent jurisdiction. 140 Ind. Cas. 238=1. R. 1932 Lah. 638.

Where applicant for transfer has not engaged any pleader and opposite party has engaged pleaders and paid them fees, the case should be transferred to another Court in the same place and it would be unjust to transfer it to another place. A. I. R. 1924 Oudh 372=80 Ind. Cas. 826=11 O. L. J. 337=27 O. C. 401. Original side of the High Court has no power to transfer Insolvency proceedings from one Court to the other. A. I. R. 1927 Rang. 105=4 Rang. 554=100 Ind. Cas. 265 ; see also A. I. R. 1925 Bom. 543=49 B. 788=27 Bom. L. R. 1207=91 Ind. Cas. 160.

**Application.**—An application to transfer an insolvency petition from the file of Subordinate Judge to the original side of the High Court for trial and disposal is not maintainable. A. I. R. 1928 Mad 1091=55 M. L. J. 671=28 L. W. 369=52 M. 57=114 Ind. Cas. 352. Where numerous suits are sought to be transferred an application should be made in respect of each separately. 4 Pat. L. J. 13=49 Ind. Cas. 208.

**After notice to the parties**—In case of application by one party for transfer of case, notice to opposite party is necessary. Transfer without notice in such case is tainted with material irregularity. 136 Ind. Cas. 381=1931 A. L. J. 1061=53 A. 916=A. I. R. 1933=781 ; see also 74 Ind. Cas. 249=A. I. R. 1923 Oudh 240 ; A. I. R. 1926 All. 17=23 A. L. J. 918=90 Ind. Cas. 287 ; A. I. R. 1923 Oudh 240=26 O. C. 62=74 Ind. Cas. 249 ; 137 Ind. Cas. 430=A. I. R. 1932 Cal. 265=A. I. R. 1932 Cal. 302.

An order of transfer made without notice to the other party can be set aside in revision and on the application of one party. A. I. R. 1925 Lah. 189=78 Ind. Cas. 614. Where District Judge transfers case on his own motion, he can do so without notice to the parties, but if the transfer is applied for by a party he must issue notice before ordinary transfer under s. 24. 18 A. L. J. 351=U. P. L. R. (All.) 83=58 Ind. Cas. 560. It is illegal to transfer suit without notice to parties. 33 P. W. R. 1917=40 Ind. Cas. 111 ; see also 13 N. L. R. 203=42 Ind. Cas. 746. In the absence of a notice informing parties of the transfer of case a party may well plead that he did not know in what Court he had to appear. A. I. R. 1923 Lah. 444=84 Ind. Cas. 238. Notice to plaintiff's pleader in original Court is not sufficient. A. I. R. (1932) Lah. 668. No notice before institution is necessary. A. I. R. 1933 Lah. 635=146 Ind. Cas. 38.

**At any stage.**—Where High Court refuses to transfer a case on its own motion, it can still transfer the case at a subsequent stage on plaintiff's application and after notice to defendant. A. I. R. 1923 All. 153=20 A. L. J. 97=70 Ind. Cas. 942. No order for transfer should be made when not only the evidence for the parties have been closed, but even the arguments have been heard. A. I. R. 1934 Lah. 593=35 P. L. R. 574=A. L. R. 1934 Lah. 442.

**Suit, appeal, etc.**—Suit includes execution proceedings and so execution proceedings can be transferred under this section. A. I. R. 1925 All. 276=47 A. 57=85 Ind. Cas. 746 ; A. I. R. 1926 Lah. 345=95 Ind. Cas. 243 ; A. I. R. 1926 Mad. 421=49 M. 746=50 M. L. J. 161=95 Ind. Cas. 12. The word "proceeding" covers only those proceedings which were contemplated at the time of the passing of the C. P. Code. 25 A. L. J. 433=A. I. R. 1927 All. 469=49 A. 460=101 Ind. Cas. 247. Where a Judge has already expressed an opinion when deciding an appeal, it is desirable in the interests of justice, that the other appeal should be heard and decided by another Court. A. I. R. 1934 Lah. 539=35 P. L. R. 468=152 Ind. Cas. 696. The High Court may not exercise the power of transferring appeals in its discretion. A. I. R. 1936 Pat. 345=163 Ind. Cas. 962. It is not open to a District Judge in whose Court an appeal under s. 476B, Cr. P. Code is pending to transfer the appeal to the Court of Subordinate Judge. A. I. R. 1935 All. 440=1935 A. L. J. 473.

**Any Court Subordinate to it.**—Divisional Court not being subordinate to High Court, latter cannot transfer petition for alimony to Divisional Court. 40 B. 109=17 Bom. L. R. 948=31 Ind. Cas. 331. District Judge can transfer case from Munsiff to Sub-Judge having Small Cause Jurisdiction, though thereby party is deprived of his right of appeal. 36 Ind. Cas. 881. A Sub-Judge cannot exercise the powers under s. 24 unless the same are delegated to him by the District Judge under ss. 37 and 44, Punjab Courts Act. 33 P. W. R. 1917. A District Judge can delegate power of transfer but when so delegated it can only be exercised in cases pending in a Court subordinate to the Court exercising the power. 52 Ind. Cas. 352.

**Competent to try.**—The word "competent" refers to pecuniary jurisdiction only. 143 Ind. Cas. 75=54 A. 824=1932 A. L. J. 984=A. I. R. 1932 All. 660. Court, not possessing both pecuniary and territorial jurisdiction is not competent. 136 Ind. Cas. 304=1931 A. L. J. 1061=53 A. 916=A. I. R. 1933 All. 178. Proper construction to be put on the word is to hold that Court is competent when it can as regards nature and subject-matter of case and as regards pecuniary value, entertain transferred suit. Word does not include competence from point of view of territorial jurisdiction. 10 O. W. N. 443=A. I. R. 1933 Oudh 154=144 Ind. Cas. 578=6 Luck. 347 "Competent" means of jurisdiction competent to try. 55 M. 960=1932 M. W. N. 763=36 L. W. 476=139 Ind. Cas. 477 M ; 63 M. L. J. 689=A. I. R. 1932 M. 683=A. L. R. 1932 M. 1213. A transfer cannot be made from one Court to another, unless the original Court has jurisdiction such one order, if made is void. A. I. R. 1928 Mad. 405=54 M. L. J. 145=27 L. W. 609=108 Ind. Cas. 413.

**Grounds for transfer.**—Where the Judge has expressed his opinion, the case should be better transferred to another Court. 109 Ind. Cas. 402 (Lah). Applicant under s. 24 must make out strong case for transfer. Court should not interfere unless expense and difficulties are so great as would lead to injustice. A. I. R. 1930 Lah. 944=130 Ind. Cas. 523. The fact that a Judge has decided a point of law arising in a previous case is not a good ground for transferring from his Court another case involving the same point. A. I. R. 1930 Lah. 176=124 Ind. Cas. 687 ; A. I. R. 1926 Lah. 343=94 Ind. Cas. 394 ; 78 P. L. R. 1922=67 Ind. Cas. 228=1921 Lah. 357. The burden always lies on the applicant to make out a strong case for transfer. Mere balance of convenience would not be a sufficient ground, unless the expense and difficulties of the trial would be so great as to lead to injustice, or the forum was deliberately chosen for the purpose of working injustice. A. I. R. 1931 Lah. 115=31 P. L. R. 920=130 Ind. Cas. 523. The onus of establishing sufficient ground for transfer lies heavily on the applicant. He must prove that he has a reasonable apprehension that he might not get justice in the Court in which the suit is pending. Incidents said to have taken place between a party's pleader and the Judge do not justify transfer of the case from the Judge. A. I. R. 1934 Lah. 593=35 P. L. R. 574=A. L. R. 1934 Lah. 442. Even in a case of a communal or quasi-communal nature, it is not open to a person belonging to one community to obtain the transfer of the case from a Court presided over by a Judge belonging to the rival community. A. I. R. 1934 Lah. 762=150 Ind. Cas. 334=36 P. L. R. 29.

The High Court has no jurisdiction to transfer the matter if the matter sought to be transferred is not one within the jurisdiction of the Court. A. I. R. 1934 Sind 95=150 Ind. Cas. 839. Defendant having influence in the town is no ground for transfer. A. I. R. 1927 Lah. 80=98 Ind. Cas. 859. Prejudice of Judge against party's pleader cannot be presumed to operate against the party and hence it is no ground for transfer unless it is likely to affect judicial attitude of Judge towards the party or his case. 91 Ind. Cas. 559. The reasonable apprehension on the part of the litigant should no doubt receive consideration, but the apprehension must be such as a reasonable man might reasonably be expected to have. A. I. R. 1923 Lah. 564=77 Ind. Cas. 762. Transfer of case without looking to convenience of parties and without hearing defendants is illegal. 23 C. L. J. 295=33 Ind. Cas. 797. Burden of proof of balance of convenience as ground for transfer is on applicant. 14 A. L. J. 242=32 Ind. Cas. 613. Removal of suit against plaintiff's will from Court where plaintiff brought it, must be supported by good cause. 17 A. L. J. 371=41 A. 38=50 Ind. Cas. 368. The convenience of the parties in the conduct of litigation is certainly a relevant consideration, and it is perhaps not too much to say that it is the basis of nearly all statutory jurisdiction on the civil side. 135 Ind. Cas. 402=27 N. L. R. 307=A. I. R. 1932 Nag. 49=A. L. R. 1932 Nag. 15; see also A. I. R. 1933 Lah. 635=146 Ind. Cas. 38. Where a judgment-debtor is justified in thinking the Subordinate Judge is prejudiced against him, the case should be transferred to some other Court. A. I. R. 1933 Lah. 915. Mere fact that a Subordinate Judge is subordinate to Commissioner in his executive capacity is no ground for transfer of suit, where the person applying transfer has been dismissed from the office of *Ghatwal* and the suit is a declatory suit relating to that office. A. I. R. 1933 Pat. 338. Where District Judge decided appeal on entire evidence including additional evidence admitted by himself and his decree was set aside and the case was remanded, it was held on application of transfer by party that it was a proper case for transfer. 10 O. W. N. 443=A. I. R. 1933 Oudh 154=8 Luck. 347. An order for transfer by the High Court is competent where two appeals are pending involving the same questions in the District Court and the High Court respectively. A. I. R. 1933 Lah. 1033. Close relationship of the Judge to one of the parties is a ground for transfer. A. I. R. 1932 Sind 206. Mere balance of convenience is not sufficient ground for transfer, though it may be a relevant consideration. A. I. R. 1931 Lah. 115. Where in some prior proceedings the Judge has expressed an opinion very definitely as to the nature and value of the plaintiffs' account books and the same books have to be considered in the subsequent suit, it is desirable to transfer the case in the interest of justice. 32 P. L. R. 388. In ordering transfer convenience of the parties is not merely a relevant but also a material consideration, and such convenience is at the basis of all the arrangement for statutory jurisdiction on the civil side. Where in a partition suit the greater part of the property is situated in B District, that is a reason why it should be advantageous to both parties to have the suit tried in that district. The mere fact that the majority of the parties reside there, is not very weighty consideration in favour of transfer. That a party has engaged a counsel with heavy fees is a circumstance to be considered when ordering transfer. A. I. R. 1927 Nag. 219=10 N. L. J. 67=101 Ind. Cas. 723.

**Sub-section (2)**—Under s. 24 (2), the District Judge can transfer a Small Cause suit from the Court of Small Causes to another Court not exercising Small Cause Court powers. 147 Ind. Cas. 334. The word "suit" when occurs for the second time in sub-section (2) must be taken to include proceeding : otherwise parts of sub-section would be quite meaningless. A. I. R. 1936 Pesh. 56=161 Ind. Cas. 54.

**Sub-section (4)**.—The expression "Court of Small Causes" includes a Court vested with the powers of a Court of Small Causes as well as Courts constituted under Act IX of 1887, and where a suit is transferred under that sub-section procedure for trial is governed by the Provincial Small Cause Courts Act and no appeal lies from the decision. A. I. R. 1929 Cal. 354=49 C. L. J. 237=56 C. 588=120 Ind. Cas. 589; A. I. R. 1923 Pat. 49=4 Pat. L. T. 259=69 Ind. Cas. 717; 14 A. L. J. 705; 38 A. 425=14 A. L. J. 549=34 Ind. Cas. 113; 39 A. 214=15 A. L. J. 69=37 Ind. Cas. 809; 38 M. 25=23 M. L. J. 373=(1912) M. W. N. 1086=17 Ind. Cas. 425; A. I. R. 1928 All. 609=26 A. L. J. 839=110 Ind. Cas. 493; 46 Ind. Cas. 893=40 A. 525=16 A. L. J. 548; 1931 A. L. J. 953; 12 A. L. J. 853=26 Ind. Cas. 56; 27 C. L. J. 461=44 Ind. Cas. 881; A. I. R. 1929 Cal. 354=49 C. L. J. 237=56 C. 588=120 Ind. Cas. 589; 43 Ind. Cas. 314=20 O. C. 350. Section 24 (4) does



not apply to cases transferred from Small Causes Court to Honorary Munsiff's Court. Decrees passed by latter Court are therefore appealable. 1 U. P. L. R. (H. C.) 27 ; 54 Ind. Cas. 435. Section 16, Small Cause Courts Act is no bar to the exercise of powers of transfer of the District Judge under s. 24, C. P. Code, A. I. R. 1934 Lah. 901 ; see also 151 Ind. Cas. 385=A. I. R. 1934 All. 530. Where Small Cause Court finding question of title involved, sends a case to District Judge and the latter transfers the same to a Munsiff, the District Judge's order of transfer is under s. 23, Provincial Small Cause Courts Act and not under s. 24, C. P. Code. An appeal therefore, lay from the decision. 64 Ind. Cas. 335 ; see also 115 Ind. Cas. 127=26 A. L. J. 772=50A. 810=A. I. R. 1929 A. 50. The Small Cause Court does not cease to exist if at any time there should be no Judge to preside over it. A. I. R. 1925 Lah. 561=26 P. L. R. 308=88 Ind. Cas. 139. Where a suit instituted in the Court of Small Cause is transferred to the regular side, the Judge trying the suit has the same powers as the Small Cause Court possessed in the matter of awarding compensation under s. 35A. A. I. R. 1930 Nag. 133=120 Ind. Cas. 412. Order of transfer passed under sub-clause (4) cannot invest Court not having Small Cause jurisdiction with such jurisdiction nor could such an order enable a Judge having Small Cause jurisdiction up to a particular limit to try suit exceeding that limit as a Small Cause suit. A. I. R. 1929 Mad. 513=56 M. L. J. 649=29 L. W. 810=121 Ind. Cas. 481. Where a Small Cause suit is transferred to a Court which is not invested with any Small Cause jurisdiction, the latter Court is to be deemed for the purpose of the transferred suit to be a Court of Small Causes. 55 M. 960=1932 M. W. N. 763=36 L. W. 479=63 M. L. J. 689=139 Ind. Cas. 477=A. I. R. 1932 Mad. 683=A. L. R. 1932 Mad. 1213 ; 135 Ind. Cas. 402=27 N. L. R. 307=A. I. R. 1932 Nag. 49=A. L. R. 1932 Nag. 15 ; 1933 A. L. J. 1196=A. I. R. 1933 All. 662=145 Ind. Cas. 701 ; A. I. R. 1935 All. 690=1935 A. L. J. 511=157 Ind. Cas. 210 ; A. I. R. 1935 All. 765 ; A. I. R. 1935 Nag. 42=31 N. L. R. 170 ; A. I. R. 1936 Lah. 883. Section 24 (4) makes no reference to the Court to which a case is transferred from a Small Cause Court being invested with Small Cause powers upto any particular extent or indeed with Small Cause Court powers at all. The terms of the section appear rather to be intended to confer the powers of a Small Cause Court upon the trying Court for that particular case irrespective of the powers with which the Court is invested. Sub-section (4) gives the power to transfer a suit from a Small Cause Court to a regular Court irrespective of the Small Cause Court powers of the Court to which the suit is transferred, provided the suit to be transferred is within the limits of the pecuniary jurisdiction of the Court to which the transfer is to be made. *Pcr Baker J.* in 56 B. 387=34 Bom. L. R. 931=139 Ind. Cas. 194=A. I. R. 1932 Bom. 486=A. L. R. 1932 Bom. 681. Sub-clause (4) does not deal with transfers to a Court already invested with Small Cause powers. The word "deemed" seems to indicate that it deals with transfers to a Court without such powers. Therefore where a suit is transferred to a Small Cause Court, there is nothing in the sub-section which requires that suits of higher value when transferred should be tried as Small Cause suits or that there shall be no appeal therefrom. 55 M. 960=1932 M. W. N. 763=36 L. W. 479=63 M. L. J. 689=139 Ind. Cas. 477=A. I. R. 1932 Mad. 683=A. L. R. 1932 Mad. 1213. Obviously s. 24 contemplates the transfer of a case from one existing Court to another existing Court. If therefore, a Court of Small Causes has ceased to exist or the officer invested with Small Cause Court powers has been transferred from the District and there is no other officer possessing such power there would be no Court from which the District Court can under s. 24 transfer the case to a ordinary Civil Court. The contingency where no Court or officer invested with Small Cause Court powers exists is provided for in s. 35 of the Provincial Small Cause Courts Act. 54 A. 171=A. I. R. 1931 All. 574=136 Ind. Cas. 357=1931 A. L. J. 953 (F. B.).

**Revision.**—High Court in its general powers of superintendence can direct transfer of a case where District Judge has refused to exercise that power under s. 24. A. I. R. 1926 Cal. 326=87 Ind. Cas. 170 ; A. I. R. 1927 Pat. 383=8 P. L. T. 777=103 Ind. Cas. 456. The High Court in revision has authority to retransfer a case to the original Court without the formality of first having the plaint filed in the Court to which the case is transferred. A. I. R. 1933 All. 249=21 A. L. J. 86=73 Ind. Cas. 495. The High Court has jurisdiction to make an order of transfer under s. 24 and not being a 'judgment' either under the Code or under any other "express enactment" an order of transfer made under s. 24 is not subject to appeal. A. I. R. 1935 Rang. 267 (F. B.)=13 Rang. 457=157 Ind. Cas. 1107.

**25. [Ss. 20—21.] (1)** Where any party to a suit, appeal or other proceeding pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the "Provincial Government,"\* who may, by notification in the official Gazette\* transfer such suit, appeal or proceeding to any other High Court.

Power of Governor-General in Council to transfer suits.

(2) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied to such case:

"Provided that no suit, appeal or proceeding shall be transferred to a High Court without the consent of the Provincial Government of the Province in which that High Court has its principal seat".†

**Scope.**—Where Governor-General in Council transfers a case to High Court on its original side, appeal lies to appellate side of the High Court. A. I. R. 1921 Mad. 687=(1922) M. W. N. 830.

**Amendment in Burma.**—This section has been omitted in Burma by G. B. order of 1937.

#### INSTITUTION OF SUITS.

**26. [S. 48.]** Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

**Scope.**—Suit is presented when the plaint was filed in Court and not on the date when it was ordered to be registered. A. I. R. 1921 Cal. 227=34 C. L. J. 465=66 Ind. Cas. 923; A. I. R. 1929 Mad. 480=113 Ind. Cas. 550; 17 S. L. R. 223=85 Ind. Cas. 893. Where a suit is instituted in Court without jurisdiction the second suit in proper Court is not continuation of former. A. I. R. 1929 P. C. 103=56 C. 1048=56 I. A. 128=(1929) A. L. J. 254=33 C. W. N. 485=29 L. W. 682=56 M. L. J. 614=6 O. W. N. 473=49 C. L. J. 462=31 Bom. L. R. 741=115 Ind. Cas. 550 (P.C.). The presentation of a plaint after the usual Court hours at the private residence of the Judge is valid though the Judge is not obliged to do so. A. I. R. 1922 Nag. 167=19 N. L. R. 23=65 Ind. Cas. 674; see also 34 A. 482 (F. B.)=9 A. L. J. 743=14 Ind. Cas. 744. Where plaintiff's servant signed and presented plaint and also signed *Vakil patra*, and the plaintiff did not make effort to show that servant was his recognized agent, it was held that the plaint was not properly presented. A. I. R. 1922 Bom. 113=46 B. 150=23 Bom. L. R. 911. Section 26 merely provides that every suit shall be instituted by the presentation of the plaint or in such other manner as may be prescribed. It does not say that the presentation should be by the plaintiff or his duly authorized agent. (1931) A. L. J. 777=A. I. R. (1931) All. 507. Section 26 enacts that "every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed." No other manner of instituting a suit has so far been prescribed. It may, therefore, be stated as a general proposition that, unless there is a special provision to the contrary, a proceeding that does not commence with a plaint cannot be held to be a suit. 13 L. 672=137 Ind. Cas. 266=33 P. L. R. 508=A. I. R. 1932 Lah. 374=I. R. 1932 Lah. 314.

#### SUMMONS AND DISCOVERY.

**27. [S. 64.]** Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.

**Scope.**—A suit was instituted on the last day for filing the suit under the Limitation Act. The plaint was insufficiently stamped and the deficit Court-fees not having been put in within the time fixed by the Court, the suit was dismissed. Thereafter on an application for review, the order of dismissal was set aside without any

\* Substituted by G. I. Order of 1st April, 1937.

† Inserted by G. I. Order dated 1. 4. 37.

notice to the defendant and time was granted for putting in the deficit Court-fee : *Held* that at the time the order of dismissal was set aside, there was no opposite party on whom the notice could be served, as the summons in the suit had not yet been issued on the defendant and as until the suit was registered, the suit could not be said to have been duly instituted. The order of dismissal passed at that stage of case can be reviewed without notice to the defendant. 26 C. W. N. 391=A. I. R. 1922 Cal 234=69 Ind. Cas. 43.

Service of summons where defendant resides in another Province.

28. [S. 85.] (1) A summons may be sent for service in another Province to such Court and in such manner as may be prescribed by rules in force in that province.

(2) The Court to which summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto.

**Amendment in Burma.**—This section has been omitted in Burma by Government of Burma (*Adaptation of Laws*) Order, 1937.

29. [S. 650A.] Summonses issued by any Civil or Revenue Court situate beyond the limits of British India may be sent to the Courts in British India and served as if they had been issued by such Courts :

[India] "Provided that the Court issuing such summonses have been established or continued by the authority of Central Government or of the Crown Representative, or that the Provincial Government by whose Courts a summons is to be served has by notification in the official Gazette declared the provisions of this section to apply to Courts of the Province."\*

[Burma] "Provided that the Governor has by notification in the Gazette declared the provisions of this section to apply to such Courts."†

**Notes**—Where a witness in a Native State fails to appear he should be examined on commission. 144 Ind. Cas. 983=10 O. W. N. 173=A. I. R. 1933 Oudh 128.

**British India.**—"British India" shall mean as respects the period before the commencement of the Government of Burma Act, 1935, all territories and places with His Majesty's Dominions which were for the time being governed by His Majesty through the Governor-General of India or through any Governor or officer subordinate to the Governor-General of India, and as respects any period after that date shall have the same meaning as in the Government of India Act, 1935."—*Burma General Clauses Act*, s 2(5).

30. [New.] Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either Power to order discovery and the like. of its own motion or on the application of any party,—

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence ;

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid ;

(c) order any fact to be proved by affidavit.

31. [New] The provisions in sections 27, 28 and 29 shall apply to Summons to witness. summonses to give evidence, or to produce documents or other material objects.

32. [New.] The Court may compel the attendance of any person to whom a summons has been issued under section Penalty for default. 30 and for that purpose may—

\* Has been substituted in India by G. I. Order 1-4-37.

† Has been substituted in Burma by G. B. Order,

- (a) issue a warrant for his arrest ;
- (b) attach and sell his property ;
- (c) impose a fine upon him not exceeding five hundred rupees ;
- (d) order him to furnish security for his appearance and in default commit him to the civil prison.

**Scope.**—This section does not apply to the case of a party who fails to produce documents which he has been ordered to produce. 5 Pat. L. J. 550=1 Pat. L. T. 668=58 Ind. Cas. 281. No fine will be imposed on person who fails to attend on the day for which he was summoned, if he is not subsequently required to give evidence and has not been called upon to appear on subsequent date. A. I. R. 1929 All. 850=1929 A. L. J. 1216=123 Ind. Cas. 97. Jurisdiction to impose fine vested by s. 32 has to be exercised only in the manner laid down by Order XVI. *Ibid.*

#### JUDGMENT AND DECREE.

**33. [S. 198.]** The Court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.

**Scope.**—Decree drawn up by the Court must be in accordance with judgment. A. I. R. 1924 All. 818=22 A. L. J. 791=46 A. 864=82 Ind. Cas. 184. Court's omission to draw up decree following judgment does not deprive party of his right to appeal. 66 P. R. 1919=52 Ind. Cas. 479. A party is not required to apply to draw up decree nor is he required to apply for copy of a decree until it is drawn up. Hence party's failure so to apply does not affect right to appeal. A. I. R. 1924 Nag. 271=20 N. L. R. 131=78 Ind. Cas. 996. The judgment having been pronounced a decree must be prepared in accordance with it and the Court cannot direct the stoppage of the preparation of the decree. 11 P. 532=13 P. L. T. 304=137 Ind. Cas. 855=A. I. R. 1932 Pat. 228=1. R. 1932 P. 195.

#### INTEREST.

**34. [S. 209] (1)** Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie.

**Scope.**—Section 34 or its principle is not intended to be used as a means for providing for compound interest but to relieve the debtor of a harder rate of interest. But an order allowing interest up to date of decree and compounding it with the principal on the date of the decree and allowing interest thereon at the Court rate is sanctioned by s. 34 of the C. P. Code. 61 C. 711. The plaintiff cannot claim the contract rate of interest as a matter of right. 61 C. 711. The Court has discretion in awarding interest. A. I. R. 1936 Rang. 141=8 R. R. 558=162 Ind. Cas. 352. Rate of interest is a matter to be decided on the facts of each case. A. I. R. 1924 Nag. 346=76 Ind. Cas. 131. Grant of interest is a matter within the discretion of Court. A. I. R. 1921 Lah. 954=29 P. L. R. 670=111 Ind. Cas. 354. High Court will not interfere with lower Court's discretion in granting interest, unless exercised unreasonably. 13 O. L. J. 338=92 Ind. Cas. 679. Where lower Court does not consider question of interest, the appellate Court may grant it. A. I. R. 1927 Lah. 679=9 Lah. L. J. 347=104 Ind. Cas. 146. Where compound and *post diem* interest is clearly stated in the document, it should be allowed by the Court. A. I. R. 1931 Nag. 91=13 N. L. J. 213=130 Ind. Cas. 817. Where money due to plaintiff was not paid and there was no stipulation for interest, interest may be allowed by way of damages. A. I. R. 1930 Cal. 357=34 C. W. N. 121=57 C. 953=127 Ind. Cas. 76. Compound

interest at 2 per cent. should be allowed when it is stipulated. It is high but not extortionate. A. I. R. 1931 Nag. 91=13 N. L. R. 212=130 Ind. Cas. 817. The mortgagee cannot get any interest in excess of the rule of *Damdapat* for the period between the date of filing the suit and the date fixed for repayment in the preliminary decree. A. I. R. 1931 Nag. 88=13 N. L. J. 192=130 Ind. Cas. 159. Where the rule of *Damdapat* applies, the contractual obligation as regards interest, comes to an end as soon as the maximum limit of interest is reached. When that obligation has come to an end before suit is filed, the Court has discretion to award interest from the date of the suit over and above the amount of interest allowed by the rule. A. I. R. 1929 Nag. 355=121 Ind. Cas. 45. Where a lessee knowing that the lessor would not be able to put him in possession waits for three years and then institutes suit for recovery of possession, he cannot claim interest on the sum paid as premium or for amount of rent paid at the time of the loan. A. I. R. 1930 Cal. 385=57 C. 114=125 Ind. Cas. 607. Interest allowed as stipulated for mortgage-deed at Re. 1-8 as per cent. (compound) *pendente lite* is not excessive. A. I. R. 1929 Nag. 6=113 Ind. Cas. 891.

Interest on *mesne profits* is within discretion of Court. High Court will not interfere. A. I. R. 1921 Pat. 430=2 Pat. L. T. 648=68 Ind. Cas. 903; A. I. R. 1921 Pat. 367=2 P. L. T. 147=62 Ind. Cas. 116. S. 34 has no applicability to a suit brought by mortgagee to recover the amount due to him on foot of the mortgage as a mortgage decree until it reaches the stage shown by Order XXXIV, r. 6, Civil Procedure Code cannot be said to be decree for money. A. I. R. 1927 Lah. 445=8 Lah. 721=9 Lah. L. J. 301=28 P. L. R. 380=103 Ind. Cas. 437. In mortgage suits question of interest is determined not by s. 34 but by Order XXXIV. A. I. R. 1927 P. C. 1=54 C. 161=25 A. L. J. 23=31 C. W. N. 390=52 M. L. J. 372=38 M. L. T. (P. C.) 53=54 I. A. 1=29 Bom. L. R. 752=45 C. L. J. 279=25 L. W. 685=8 P. L. T. 173=99 Ind. Cas. 686 (P. C.); 8 Luck. 315=144 Ind. Cas. 983=10 O. W. N. 173=A. I. R. 1933 Oudh 218; but see 63 I. A. 114=15 Pat. 210=38 Bom. L. R. 349=1936 O. W. N. 28=160 Ind. Cas. 285=43 L. W. 268=17 Pat. L. T. 89=1936 A. L. J. 108=1936 M. W. N. 308=63 C. L. J. 154=40 C. W. N. 328=A. I. R. 1936 P. C. 63=70 M. L. J. 355 (P. C.); 52 I. A. 418 (433)=5 Pat. 135=30 C. W. N. 482, where it has been held that in such a case s. 34 does apply. High Courts in India being Court both of equity and of law, can award interest in cases which are not provided for by the Interest Act. It is impossible to say that equitable principles should not be applied in cases of contract. A question of equity must apply to all cases. A. I. R. 1927 Mad. 47=97 Ind. Cas. 453. The expression "decree for the payment of money" is very general and must be construed so as to include a claim to unliquidated damages. A. I. R. 1926 Mad. 1021=51 M. L. J. 243=1926 M. W. N. 691=97 Ind. Cas. 871. Mortgage decree should give interest at contract rate till date fixed for repayment, and not at 6 per cent. 6 L. W. 296=33 M. L. J. 679=42 Ind. Cas. 349. Court may allow *post diem* interest though not allowed in mortgage-deed. 3 O. L. J. 390=36 Ind. Cas. 685. Court's jurisdiction to grant further interest after period of grace allowed by preliminary decree is under s. 209 of the Code of 1882. The proper period for allowing such further interest is when decree absolute is made. 27 C. L. J. 576=46 Ind. Cas. 469. It is within competence of trial Court in a suit for arrears of rent against an under-proprietor to award future interest at such rate as it considers reasonable. 6 C. L. J. 362=22 O. C. 287=52 Ind. Cas. 865. Although 24 per cent. per annum is high rate. Small Cause Court has jurisdiction to grant it. A. I. R. 1923 Cal. 650=37 C. L. J. 399=27 C. W. N. 549=74 Ind. Cas. 601. Interest need not be granted where co-sharer makes no demand for his share of profits. A. I. R. 1923 Nag. 197=19 N. L. R. 24=73 Ind. Cas. 142. In a suit for recovery of money representing depreciation in the value of goods supplied, no interest can be claimed during pendency of suit. 32 C. L. J. 239=60 Ind. Cas. 288. The granting of interest, not specifically asked for in a suit for money, cannot be regarded as inconsistent relief and a Court has discretion to award interest subsequent to suit. A. I. R. 1921 Lah. 125=2 Lah. 256=107 P. L. R. 1921=64 Ind. Cas. 896; 34 Bom. L. R. 129=136 Ind. Cas. 796=A. I. R. 1932 Bom. 319. Mere hardship would not justify a Court in disallowing contract rate of interest, unless evidence is that the lender has taken undue advantage of his position. 60 Ind. Cas. 733. Rate allowed by mortgage-bond being excessive is not sufficient reason to refuse contract rate of interest. 60 Ind. Cas. 693. Court can give compound interest under this section. A. I. R. 1934 Bom. 86; 61 C. 711. Section 141 does not control the discretion passed by the Court under s. 34, Civil Procedure Code, to allow future interest at such rate as the Court deems reasonable. A. I. R. 1934 Oudh 239=11 O. W. N. 763=148 Ind. Cas. 1207. Where the delay

**Interest pending suit.**—Interest between date of suit and decree being discretionary with Court can be granted at contractual rate. A. I. R. 1930 Lah. 733=125 Ind. Cas. 629; see also A. I. R. 1930 Mad. 721=53 M. 475=32 L. W. 143=123 Ind. Cas. 7; A. I. R. 1930 Lah. 985=129 Ind. Cas. 281. Award of interest pending suit though discretionary should not be refused in the absence of proper reasons. A. I. R. 1926 Nag. 109=22 N. L. R. 49=88 Ind. Cas. 699; see also 18 N. L. J. 323; 161 Ind. Cas. 862=A. I. R. 1936 Pat. 191. Court can award interest at contractual rate from date of institution to date of judgment. 96 Ind. Cas. 310. Where party delays ascertainment of damages for a long time, interest should be allowed from date of suit. A. I. R. 1925 Bom. 547=27 Bom. L. R. 1168. It is within Court's discretion to award interest on redemption money from date of suit. 87 Ind. Cas. 719=A. I. R. 1926 Bom. 362=27 Bom. L. R. 492. Unless rate of interest at mortgage is excessive and transaction unfair, such rate should be allowed *pendente lite*. A. I. R. 1925 Cal. 268=29 C. W. N. 118=85 Ind. Cas. 218. Court has discretion to award interest on damages from date of the suit to date of the decree but the Court should state its reasons. A. I. R. 1924 Cal. 637=39 C. L. J. 77=80 Ind. Cas. 87. Even if money carried no interest *ab initio* or for any reason had ceased to carry interest from and after the date of the suit for some earlier date, the Court may in a proper case apply s. 34 and grant interest. A. I. R. 1924 Nag. 348=78 Ind. Cas. 711. Court has discretion as to the rate of interest to be awarded after institution of the suit till judgment and where Court below awarded 8 per cent. Privy Council refused to interfere. A. I. R. 1922 P. C. 46=43 M. L. J. 46=26 C. W. N. 737=24 Bom. L. R. 971=67 Ind. Cas. 423 (P. C.). Interest pending suit is discretionary. But it should be refused in absence of proper reasons. 23 C. W. N. 336=50 Ind. Cas. 862. In a suit for recovery of money representing depreciation in the value of goods supplied, no interest can be claimed during pendency of suit. 42 A. 230=18 A. L. J. 100=59 Ind. Cas. 20. Section 34 has no application to interest after the institution of the suit when discretions for calculations for this interest are contained in Order 34, Sch. I, C. P. Code. A. I. R. 1931 Nag. 161; 54 C. 161 (P. C.). Where the trial Court in exercise of its discretion has refused to award interest after suit, the appellate Court will not interfere with the order. 33 Bom. L. R. 1220=A. I. R. 1931 Bom. 549=55 B. 657. In a pure case of damages, the Court cannot give interest before judgment. 33 Bom. L. R. 703=A. I. R. (1931) Bom. 386=113 Ind. Cas. 861. The Court has power under s. 34 of the Code to give interest after suit whether claimed specifically in the plaint or not. 33 Bom. L. R. 1220=A. I. R. (1931) Bom. 549=55 B. 657. Interest is not to be granted in the case of damages. 25 S. L. R. 104=A. I. R. (1931) Sind 121. Section 34, C. P. Code gives the Court no discretion to award interest for a period prior to the date fixed in the case of a decree based on a mortgage, to the provisions of which the rule of *damaupat* applies. A. I. R. 1931 Nag. 88=130 Ind. Cas. 154. The award of future interest from date of institution of suit till realisation is discretionary with the Court. Such interest disallowed on ground of the long delay in bringing the suit and in the other circumstances of the case. 1932 (P. C.) L. 833=33 P. L. R. 19=A. I. R. 1932 Lah. 312=A. L. R. 1932 Lah. 83; see also 156 Ind. Cas. 836=A. I. R. 1935 Lah. 307; A. I. R. 1935 Pesh. 58. Usually the contract rate should prevail till the decree. 143 Ind. Cas. 43=14 Pat. L. T. 133=A. I. R. 1933 Pat. 207.

**Interest from date of decree.**—Auction-purchaser at Court sale paying off in good faith prior mortgage is entitled to claim interest on the amount paid. A. I. R. 1930 Mad. 471=58 M. L. J. 343=31 L. W. 832=125 Ind. Cas. 247. In an action to dissolve and wind up the partnership affairs interest should only be allowed to the plaintiffs from the date of final decree and not from the date of the plaint. A. I. R. 1930 P. C. 185=(1930) A. L. J. 868=34 C. W. N. 737=32 Bom. L. R. 1152=59 M. L. J. 121=52 C. L. J. 15=32 L. W. 184=24 P. L. R. 328 (P. C.)=124 Ind. Cas. 891. The decree for accounts and for partition does not fall under s. 34 and sub-section (2) does not apply. A. I. R. 1925 Bom. 406=49 B. 282=27 Bom. L. R. 226=94 Ind. Cas. 688. Santhal Parganas Regulation does not limit the powers of a Court under s. 34 to award interest on the decretal amount until realization. A. I. R. 1926 Pat. 359=5 Pat. 433=96 Ind. Cas. 627. Where interest charged at 24 per cent. interest after decree was not allowed. A. I. R. 1928 Lah. 811=109 Ind. Cas. 416. Future interest being discretionary with trial Court, appellate Court will

not interfere unless discretion is improperly exercised. A. I. R. 1925 Lah. 308=7 Lah. L. J. 1=86 Ind. Cas. 240. Where decree allowed interest until realization, it might be paid after sale and before confirmation of it. 17 A. L. J. 617=50 Ind. Cas. 772. In redemption suit, where mortgagee persists in unwarrantable claim, interest was disallowed from date of trial Court's decree. A. I. R. 1921 P. C. 100=24 C. W. N. 977=14 L. W. 710=7 O. L. J. 350=23 O. C. 150=58 Ind. Cas. 891=69 Ind. Cas. 65. The award of interest after the date of decree is in the discretion of the Court, it cannot be claimed as a matter of right. A. I. R. 1933 Lah. 352=142 Ind. Cas. 408=14 Lah. 591=34 P. L. R. 859. 12 per cent. interest after the date of the decree is excessive. Ordinarily 6 per cent. interest should be granted. A. I. R. 1933 Lah. 101; A. I. R. 1933 Lah. 780=144 Ind. Cas. 601. In case of *kundis* which carries no interest, future interest should not be allowed. 145 Ind. Cas. 725=A. I. R. 1923 Lah. 440.

**Sub section (2).**—Where a decree is silent with respect to further interest from date of decree to the date of payment the Court must be deemed to have refused and a separate suit will not lie. 9 L. B. R. 78=11 Bur. L. T. 132=40 Ind. Cas. 858. In spite of sub section (2) in the normal case it is highly desirable that the Judge should give his reason for disallowing future interest. A. I. R. 1928 Nag. 115=106 Ind. Cas. 270. Court cannot under s. 151 award interest or damages in lieu of interest on decretal amount where no interest has been awarded by decree. A. I. R. 1924 Rang. 275=3 Bur. L. J. 58=82 Ind. Cas. 427. Where judgment-debtor deposited decretal amount intending decree-holder to receive on condition of given security during pendency of appeal, but security was not given and consequently money was not paid, the decree-holder cannot claim interest from date of deposit. A. I. R. 1929 Lah. 316=120 Ind. Cas. 423. Where decree is silent as to interest, interest should be deemed to have been refused. A. I. R. 1924 Mad. 102=45 M. L. J. 687=18 L. W. 686=33 M. L. T. 101=1923 M. W. N. 753=75 Ind. Cas. 566. The costs of the Privy Council do not carry interest, unless such interest is specially mentioned. A. I. R. 1934 Pat. 192=15 Pat. L. T. 513=13 Pat. 21=A. L. R. 1934 Pat. 103.

### COSTS.

#### 35. [Ss. 218—221, Jud. Act, 1890, S. 5, R. S. C. O. 45, r. 1.] (1)

##### Costs.

Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

(3) The Court may give interest on costs at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such.

**Scope**—The award of cost rests with the discretion of the Judge. Discretion means judicial discretion, which must be exercised with established legal principles and not to be exercised capriciously. 24 C. W. N. 352=58 Ind. Cas. 421; A. I. R. 1937 Mad. 145. This section does not give an absolute discretion but it can be interfered with if exercised wrongly and arbitrarily. 18 M. L. T. 460=1915 M. W. N. 1021=31 Ind. Cas. 312; see also 35 Ind. Cas. 429=156 P. L. R. 1916; A. I. R. 1925 Cal. 1085=42 C. L. J. 137=90 Ind. Cas. 486; A. I. R. 1931 Oudh 9=7 O. W. N. 1055; 145 Ind. Cas. 376=A. I. R. 1933 Rang. 160; 29 N. L. R. 8=141 Ind. Cas. 262=A. I. R. 1933 Nag. 49; 144 Ind. Cas. 76; 142 Ind. Cas. 656=A. I. R. 1933 Mad. 224; A. I. R. 1933 Oudh 455=10 O. W. N. 981; 35 Bom. L. R. 569=A. I. R. 1933 Bom. 304. The "costs incident to all suits" referred to in section 35 of the Civil Procedure Code does not only include costs from the institution of the suit to its termination but also includes costs incurred by a party before the institution of a suit, but naturally or intimately connected with the suit. 40 C. W. N. 762. Where the lower appellate Court acts in an arbitrary manner with the proper decision of the Court of first instance with

regard to costs, the High Court would interfere with the order of the lower appellate Court. A. I. R. 1931 Oudh 9=129 Ind. Cas. 165. Costs should not be allowed in suits on immoral contract. A. I. R. 1928 Sind 173=113 Ind. Cas. 366. The rule that costs should follow event may be departed from in a proper case. A. I. R. 1926 Bom. 189=28 Bom. L. R. 126=98 Ind. Cas. 358. No interference in appeal unless discretion is based on wrong ground. 22 C. W. N. 372=44 Ind. Cas. 870. The provision of this section is supplementary to s. 47. 35 C. L. J. 156=68 Ind. Cas. 600. Where defendant's conduct necessitates suit, he is disallowed cost even when successful. 63 M. L. J. 868=36 L. W. 833=1932 M. W. N. 1017=A. I. R. 1932 Mad. 779. Award of proportionate cost is proper where party has succeeded only on one issue and has failed on other important issue. 55 M. 636=A. I. R. 1932 Mad. 470.

Party failing to cite authorities showing correct practice should be deprived of costs. A. I. R. 1926 Mad. 642=50 M. L. J. 428=94 Ind. Cas. 306. A litigant who succeeds may be deprived of his costs for sufficient reason cannot be ordered to pay the costs of the other side except in exceptional cases. 40 Ind. Cas. 614. Where misconduct of defendant forces plaintiff into litigation defendant even if successful, is not entitled to costs. 21 C. W. N. 1137=7 L. W. 133 (P. C.)=(1917) M. W. N. 236; see also 43 C. 190=19 C. W. N. 880. Where suit is overvalued, plaintiff is entitled to costs on proper valuation. A. I. R. 1925 Sind 275=87 Ind. Cas. 1002. Where the suit is not justifiable, the plaintiff should bear the cost. A. I. R. 1923 Cal. 691=50 C. 419=77 Ind. Cas. 910. Plaintiff coming to enforce a legal right with no misconduct, omission or neglect on his part is entitled to costs. A. I. R. 1921 Lah. 104=62 Ind. Cas. 812. Where the suit was rendered inevitable by the gross mismanagement of the trust estate by the appellant, the appellant should pay costs. A. I. R. 1923 Pat. 420=4 P. L. T. 326=71 Ind. Cas. 280. *Bona fide* mistake of temple committee in instituting proceedings should not be penalised. 5 L. W. 672=38 Ind. Cas. 695. Mere exaggeration of claim is no ground for disallowing costs. 3 O. L. J. 204=34 Ind. Cas. 690. Where both parties make false allegations, costs not allowed to either side. 160 P. W. R. 1915=31 Ind. Cas. 862. Where litigation was not caused by either party, each party to bear its costs. 24 C. W. N. 189=30 C. L. J. 270=53 Ind. Cas. 741. A suit for damages pursued in vindictive spirit. Appellate Court ought not to interfere with the discretion of allowing costs unless some misapprehension of facts or violation of principle or absence of the exercise of the discretion is apparent. 24 C. W. N. 352=58 Ind. Cas. 421; A. I. R. 1923 Mad. 485=17 L. W. 358=24 Cr. L. J. 585=73 Ind. Cas. 329. Where grounds of appeal was loosely drafted, appellant though successful was ordered to pay respondent's cost. A. I. R. 1925 Oudh 561=28 O. C. 203=85 Ind. Cas. 445. Where plaintiff claimed very high interest, costs were disallowed. A. I. R. 1923 Oudh 8=9 O. L. J. 442=69 Ind. Cas. 657. Delay in disposal of suit due to laches of plaintiff cannot be considered in deciding question of costs. 65 Ind. Cas. 709. Where defendant raises all possible pleas unsuccessfully, he was ordered to bear the cost personally. A. I. R. 1922 Lah. 229=4 Lah. L. J. 210=60 Ind. Cas. 362. Where Court holds that reference to arbitration is invalid it has jurisdiction to pass an order as to the costs of award. A. I. R. 1928 M. 370=54 M. L. J. 580=(1928) M. W. N. 228=27 L. W. 803=109 Ind. Cas. 175. Where costs of interlocutory application has been ordered to be costs in cause, party obtaining general costs is entitled to the costs of application. Judge hearing case has no jurisdiction to interfere, with previous order of costs of application. A. I. R. 1926 Bom. 596=50 B. 430=28 Bom. L. R. 1283=97 Ind. Cas. 133; see also A. I. R. 1924 Bom. 398=26 Bom. L. R. 282=80 Ind. Cas. 263. Court has power to award costs to a defendant out of the deceased plaintiff's estate even where suit abates by reason of the cause of action not surviving. 37 M. L. J. 596=10 L. W. 656=43 M. 284=54 Ind. Cas. 118. Where decree has been appealed against unsuccessfully trial Court has jurisdiction to deal with taxation of costs under its decree. A. I. R. 1926 Bom. 367=28 Bom. L. R. 550. Where suit brought against two sets of defendants, claiming alternative relief, two sets of costs can be awarded on the dismissal of the suit. A. I. R. 1933 All. 466=1933 A. L. J. 796=144 Ind. Cas. 703. Where surviving appellant is not solvent to pay costs, costs can be ordered against the estate of deceased appellant. A. I. R. 1934 All. 1=1933 A. L. J. 1933=55 A. 687. No doubt ordinarily costs are awarded to a mortgagee decree-holder in a mortgage suit or appeal, in the absence of any express direction to the contrary would be part of the mortgage amount decreed and would be a charge on the mortgaged property. But where costs are awarded to the mortgagee in appeal by some defendants without any mention of other defendants, the



defendants appellants are liable to pay costs of appeal personally. A. I. R. 1934 All. 89. In certain cases the Court is competent to make persons liable for costs who are not parties to the suit. A. I. R. 1934 Nag. 250. In a fit case a successful party may also be deprived of cost. A. I. R. 1934 Mad. 224=39 L. W. 147=148 Ind. Cas. 523. On a dismissal of suit several defendants should not be awarded separate costs when they are represented by the same advocate and their case is practically identical. A. I. R. 1934 Rang. 259=7 R. R. 142=152 Ind. Cas. 71. In a mortgage suit the Court is competent to make the mortgagor personally liable for costs of the litigation. 40 L. W. 576=1934 M. W. N. 321. Where the remaining defendants are in no way responsible for the discharge of the other defendants who claimed to have no interest in the property, the costs of the latter should not be charged against the mortgaged estate but would be paid by the plaintiff. A. I. R. 1934 Nag. 264=30 N. L. R. 331. Certain property was purchased subject to a mortgage. Subsequently the mortgagee brought a suit on his mortgage. The purchaser, who was in possession of the property, has tried to put off the mortgagee and thus wanted to make as much money out of the delay as he could : *Held* that the purchaser should bear half the taxed costs of the suit. A. I. R. 1936 Lah. 705=38 P. L. R. 896. A mortgagee sued on his mortgage the mortgagor impleading therein the *pui*sne mortgagees as defendants. The *pui*sne mortgagees contested the claim of the prior mortgagee. In the decree passed in the above suit costs were passed against all the defendants. It was contended that as it was a mortgage suit costs could not be saddled on the *pui*sne mortgagees : *Held* that s. 35, Civil Procedure Code, is clear that the Court has discretion in the matter of costs. A. I. R. 1936 Lah. 607=38 P. L. R. 1024=164 Ind. Cas. 841=17 Lah. 520.

Where a person whose suit has been dismissed by the trial Court is successful in appeal and the appellate Court remands the case for trial in accordance with law, he is entitled to his costs if he ultimately succeeds in the trial Court, but it is a fairer order to direct that the costs of appeal in the appellate Court should abide the final result of the suit. A. I. R. 1936 Rang. 316=9 R. R. 59=164 Ind. Cas. 133. When the judgment-debtor appellant was evading the satisfaction of the decree for a long time, inspite of his ability to pay, he was not allowed any costs even when successful. 148 Ind. Cas. 246=A. I. R. 1934 Oudh 10=11 O. W. N. 72.

Where the action of the petitioning creditor in making the application for the winding up of a company and in insisting upon further proceedings in liquidation is not *bonafide* he should be saddled with the entire costs of the liquidation. And in the absence of a clear provision in the Companies Act dealing with a case of this kind, the matter is governed by s. 35, Civil Procedure Code, under which section the High Court can pass proper order in this behalf. A. I. R. 1934 Lah. 746. A plaintiff appellant should be allowed the cost of appeal where a wrong decree has been passed by the trial Court through oversight. 11 O. W. N. 1165=A. I. R. 1934 Oudh 449.

The Court has power to order on unsuccessful infant plaintiff to pay the defendant's costs and *vice versa* and such costs can be ordered to be paid out of the minor's estate. Orders can be made on a next friend or guardian *ad litem* to pay the costs personally. A. I. R. 1934 Cal. 474=59 C. L. J. 9=51 C. 227=151 Ind. Cas. 399. But in considering the provisions of the Code relating to costs *i. e.* s. 35 or to damages for improper arrest or attachment before judgment, it is not right to deal with the general law where a minor's estate is to be made liable in respect of the acts of a guardian. A. I. R. 1935 Mad. 866=42 L. W. 542=1935 M. W. N. 1055=158 Ind. Cas. 831.

**Cost should follow the result of the suit.**—The ordinary rule is that a successful party is entitled to the cost of the suit. 18 B. 474. But a successful party may be ordered to pay the cost of the suit because his conduct in the case does not appear to be creditable and straight-forward. 124 Ind. Cas. 140=A. I. R. 1930 M. 154=58 M. L. J. 29=1929 M. W. N. 831=31 L. W. 97 ; 27 M. 341 ; 12 C. 18 (P. C.) ; 54 M. L. J. 603=110 Ind. Cas. 5=A. I. R. 1928 Mad. 346. A party must produce all such material documents relating to the suit as may be in his possession, even though no application has been made for their production by the other party. Non-production would entail deprivation of costs. A. I. R. 1929 All. 134=1929 A. L. J. 262=112 Ind. Cas. 791. Where party, tries to profit by his fraud, discretion in awarding costs should be used against him. A. I. R. 1930 Mad. 707=123 Ind. Cas. 39. Where a case was not properly presented in trial Court, but appeal was successful, the costs

in the trial Court was refused. A. I. R. 1930 Mad. 218=58 M. L. J. 210=21 L. W. 65=53 M. 480=122 Ind. Cas. 504; see also 104 Ind. Cas. 325=A. I. R. 1927 Lah. 723; A. I. R. 1929 Lah. 246=118 Ind. Cas. 533; A. I. R. 1930 Lah. 240=115 Ind. Cas. 23. In an application by plaintiff to revenue authorities for partition of land, the defendant set up exclusive title to the land and repeated it in the Civil Courts but failed. The plaintiff should be allowed the costs of the suit. A. I. R. 1930 Lah. 222=116 Ind. Cas. 717. Where a point as to limitation was newly raised in application for review, the party was allowed to raise it but was ordered to pay the costs of that application. A. I. R. 1928 P. C. 103=6 R. 302=30 Bom. L. R. 842=47 C. L. J. 515=26 C. L. J. 657=32 C. W. N. 845=55 I. A. 161=28 L. W. 204=54 M. L. J. 696 (P. C.). Costs generally abide result. A. I. R. 1923 Lah. 513=77 Ind. Cas. 416; A. I. R. 1925 Cal. 297=40 A. L. J. 504=85 Ind. Cas. 127; A. I. R. 1921 Bom. 71=45 Bom. 1177=23 Bom. L. R. 189=61 Ind. Cas. 271; A. I. R. 1923 B. 265=25 Bom. L. R. 323=47 B. 637. Costs to successful party are given as compensation for probable expenses. In complicated cases, special costs may be given. A. I. R. 1921 Cal. 185=48 C. 427=25 C. W. N. 297=60 Ind. Cas. 337. Wasting of Court's time by false or unnecessary evidence justifies refusal of cost. A. I. R. 1927 Mad. 474=100 Ind. Cas. 224. Absent defendant need not be necessarily exempted from payment of costs. Antecedent conduct of defendant leading up to necessity for institution of suit should be looked into. A. I. R. 1925 Cal. 569=29 C. W. N. 297=86 Ind. Cas. 321. Where trial Court decided case on generally accepted rulings which were subsequently explained or dissented from, the appellate Court in reversing the decision should not saddle the respondent with costs. A. I. R. 1930 All. 167=124 Ind. Cas. 23. In awarding costs, Court should not include the costs of witnesses who were summoned but were not examined in Court. A. I. R. 1936 Lah. 681=164 Ind. Cas. 689=38 P. L. R. 219. Where two sets of defendants, having the same defence appeared through different counsel, they are not entitled to two separate sets of costs. 1936 A. M. L. J. 63. A successful party may be deprived of cost, if he has rendered elucidation difficult by confusion of pleadings. 18 R. D. 510=15 L. R. 652 (Rev.).

**Sub-section (2).**—Successful party is generally entitled to cost. 122 Ind. Cas. 378; 54 M. L. J. 603=27 L. W. 841=110 Ind. Cas. 5=A. I. R. 1928 Mad. 346. Sub-section (2) provides that where a Court directs that costs shall not follow the Court, the Court shall state the reasons in writing. 16 R. D. 290=12 U. D. 336; A. I. R. 1928 Oudh 224=5 O. W. N. 35=107 Ind. Cas. 881; A. I. R. 1925 Bom. 527=27 Bom. L. R. 422; A. I. R. 1923 Lah. 302=75 Ind. Cas. 64; 3 U. P. L. R. All. 55=64 Ind. Cas. 962; 24 C. W. N. 352=58 Ind. Cas. 421; 17 R. D. 164; A. I. R. 1933 Nag. 49=29 N. L. R. 8; 1936 A. M. L. J. 63. Such discretion may be interfered with when there has been violence of any established principle, misapprehension of facts and no real exercise of discretion. 3 U. P. L. R. All. 55=64 Ind. Cas. 962; 24 C. W. N. 352=58 Ind. Cas. 421. Reasons should be stated also when granting greater or less costs than are usually granted in a particular case. A. I. R. 1928 Nag. 171=108 Ind. Cas. 740. Where Court's discretion results in costs following even, reasons need not be stated. 95 Ind. Cas. 446 (Nag.). Where not only the reasons are not stated but there is no reason at all why any cost should not be allowed and the main expenditure in the case appears to have been due to the folly of the party against, when the decree has been passed, the full costs in the case should be allowed. 16 R. D. 290=12 U. D. 336.

**Appeal against order of cost.**—The awarding of costs is a matter entirely within the discretion of trial Court and if the trial Court has exercised that jurisdiction in a judicial manner it is not open to the appellate Court to interfere with the discretion of the trial Court except for good reasons which are clear from the facts and circumstances in the case. Where the appellate Court interferes on wrong grounds, the High Court can interfere in the second appeal. A. I. R. 1934 Oudh 259=11 O. W. N. 754=149 Ind. Cas. 901; see also A. I. R. 1931 Oudh 9=6 Luck. 378.

**Appeal only against order of costs while accepting decisions on main point is not maintainable.** A. I. R. 1930 Bom. 445=32 Bom. L. R. 406=126 Ind. Cas. 334. Discretion exercised will not be interfered with unless the lower Court proceeds manifestly upon wrong ground. A. I. R. 1925 Oudh 699=2 O. W. N. 901=91 Ind. Cas. 111; 72 Ind. Cas. 993=A. I. R. 1923 Bom. 37; 47 C. 67=56 Ind. Cas. 334; 20 C. W. N. 929=23 C. L. J. 606=36 Ind. Cas. 655. Appeal is entertainable against a decision on the question of costs where a question of principle is involved. 21 C. W. N. 339=39 Ind. Cas. 388; A. I. R. 1934 Mad. 73; 42 B. 327=20 Bom. L. R. 905=

47 Ind. Cas. 762 ; 25 Bom. L. R. 242=47 B. 559=72 Ind. Cas. 324 ; 40 A. 558=16 A. L. J. 592=48 Ind. Cas. 478 ; A. I. R. 1921 U. B. R. 20=63 Ind. Cas. 811 ; 3 U. P. L. R. (A.) 55=64 Ind. Cas. 262 ; A. I. R. 1930 Lah. 234 ; 30 Bom. L. R. 1622=53 B. 178. Some order as to costs must be made, so failure to do so is appealable. A. I. R. 1929 Oudh 155=25 O. C. 385=10 O. L. J. 20=73 Ind. Cas. 222. Second appeal lies on question of costs if question of law or principle is involved or discretion is exercised arbitrarily. 2 Lah. 332=27 P. L. R. 391=100 Ind. Cas. 598 ; 35 C. L. J. 156=68 Ind. Cas. 60 ; 2 Lah. L. J. 310 ; 52 Ind. Cas. 961 ; 97 P. W. R. 1918=45 Ind. Cas. 948 ; 56 Ind. Cas. 971 ; A. I. R. 1921 Cal. 156=34 C. L. J. 475=66 Ind. Cas. 903

Question of costs cannot be raised newly in second appeal. A. I. R. 1923 All. 334=75 Ind. Cas. 527. Second appeal does not lie on question of costs concurrently decided. A. I. R. 1926 All. 419=93 Ind. Cas. 1008. No appeal lies against direction how costs are to be taxed. A. I. R. 1925 Bom. 432=27 Bom. L. R. 692=89 Ind. Cas. 211. Where trial Court orders parties to bear their own costs, and only one party appeals therefrom, such party cannot be ordered to pay costs of non-appealing party in trial Court. A. I. R. 1929 Lah. 177=30 P. L. R. 600=118 Ind. Cas. 464.

**Interference by High Court.**—High Court will not interfere unless question of principle is involved. A. I. R. 1931 All. 126=(1931) A. L. J. 16=129 Ind. Cas. 551 ; A. I. R. 1929 Oudh 406=6 O. W. N. 689=119 Ind. Cas. 449 ; A. I. R. 1926 Oudh 35=90 Ind. Cas. 577 ; 46 Ind. Cas. 544 ; 27 C. L. J. 78=45 Ind. Cas. 733 ; 32 Ind. Cas. 579=3 L. W. 109=19 M. L. T. 86. But the High Court can interfere where reason given by the lower Court is not supported by facts. 11 N. L. R. 189=31 Ind. Cas. 880. Where trial Court had given good reasons for order as to costs, and the first appellate Court interfered without giving any reasons, the High Court interfered. A. I. R. 1923 Oudh 114=27 O. C. 64=9 O. L. J. 629=74 Ind. Cas. 369. The High Court can interfere in second appeal where question of principle is involved. 41 A. 254=17 A. L. J. 169=49 Ind. Cas. 696. But there would be no interference where reasonable discretion has been exercised. 73 Ind. Cas. 507=A. I. R. 1924 Oudh 110.

**Appeal to Privy Council.**—Where leave to appeal obtained but appeal not presented, appellant must pay costs of application. A. I. R. 1925 Bom. 471=27 Bom. L. R. 699=89 Ind. Cas. 213. Where respondent lodged a case but did not appear at the hearing and the appeal was dismissed with costs, the costs should be paid to the respondent down to the lodging of the case. 47 A. 459=87 Ind. Cas. 292=41 C. L. J. 450=27 Bom. L. R. 853 (P. C.)=49 M. L. J. 238.

**Costs against legal practitioners.**—High Court cannot order a legal practitioner to pay the costs of an application or suit personally except where s. 35 can be made applicable. A. I. R. 1930 All. 225=(1930) A. L. J. 402=52 A. 619=125 Ind. Cas. 477 (F. B.). Section 35 has a wider scope and authorizes a Court to make an order as to costs, against a person who is not a party to the litigation but the section has nothing to do with the misconduct of Advocates. Cases of contempt of Court are not within the scope of the section. *Ibid.*

**Sub section (3).**—There is no such thing as a "Court rate" of interest. A rate of six per cent. per annum which is the maximum awardable on costs may be appropriate rate of interest to allow for damages. A. I. R. 1926 Nag. 363=94 Ind. Cas. 971. Interest should not be allowed until costs have been actually incurred. 60 Ind. Cas. 345. Where judgment is silent as to costs, it can be included in decree. 35 Ind. Cas. 218.

**Account suit.**—Costs against unsuccessful party can be given in preliminary decree. A. I. R. 1930 All. 72=121 Ind. Cas. 550. Where defendants are largely responsible for litigation and hampering investigation they must pay full costs. 24 C. W. N. 110=30 C. L. J. 417=54 Ind. Cas. 636 ; see also 20 C. W. N. 368=35 Ind. Cas. 383.

**Costs in administration suit.**—Where litigation is caused by act of deceased, estate should pay the cost. A. I. R. 1931 Sind 17=25 S. L. R. 72=129 Ind. Cas. 300. Costs of intervenor voluntarily coming in for future personal benefit should not be saddled on claimant. 24 C. W. N. 888=48 C. 352=59 Ind. Cas. 581.

**Cost of Commission.**—Party taking out commission succeeding to any extent is entitled to costs. A. I. R. 1929 Cal. 719=33 C. W. N. 614=122 Ind. Cas. 220.

**Cost against several defendants.**—Where a decree for cost has passed against several defendants, each is jointly and severally liable. A. I. R. 1923 Pat. 215=70 Ind. Cas. 782. Where the decree does not indicate the proportions in which the costs are to be borne by the defendants or respondents, the accepted rule is that such a decree imposes a joint and several liability on all the respondents. A. I. R. 1933 Pat. 24=13 P. L. T. 619=140 Ind. Cas. 874 ; see also A. I. R. 1932 Lah. 308=1932 P. C. L. 308 ; 1932 A. L. J. 411=A. I. R. 1932 A. 383=A. L. R. 1932 All. 641.

**Divorce suit.**—Wife's cost in a divorce suit should be paid by the husband irrespective of result. 66 Ind. Cas. 494=A. I. R. 1922 All. 243.

**Guardianship proceedings.**—Philanthropic society unsuccessfully seeking to be made a guardian of a minor's property cannot claim costs as they are not expenses either on account of necessities or as having been incurred for the welfare of the minor or for the protection of his estate. A. I. R. 1930 Cal. 397=51 C. L. J. 272=58 C. 15=126 Ind. Cas. 707.

**Income-tax reference.**—Successful assessee is entitled to recover deposit. A. I. R. 1931 All. 23=1930 A. L. J. 1548=52 A. 991=130 Ind. Cas. 634.

**Insolvency proceeding.**—Costs on petitioning creditor on setting aside adjudication order cannot be set off against debt due. A. I. R. 1930 B. 516=32 Bom. L. R. 1076=128 Ind. Cas. 24. Where simple order cost has been passed against official receiver, he is personally liable, he is entitled to be reimbursed on obtaining leave of Court. A. I. R. 1929 Mad. 105=55 M. L. J. 873=28 L. W. 719=114 Ind. Cas. 825. Official Receiver or trustee in bankruptcy may be ordered to pay costs. A. I. R. 1929 Mad. 105=54 M. L. J. 873=28 L. W. 719=52 M. 263=114 Ind. Cas. 825.

**Judicial separation.**—Section 35] does not empower Court to order costs in cases of judicial separation. A. I. R. 1930 Cal. 558=57 C. 1089=34 C. W. N. 319=127 Ind. Cas. 559.

**Maintenance suits.**—In awarding costs in maintenance suits, Courts should see if claim was excessive or exaggerated. A. I. R. 1930 Mad. 479=59 M. L. J. 531=32 L. W. 729=126 Ind. Cas. 597. Costs in proportion to success should be awarded. 10 L. W. 540=(1919) M. W. N. 878=53 Ind. Cas. 796 ; A. L. R. 1932 Mad. 1203. Where widow claimed maintenance at a rate found to be excessive though being prevented from knowing the actual income of the family property and where the defendant put up vexatious pleas to defeat her claim, she is entitled her full costs. A. I. R. 1928 Mad. 216=54 M. L. J. 530=28 L. W. 328=108 Ind. Cas. 712.

**Mortgage suit.**—Personal decree for cost against party who is not mortgagor can be granted by Court. A. I. R. 1931 Mad. 272=33 L. W. 263=131 Ind. Cas. 151. Mortgagor is ordinarily entitled to costs in redemption suit. But where question of compensation is involved and where mortgagor failed even to deposit the mortgage amount in full mortgagee is entitled to his cost. (1917) M. W. N. 275=38 Ind. Cas. 655. In a redemption suit where the mortgagee alleges the transaction to be a sale he is not entitled to cost. A. I. R. 1924 Bom. 172=25 Bom. L. R. 1209. Claim for cost is not an independent claim, costs form part of entire decretal amount to be realized. A. I. R. 1925 Cal. 1135=41 C. L. J. 697=93 Ind. Cas. 364. In a suit by mortgagee to enforce his security, the order as to costs may be to give him liberty to add his costs to his security. But there must be an order for payment of costs against mortgagor or receiver disputing validity of mortgage. A. I. R. 1930 Bom. 11=31 Bom. L. R. 1199=122 Ind. Cas. 857. The transferee of the equity of redemption can be personally saddled with cost where he raises pleas for which there is no foundation. 34 F. L. R. 171=A. I. R. 1933 Lah. 329. A *puisne* mortgagee may also be liable for cost for his own conduct, although ordinarily he is not so liable in a mortgage suit. A. I. R. 1933 Rang. 335. It is not illegal to award a personal decree for costs against a party to a suit who is not himself a mortgagor. A. I. R. 1931 M. 272=131 Ind. Cas. 151 ; see also A. I. R. 1931 Rang. 153=133 Ind. Cas. 225=9 R. 186.

**Parties.**—Guardian continuing as such after minor has attained majority, is liable for costs. A. I. R. 1929 Mad. 782=1929 M. W. N. 545=123 Ind. Cas. 805. The words "by whom" in s. 35 include next friends and guardians of minor plaintiffs and

defendants. A. I. R. 1929 Mad. 782=(1929) M. W. N. 545=123 Ind. Cas. 805. Third party claiming through a party to a suit, against whom costs are awarded is liable. A. I. R. 1930 Mad. 577=(1930) M. W. N. 153=58 M. L. J. 318=31 L. W. 262=53 M. 708=123 Ind. Cas. 47. Where several defendants raised various defences, separate costs can be awarded. 18 M. L. T. 460=(1915) M. W. N. 1021=31 Ind. Cas. 312; A. I. R. 1925 Bom. 432=27 Bom. L. R. 692=89 Ind. Cas. 211. In case of alternative relief against two sets of defendants unsuccessful defendant must bear costs of other defendant. 11 S. L. R. 1=42 Ind. Cas. 636. Defendant against whom suit fails is entitled to costs. A. I. R. 1926 Mad. 1084=51 M. L. J. 446=24 L. W. 378. Guardian *ad litem* of a party can be made to pay costs. A. I. R. 1928 Mad. 590=1928 M. W. N. 318=110 Ind. Cas. 380. Co-plaintiff not appealing made respondent cannot get costs of appeal. A. I. R. 1923 All. 119=20 A. L. J. 980=71 Ind. Cas. 424; A. I. R. 1929 Mad. 738=52 M. 845=30 L. W. 254=57 M. L. J. 374=122 Ind. Cas. 167. Defendant against whom claim is not proved is entitled to costs. A. I. R. 1926 Lah. 464=26 P. L. R. 254=97 Ind. Cas. 795. Plaintiff who had no just claim should pay defendant's costs. A. I. R. 1931 Cal. 76=52 C. L. J. 357=58 C. 561=129 Ind. Cas. 860. Where parties are joined, unnecessarily the party at whose instance they were joined should pay cost. 129 Ind. Cas. 235=A. I. R. 1930 Mad. 913=59 M. L. J. 524=23 L. W. 438. Costs cannot be granted against a party against whom no relief is sought. A. I. R. 1930 Mad. 195=30 L. W. 949=58 M. L. J. 118=124 Ind. Cas. 216.

**Damage suit.**—In a claim for moral damages, it is hardly right to order proportionate costs. A. I. R. 1929 Mad. 493=29 L. W. 604=(1929) M. W. N. 341=119 Ind. Cas. 149. In a libel case where claim for damage was much higher than allowed the cost is at the discretion of the Court. 117 Ind. Cas. 884=A. I. R. 1929 Lah. 129=10 Lah. 816; see also 78 Ind. Cas. 573=46 M. L. J. 366=A. I. R. 1924 Mad. 692=(1924) M. W. N. 373=20. L. W. 60.

**Partition suit.**—In a suit for partition where the defendant pleaded but failed to prove partition, he can be directed to pay costs of suit. 35 C. W. N. 115. Ordinarily in a partition suit, parties should bear their own costs. The institution fee should be borne proportionately by all. A. I. R. 1923 Bom. 464=77 Ind. Cas. 914. Where plaintiff's claim has not been contested, the costs up to preliminary decree cannot be awarded to the plaintiff. A. I. R. 1930 Pat. 336=11 Pat. L. T. 233=9 Pat. 773=125 Ind. Cas. 129. Where neither party is guilty of unfair contention, costs till the preliminary decree, should come out of the estate. 11 L. W. 5=54 Ind. Cas. 382.

**Will.**—Where litigation was caused by vagueness of Will, costs should come out of estate. 78 Ind. Cas. 249=A. I. R. 1925 Sind 195=19 S. L. R. 220.

**Cost of witness.**—Expenses incurred in procuring attendance of witnesses can be included in the cost. A. I. R. 1928 Lah. 800=10 Lah. L. J. 401=109 Ind. Cas. 476. Non-resident witness whether party or not is entitled to his expenses when his evidence is material and necessary. A. I. R. 1930 Bom. 24=54 B. 62=31 Bom. L. R. 1020=122 Ind. Cas. 121.

\* [35A.] (1) If in any suit or other proceeding, not being an appeal,

Compensatory cost in respect of false or vexatious claims or defences.

any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part, the Court, if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector, by the party by whom such claim or defence has been put forward, of costs by way of compensation.

(2) No Court shall make any such order for the payment of an amount

\* Section 35A was inserted by s. 2 of the Civil Procedure (Amendment) Act, 1922 (9 of 1922) which under section 1 (2) thereof may with the previous sanction of the Governor-General in Council be brought into force in any Province by the Local Government on any specified date.

exceeding one thousand rupees or exceeding the limits of its pecuniary jurisdiction, whichever amount is less :

Provided that where the pecuniary limits of the jurisdiction of any Court exercising the jurisdiction of a Court of Small Causes under the Provincial Small Cause Courts Act, 1887,\* and not being a Court constituted under that Act, are less than two hundred and fifty rupees, the High Court may empower such Court to award as costs under this section any amount not exceeding two hundred and fifty rupees and not exceeding those limits by more than one hundred rupees :

Provided, further, that the High Court may limit the amount which any Court or class of Courts is empowered to award as costs under this section.

(3) No person against whom an order has been made under this section shall, by reason thereof, be exempted from any criminal liability in respect of any claim or defence made by him.

(4) The amount of any compensation awarded under this section in respect of a false or vexatious claim or defence shall be taken into account in any subsequent suit for damages or compensation in respect of such claim or defence.

**Scope.**—Costs under s. 35 A are compensatory and not penal. A. I. R. 1931 Lah. 509=131 Ind. Cas. 377. In a suit against father and minor sons with identical interest in which the father alone has to bear the harassment and trouble it would be wrong to award costs under s. 35 A to both separately. *Ibid.* In case of harassment of the plaintiff by the defendant, punitive costs can be awarded under this section. 14 L. R. 15 (Rev.)=17 R. D. 227. Compensation can be awarded only after objection by the opposite party. A. I. R. 1926 Lah. 472=94 Ind. Cas. 78. An order under this section can be passed against next friend of a minor. 52A. 907=(1930) A. L. J. 1295=128 Ind. Cas. 225. A suit instituted in the Court of Small Cause was subsequently transferred to the regular side. Judge trying has same powers as the Small Cause Court in awarding compensation under s. 35 A. A. I. R. 1930 Nag. 133=120 Ind. Cas. 412. Power of Small Cause Court to award costs under s. 35 A is conditional upon its having express authority from High Court so to do or having jurisdiction up to Rs. 250. A. I. R. 1926 All. 354=94 Ind. Cas. 790. Appeal against order of Small Cause Court awarding cost under s. 35 A lies to District Judge. A. I. R. 1927 All. 554=94 Ind. Cas. 790. In appeal the Collector is not competent to award penal cost on the ground that the claim is false and vexatious. 15 L. R. 115 (Rev.). An Insolvency Court passing an order awarding exemplary costs, has powers in the exercise of its original civil jurisdiction to apply s. 35A, Civil Procedure Code ; and whether that section was in existence or not when the Provincial Insolvency Act came into force is immaterial. A. I. R. 1935 Nag. 207=158 Ind. Cas. 394=31 N. L. R. 365.

## PART II.

### EXECUTION.

#### GENERAL.

**36.** [New.] The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders.

Application to orders.

**Scope.**—A subsequent order of Court in regard to particular costs is executable even though those particular costs are not shown in the decree. A. I. R. 1931 Sind 13=15 S. L. R. 11=62 Ind. Cas. 507. An order directing the payment of an amount to Commissioner for work done is executable as decree an order 47 applies to such execution. A. I. R. 1925 Cal. 57=52 C. 269=40 C. L. J. 180=84 Ind. Cas. 724. An order under Order XX, rule 11 (2) is executable as if decree. A. I. R. 1925 Rang. 189=4 Bur. L. J. 32=2 Rang. 673=85 Ind. Cas. 291. Judgment obtained on admission under Order XII, rule 6. Plaintiff can enforce payment of amount awarded as

\* IX of 1887.

an order in execution proceeding, without a decree being drawn up. A. I. R. 1926 Sind 119=20 S. L. R. 216=92 Ind. Cas. 562. Section 36 is not limited to orders made only under the Code, but is applicable to all orders which could be included in the definition of the term "order" as defined in s. 2 (14). The order made on a notice of motion would be an order within the meaning of s. 2 (14) and could therefore be executed under s. 36. *Kila Chand v. Ajodhya Prasad*, A. I. R. 1934 Bom. 452=36 Bom. L. R. 992.

**37. [S. 649, 2nd para.]** The expression "Court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include—

Definition of Court which passed a decree.

(a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

**Scope.**—This section has no reference to a Court to which a decree has been transferred for execution. 162 Ind. Cas. 865=8 R. R. 596=A. I. R. 1936 Rang. 184.

**Clause (a).**—As a general rule decree of final Court can be executed. A. I. R. 1921 L. B. 37=11 L. B. R. 163.

**Clause (b)**—Court passing decree is proper Court to execute it though it has lost territorial jurisdiction over property due to assignment to another Court, at the time of presentation of execution petition. 42 M. 821=37 M. L. J. 284=26 M. L. T. 223=(1919) M. W. N. 640=11 L. W. 63 (F. B.)=53 Ind. Cas. 213. Court abolished and then revived with some jurisdiction is the same Court. A. I. R. 1926 Pat. 209=4 Pat. 688=7 P. L. T. 333=92 Ind. Cas. 900. Principle of s. 37 (b) is to be applied in interpreting the phrase "Court of first instance." A. I. R. 1926 Mad. 813=51 M. L. J. 161=(1926) M. W. N. 395=95 Ind. Cas. 587. Court passing decree can alone execute decree though losing territorial jurisdiction over property subsequently. A. I. R. 1928 M. 746=28 M. L. W. 885=114 Ind. Cas. 545; A. I. R. 1921 Pat. 152=6 P. L. J. 304=(1921) Pat. 186=2 P. L. T. 374=62 Ind. Cas. 487. Territorial jurisdiction is a condition precedent to the execution of a decree. 31 M. L. J. 22=35 Ind. Cas. 296. Where territorial jurisdiction of the Court passing decree has been taken away between the date of the preliminary decree in mortgage suit and final decree and it passes final decree also, it has power to transmit execution to Court having territorial jurisdiction but has no power to sell property. A. I. R. 1927 Mad. 627=50 M. 882=52 M. L. J. 605=38 M. L. T. 351=25 L. W. 671=(1927) M. W. N. 282=103 Ind. Cas. 245. If subsequent to the passing of money decree the area in which the judgment-debtor lived was transferred from the jurisdiction of one Court to another Court, the latter Court can execute the decree. A. I. R. 1924 Mad. 32=45 M. L. J. 210=(1923) M. W. N. 406=18 L. W. 17=73 Ind. Cas. 956; see also 49 Ind. Cas. 958; 49 Ind. Cas. 94; 31 M. L. J. 90=20 M. L. T. 327=35 Ind. Cas. 237; A. I. R. 1922 Mad. 10=46 M. 1=42 M. L. J. 344=65 Ind. Cas. 727; 57 M. 995=148 Ind. Cas. 1088=A. I. R. 1934 Mad. 283=66 M. L. J. 492. Where a Court passing decree was abolished but subsequently was re-established it can execute the decree provided it would have jurisdiction to try the suit to which the decree relates if instituted at time of execution. A. I. R. 1926 Pat. 209=4 Pat. 688=7 P. L. T. 333=92 Ind. Cas. 900. Mortgage decree passed without jurisdiction cannot be executed by Court having jurisdiction over subject-matter of mortgage except by transfer. 42 M. 461=36 M. L. J. 199=10 L. W. 370=51 Ind. Cas. 102. A preliminary decree for nearly Rs. 2,000, was made in a mortgage suit by Munsiff having power to try suits up to Rs. 2,000, his successor not having been vested with the same power, the final decree was made by the Sub-Judge. Munsiff in the mean time was vested with jurisdiction. The Munsiff could execute decree under s. 150 but not under ss. 37 and 38. 24 C. W. N. 699=57 Ind. Cas. 879; see also 1931 M. W. N. 842. A decree of the Calcutta High Court in a suit which arose within the present jurisdiction of the Patna High Court, will be executed under the supervision of the latter Court. 3 P. L. J. 435=48 Ind. Cas. 107. Where the notification does not purport to transfer business specifically or by general description from the Court

which passed the decree to the Court to which jurisdiction over the mortgaged property is transferred, the latter Court cannot execute the decree without transmission of the same from the Court which passed it. 55 M. 801=62 M. L. J. 687=35 L. W. 742=1932 M. W. N. 255=137 Ind. Cas. 305=A. I. R. 1932 Mad. 418=A. L. R. 1932 Mad. 117 (F. B.). The Court 'which passed the decree' according to the explanation in s. 37 (b) merely includes another Court in cases where the Court which originally passed the decree has ceased to have jurisdiction to execute it but does not exclude that latter Court. 35 C. W. N. 77=A. I. R. 1931 Cal. 312=52 C. L. J. 569=132 Ind. Cas. 149=58 C. 832. Where a money suit is transferred from the Court where it was instituted to another Court beyond that jurisdiction, and a decree is obtained in that Court and then the second Court is abolished and its whole business is sent by an administrative order of Government under the Civil Courts Act, to a third Court, the third Court has jurisdiction to entertain a petition for sending the decree to the first Court and the petition for execution need not be presented in the first instance in the first Court. 1913 M. W. N. 842. A Court passing the decree, does not lose jurisdiction of executing it, on account of subsequent curtailment of pecuniary jurisdiction. 37 C. W. N. 679=A. I. R. 1933 Cal. 684.

#### COURTS BY WHICH DECREES MAY BE EXECUTED.

**38. [S. 223, 1st para.]** A decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution.

**Scope.**—This section confers jurisdiction for execution on either the Court which passed the decree or the Court to which it is sent for execution. 35 C. W. N. 77=A. I. R. (1931) Cal. 312=52 A. L. J. 569=132 Ind. Cas. 149=58 C. 832 ; see also 15 Pat. 439=165 Ind. Cas. 959=A. I. R. 1936 Pat. 615. Where mortgaged property is situate outside the territorial jurisdiction of the executing Court it can order the sale of the property so mortgaged. 14 Lah. 457=143 Ind. Cas. 574=34 P. L. R. 815=A. I. R. 1933 Lah. 687 ; see also 14 C. 661 ; 15 C. 667 ; 21 C. 639 ; 45 M. 746 ; 80 Ind. Cas. 901. Territorial jurisdiction is necessary to carry on execution. 35 C. W. N. 77=A. I. R. 1931 Cal. 312=52 C. L. J. 569=132 Ind. Cas. 149.

Under this section a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution and where the trial Court is not the Court to which the decree is sent for execution, section 38 prevents it from proceeding with the suit to set aside a sale as a matter in execution and executing the decree. 68 Ind. Cas. 693=A. I. R. 1922 Nag. 189. The Code does not prohibit concurrent execution. A. I. R. 1921 L. B. 25=11 L. B. R. 15=63 Ind. Cas. 809 ; 34 Ind. Cas. 302=3 L. W. 336. Executing Court is to decide objection as to executability irrespective as to value of property. 101 P. R. 1915=19 P. W. R. 1915=32 Ind. Cas. 43. Where the application for execution is not at all entertained by the Court which alone had jurisdiction to entertain it, nor is it properly sent by that Court to another Court, other Court will not derive any jurisdiction by the mere filing of the application in that Court. A. I. R. 1921 Pat. 152=2 P. L. T. 374=6 P. L. J. 304=1921 Pat. 186=62 Ind. Cas. 487. No Court can execute a decree in which the subject-matter of the suit or of the application of the suit is property entirely outside the local limits of its jurisdiction except in cases of decrees for sale of mortgaged properties. A. I. R. 1925 Pat. 139=6 P. L. T. 71=80 Ind. Cas. 901.

This section is not exhaustive. If a suit instituted in Court A is transferred to Court B and Court B decided it, application for execution shall be presented to Court B and not to Court A. A. I. R. 1925 All. 276=47 A. 57=85 Ind. Cas. 746. In all cases where original Court has lost jurisdiction over subject-matter of suit between passing of decree and executing it, it should send its decree to the Court which has territorial jurisdiction. A. I. R. 1924 Mad. 457=46 M. L. J. 250=(1924) M. W. N. 38=19 L. W. 16=79 Ind. Cas. 806 ; see also 74 Ind. Cas. 608. Court passing decree can entertain application for its execution and determine questions as to the executability but cannot order sale of properties not within its territorial jurisdiction. A. I. R. 1931 Cal. 312=35 C. W. N. 77=52 C. L. J. 569=132 Ind. Cas. 149. Court passing decree can entertain application for execution so long as decree is not transferred for execution to another Court. A. I. R. 1931 Cal. 312=35 C. W. N. 77=52 C. L. J. 569=132 Ind. Cas. 149. A



decreeing Court is not deprived of its jurisdiction by the mere fact of transfer of the *darkast*. A. I. R. 1929 Bom. 413=31 Bom. L. R. 1105=53 B. 844=123 Ind. Cas. 507. High Court on its Original side can appoint a receiver by way of execution in respect of property situated outside its ordinary original jurisdiction in a proper case. A. I. R. 1930 Cal. 502=34 C. W. N. 238=51 C. L. J. 209=57 C. 964=128 Ind. Cas. 97. Where a decree has been transferred to another Court an application to the parent Court to re-transfer it to a third Court is proper. A. I. R. 1928 Mad. 493=110 Ind. Cas. 829. Jurisdiction to execute a decree can be exercised both by the Court which passes it, as well as by the Court to which the business of the former Court has been transferred. 107 Ind. Cas. 195. Issue of injunction to Court passing decree after transfer of decree for execution to Collector is futile. A. I. R. 1929 Oudh 235=4 Luck. 635=6 O. W. N. 226=117 Ind. Cas. 471. application made by decree-holder merely to issue notice to the judgment-debtor to pay the decretal amount, to the Court which passed the decree is not illegal or to an improper Court, although the judgment-debtor at the time was residing outside that Court's jurisdiction. A. I. R. 1929 Rang. 95=116 Ind. Cas. 474.

**39. [S. 228, 2nd and 3rd paras.]** (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court,—

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

(c) if the decree directs the sale or delivery of immovable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

(2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.

**Scope of the section.**—The word “may” in this section does not mean that it is in the discretion of the Court which passed the decree either to execute the decree or to send the application for execution to another Court, when the property against which execution is sought, is situated outside the jurisdiction of the Court which passed the decree. The discretion given there indicates that the Court should send the application for execution to another Court where it thinks that the decree is executable in the way prayed for. 59 C. 199=35 C. W. N. 1096=136 Ind. Cas. 533=A. I. R. 1932 Cal. 213=I. R. 1932 C. 213. Application for executing a decree and application for transferring a decree to another Court for execution are two distinct applications. Whether a particular application is an application or for transfer of a decree is to be decided on the nature of the prayer made, and not on the choice of a particular form. An application for transfer of a decree for execution cannot become an application for execution simply because the form of the latter has been adopted. 11 P. 785=13 P. L. T. 498=A. I. R. 1932 Pat. 309 (311). An application under this section need not be in any particular form. *Ibid.* An order of transfer takes effect from the date of the order of transfer. 56 M. 692=144 Ind. Cas. 923=65 M. L. J. 137=A. I. R. 1933 Mad. 627=1933 M. W. N. 789=38 L. W. 133. After that date the Court to which the decree has been transferred can entertain an application for execution even in the absence of a copy of the decree. *Ibid.* Execution application in anticipation of the arrival of the decree to the transferee Court is incompetent. A. I. R. 1931 Mad. 103=(1930) M. W. N. 368=130 Ind. Cas. 458. Court in considering application under s. 39 must go into the question of limitation. A. I. R. 1929 Mad. 199=29 L. W. 246=(1929) M. W. N. 36=116 Ind. Cas. 113. Execution proceedings were started within 12 years and the *robkar* in transferring execution under s. 39 considered issue of limitation as not to arise on transfer, held that the *robkar* did not intend to decide that objection to limitation could not be taken in transferee Court. A. I. R. 1930 Lah. 118=11 Lah. L. J. 501=125 Ind.

Cas. 55. Section 39 only contemplates that the entire decree and not a part of it is to be sent for execution to another Court or Courts. 38 C. W. N. 1053. Where a decree is transferred for execution the original Court is not wholly divested of its jurisdiction but can still retransfer the proceedings to itself or to some other Court. When however a decree is transferred without any limitation, the original Court has no longer the power to execute the decree until and unless the decree is returned by the transferee Court with a certificate of non-satisfaction. A. I. R. 1934 Lah. 728=35 P. L. R. 751=152 Ind. Cas. 128; see also A. I. R. 1916 P. C. 16; A. L. R. 1933 Cal. 906; A. I. R. 1926 Lah. 113; 162 Ind. Cas. 51=1936 A. L. J. 277=A. I. R. 1936 All. 655. In a case where execution is pending in a Court, the Court is not deprived of the power of issuing a certificate of non-satisfaction. But the Court should before ordering transfers issue notice to the judgment-debtor, and after hearing the judgment-debtor's objection, if any, as regards the order to be made, the Judge should proceed to consider whether sufficient cause has been made out justifying the issue of simultaneous execution. A. I. R. 1935 Cal. 268=39 C. W. N. 165. But the Madras High Court in a recent case has held that the act of transmitting a decree for execution to another Court is a ministerial act and can be made by an order passed *ex parte* 159 Ind. Cas. 762=1935 M. W. N. 1303=42 L. W. 943=69 M. L. J. 862.

Where the application for execution is filed in the transferring Court before transfer of the case it is not necessary to file a fresh application for that purpose in the transferee Court. A. I. R. 1931 Cal. 312=35 C. W. N. 77=52 C. L. J. 569=132 Ind. Cas. 149. Order of transferring decree after hearing judgment-debtor's objections is not ministerial. A. I. R. 1929 Mad. 199=29 L. W. 246=(1929) M. W. N. 36=116 Ind. Cas. 113. Transfer of decree for execution to another Court is not by itself an execution of the decree. A. I. R. 1929 All. 390=(1929) A. L. J. 553=115 Ind. Cas. 865. Sale of property not within local limits of the jurisdiction of the Court which passed the decree can only be held by the Court within whose local limits property is situate, and an order of attachment before judgment does not make any difference. A. I. R. 1929 Cal. 818=33 C. W. N. 848=57 C. 67=126 Ind. Cas. 43. Irrespective of the mode in which the decree is sought to be executed before a decree can be transferred to another Court within the jurisdiction of which judgment-debtor resides it is necessary for the decree-holder to satisfy the Court that the judgment-debtor has not sufficient property within the jurisdiction of the Court which passed the decree sufficient to satisfy the decree. A. I. R. 1929 Cal. 529=33 C. W. N. 620=56 C. 1176. Order of transmission of a decree by one Court to another is a ministerial act and can be made *ex parte*. A. I. R. 1928 Nag. 40=5 Rang. 775=6 Bur. L. J. 225=106 Ind. Cas. 857.

A decree cannot be transferred to another Court for a limited purpose only. 1 P. L. W. 582=39 Ind. Cas. 737. A decree transmitted to another Court does not become a decree of that Court, though it can be executed as such. (1917) M. W. N. 498=6 L. W. 361=33 M. L. J. 539=40 Ind. Cas. 670. A Court cannot in execution sell property situate outside its territorial jurisdiction even though the decree under execution was transferred by a Court having jurisdiction over that property. 38 M. L. J. 750=23 M. L. T. 24=(1918) M. W. N. 132=43 Ind. Cas. 79.

Transferee Court having like pecuniary jurisdiction has no jurisdiction to execute a decree of the transferring Court, in excess of the pecuniary jurisdiction of that Court. 57 Ind. Cas. 722. Judgment-debtor's death before a certificate of full satisfaction of decree is issued, does not divest Court of transfer of its jurisdiction over the execution proceedings, are merely suspended until the judgment-creditor has obtained an order from the Court which passes the decree for inserting the name of the legal representative A. I. R. 1930 Sind 16=118 Ind. Cas. 221. Transfer of a portion of a decree to another Court for execution is irregular and if made without notice to the judgment-debtor will not be binding upon him. 3 P. L. W. 247=43 Ind. Cas. 186. Application for transfer of decree is not application for execution. A. I. R. 1926 All. 423=94 Ind. Cas. 482. A Court to which a decree is transferred for execution has no jurisdiction to entertain an application for bringing on the record the legal representative of a deceased decree-holder. The application must be made to the Court which passed the decree 55 Ind. Cas. 156. Where a Court has power to execute an award as if it were decree of that Court as under Bombay Co-operative Societies Act, s. 43 and rr. 31 and 34 thereunder, it can also transfer it under s. 39. A. I. R. 1922 Bom. 377=24 Bom. L. R. 909=46 B. 128=64 Ind. Cas. 337. If a Court has no pecuniary jurisdiction to entertain and try an original suit it is incompetent to execute the decree in that suit. The suit, therefore, can not be transferred to it

for execution under s. 39. A. I. R. 1922 Pat. 188=3 P. L. T. 422=(1922) Pat. 229=1 Pat. 651. A certificate of transfer of a decree need not be signed by the Judge who passed it. 162 Ind. Cas. 489=38 P. L. R. 1101=A. I. R. 1936 Lah. 369.

Section 39 has no application to a decree under the Presidency Small Cause Court Act. A. I. R. 1928 Cal. 265. Order in execution of decree transferred by Small Cause Court to Munsiff's Court is appealable as if passed by Munsiff. A. I. R. 1927 All. 740. Where property sought to be attached is *bona fide* without the jurisdiction of the original Court whose decree is sought to be enforced and is in the hands of a third party who is not amenable to or permanently residing within the jurisdiction of the executing Court, it must be transferred to the Court within the local limits of whose jurisdiction the property sought to be attached is for the time being. 4 Pat L. J. 141=(1919) Pat. 155=48 Ind. Cas. 943. A Court can execute a decree for sale of the mortgaged property, which is wholly out of its jurisdiction. A. I. R. 1925 Pat. 139=6 P. L. T. 71=80 Ind. Cas. 901. Court which passes mortgage decree may even if the property be outside its jurisdiction, bring it to sale. A. I. R. 1926 Mad. 421=49 M. 746=50 M. L. J. 161. Transferring Court ceases to have jurisdiction till it receives a certificate under s. 41, and second transfer before such certificate is without jurisdiction. A. I. R. 1925 Oudh 428=12 O. L. J. 287=2 O. W. N. 313=29 O. C. 84. Where an application for execution has been made to the Court transferring the decree for execution, a second application to transferee Court is not necessary. A. I. R. 1924 Pat. 120=5 P. L. T. 11=2 Pat. 909=(1923) Pat. 280. Decree transferred for execution to another Court, an application to re-transfer the same for execution to a third Court, or to execute itself, can be made to the Court passing the decree. A. I. R. 1927 Nag. 367=10 N. L. J. 24=101 Ind. Cas. 279. Jurisdiction of a Court transferring decree for execution to another Court is not confined to cases in which there is no property within the jurisdiction of the Court which passed the decree sufficient to satisfy decree. A. I. R. 1925 Oudh 481=28 O. C. 109. Sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree, and sending of a certificate intimating result of each application under executive orders of High Court, if any, cannot do so at all. A. I. R. 1922 Nag. 210=18 N. L. R. 178=68 Ind. Cas. 657. District Munsiff receiving by transfer a decree of a village Court or withdrawing execution of a decree to his own file has no jurisdiction to transfer it for execution to another District Munsiff's Court. 46 M. 731=32 M. L. T. (H. C.) 403=18 L. W. 19=44 M. L. J. 643=73 Ind. Cas. 792. Where decree has been transmitted to Agent's Court for execution if nothing more is said, it is presumably intended that it should be executed against those properties over which the Agent's Court has jurisdiction. A. I. R. 1924 Mad. 144=18 L. W. 747=76 Ind. Cas. 269. Even after transfer of a decree, the transferring Court retains jurisdiction to deal with applications under Order 21, rules 16 and 22. 60 C. 1176=58 C. L. J. 192=37 C. W. N. 1167=A. I. R. 1933 Cal. 906. Where the transfer is made under s. 39 (d) the transferee Court cannot question the power of the transferring Court to order the transfer. A. I. R. 1934 Mad. 266=1934 M. W. N. 1209=149 Ind. Cas. 1212. An order for sending a decree to another Court for execution is not an order can be made without there being a formal application for execution. Therefore an execution application on which such an order has been made will not help to save limitation in case of subsequent application for execution. A. I. R. 1935 Pat. 485=157 Ind. Cas. 971.

**Simultaneous execution of decree.**—A decree may be executed in more than one Court simultaneously whatever may be the case with regard to institution of suit. A. I. R. 1929 Bom. 418=53 B. 844=31 Bom. L. R. 1105=123 Ind. Cas. 507. This Code does not prohibit the sending of a decree for execution of two Courts at the same time. A. I. R. 1927 Rang. 258=5 Rang. 397=104 Ind. Cas. 133. Where a decree is transferred to another Court for execution, concurrent execution of it is permissible in the Court from which the decree has been transferred. 15 A. L. J. 532=39 Ind. Cas. 729. Where a Court transfers a decree for payment of money, on application of the decree-holder to another Court by grant of a certificate of non-satisfaction and the property is attached by transferee Court, the former Court does not lose jurisdiction to execute the decree and is competent to proceed with the execution except where the value of the property is greater than the amount of decree and decree-holder is likely to realize the whole amount of its sale, when a further order for arrest of the judgment-debtor is not justified. A. I. R. 1930 Lah. 199=121 Ind. Cas. 68; see also A. I. R. 1936 Cal. 267=162 Ind. Cas. 777. Simultaneous execution is permitted by the Court; but in making an order for such execution care should be taken so that there may not be any hardship on the

**judgment-debtor.** The Court has jurisdiction to execute its decree and at the same time send it to another Court to execute it simultaneously. A. I. R. 1935 Cal. 268 = 39 C. W. N. 165.

**Clause (b).—**Where the condition justifying transfer is that set out in s. 39, sub-section 1 (b), the intention to execute against the judgment-debtor who satisfies that condition. To hold that a judgment-creditor may obtain an order for transfer on the ground that one judgment-debtor has no property within the local limits of the Court which passed the decree, and has property within the local jurisdiction of another Court, and may then execute the decree through such other Court not against that judgment-debtor but against another judgment-debtor who does not fulfil that condition is absurd. A. I. R. 1936 Cal. 521. But a decree-holder has always a right to apply, as of course to the Court which passed the decree for its execution even if it be in respect of property outside the territorial jurisdiction of such Court can be no more than execution by transmission to another Court. A. I. R. 1936 Cal. 267 = 162 Ind. Cas. 777. Where an application for execution is made to the Court which passed the decree, that Court will transmit the same to the Court where the immovable property sought to be sold is situate along with the other papers required by Order 21, r. 5 or 6, and then the latter Court will make an order for sale. It is not necessary in such a case to have a fresh application for execution before the Court where immovable property sought to be sold in execution is situate. *Ibid.* The Court has jurisdiction to execute its decree and at the same time send it to another Court to execute it simultaneously. It is not necessary for the Court to go through the process of sale in order to find out whether in point of fact, the proceeds of the sale would be sufficient to cover the decree; it would be enough if there are allegations made, supported by an affidavit or some other evidence on which the Court can reasonably rely, which tends to show that there are circumstances present from which it can be safely inferred that the properties within the jurisdiction of the Court would not satisfy the decree. If such circumstances are proved to the satisfaction of the Court, it would be quite open to the Court having regard to the provision of clause (b) to make an order transferring the decree for execution to another Court. A. I. R. 1935 Cal. 268 = 39 C. W. N. 165.

**Whether application for transfer is a step in aid of execution.**—A mere application to have a decree transferred to another Court though not an application for execution is a step-in-aid of execution. A. I. R. 1931 Cal. 312 = 52 C. L. J. 569 = 35 C. W. N. 77 = 132 Ind. Cas. 149; 14 A. L. J. 415 = 33 Ind. Cas. 523. Where a decree is transferred for execution an application for execution in order to be a step-in-aid of execution has to be made to the Court to which the decree has been transferred and not to the Court which passed the decree. 39 M. 640 = 31 M. L. J. 300 = 18 Bom. L. R. 509 = 14 A. L. J. 1129 = 20 M. L. T. 472 = 24 C. L. J. 478 = 4 L. W. 558 = (1916) 2. M. W. N. 541 = 21 C. W. N. 162 = 43 I. A. 238 (P. C.) = 36 Ind. Cas. 682. An application for a certificate for a step-in-aid of execution. Consequently where the decree-holder having obtained his order does not carry out the order which he has obtained and the decree is not in fact sent, the Court passing the decree does not lose jurisdiction. A. I. R. 1922 Pat. 301 = 3 P. L. T. 298 = 1 Pat. 328 = 65 Ind. Cas. 332.

**Clause (d).—**Transferee Court cannot question transferor Court's power to transfer. A. I. R. 1934 Mad. 266.

**Provisions of clause (d).**—S. 39 have not to be considered at all where the decree directing sale is to be executed not only by sale of property but by removal of obstruction. A. I. R. 1936 Sind 11 = 161 Ind. Cas. 524 = 30 S. L. R. 290.

**Form of application.**—An order for sending a decree to another Court for execution is not an order for execution. Such an order can be made without thereby a formal application for execution. Therefore an execution application on which such an order has been made will not help to save limitation in case of a subsequent application for execution. A. I. R. 1935 Pat. 485 = 157 Ind. Cas. 971.

**Sub-section (2).**—Under this sub-section, the subordinate Court to which a decree is transferred must be a Court which would be competent to execute the decree as an original Court; in other words, it must be a Court having pecuniary jurisdiction to pass such a decree. 1935 A. M. L. J. 18.

**40. [New.]** Where a decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province.

Transfer of decree to Court in another province.

**Soope.**—Where the decree pending in the “transferor” Court has been completely withdrawn, transferee Court has no further jurisdiction. A. I. R. 1930 Lah. 508=126 Ind. Cas. 516.

**41. [S. 228, 4th para.]** The Court to which a decree is sent for execution shall certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.

Result of execution proceedings to be certified.

**Soope.**—The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified the fact or until it has completely failed to execute the decree and has certified that fact to the Court which forwarded the decree. A. I. R. 1923 Bom. 396=25 Bom. L. R. 453. For certifying the fact of execution all that the section requires is that the Court to which the decree is sent for execution should inform the Court which passed the decree what has happened in execution. A. I. R. 1923 Bom. 371=76 Ind. Cas. 549. The sending of a certificate does not of itself put an end to the jurisdiction of the Court to execute the decree. 68 Ind. Cas. 657=A. I. R. 1922 Nag. 210; but see A. I. R. 1925 All. 179=22 A. L. J. 1039=L. R. 6 A. 28 Civ. Mere striking of application for execution does not terminate jurisdiction it is only after certifying that the transferee Court ceases to have jurisdiction to execute 5 Pat. 398=7 P. L. T. 461=(1926) Pat. 86=94. Ind. Cas. 36; 85 Ind. Cas. 390=A. I. R. 1955 All. 176=22 A. L. J. 1039=L. R. 6 A. 28. It is only when the Court to which Court the decree is sent has executed it or has failed to execute it and not merely on failure of an application that the Court is bound to send a certificate under s. 41. 25 Bom. L. R. 453=74 Ind. Cas. 149. The original Court who has transferred its decree for execution to another Court can also bring the decree back. A. I. R. 1926 Bom. 271=50 B. 439=28 Bom. L. R. 381=94 Ind. Cas. 146. Transferee Court has jurisdiction to decide objections relating to anything done in the course of its proceedings even after issue of certificate. A. I. R. 1929 Oudh. 76=5 O. W. N. 1053=4 Luck. 209=115 Ind. Cas. 444. Certification is a very important step when a decree has once been transferred to another Court, for with it the latter Court ceases to have jurisdiction to execute the decree. A. I. R. 1924 Bom. 359=26 Bom. L. R. 345=80 Ind. Cas. 752; A. I. R. 1933 Lah. 149=143 Ind. Cas. 636=1. R. 1933 Lah. 376. Where a Court has both Small Cause powers and original jurisdiction and a decree passed under the former is executed under the latter and an entry of satisfaction is made in the Small Cause Register there is sufficient compliance with s. 41. 76 Ind. Cas. 549=(1923) Bam. 371.

The certificate prescribed by s. 41 from the Court of transfer is not a condition precedent to the jurisdiction of the Court which passed the decree to entertain the application. It is not also necessary that the Court which passed the decree should, after entertaining the application, stay its hand, until it receives certificate prescribed by s. 41 from the Court of transfer. 63 M. L. J. 788=36 L. W. 750=140 Ind. Cas. 591. Jurisdiction to execute decree that Court has, until (1) the execution is withdrawn from it or (2) it fully executes the decree and certifies that fact to the Court which sent the decree or executes it so far as the Court is able to execute it within its jurisdiction and certifies that fact to the Court which sent the decree or (3) it fails to execute the decree and certifies that fact to the Court which forwarded the decree. 11 P. 513=A. I. R. 1932 P. 286=139 Ind. Cas. 843=13 P. L. T. 623=A. L. R. 1932 Pat. 672.

**42. [S. 228.]** The Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree.

Powers of Court in executing transferred decree.

And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

**Scope.**—The expression “powers in executing such decree” in s. 42 means “powers in carrying out the purpose of executing such decree”. Although an order staying an execution may be passed while a Court is engaged in executing a decree, yet a power to order stay in execution cannot be held to be a power exercised to carry out execution of a decree. Power to stay execution is not included in s. 42. A. I. R. 1936 Rang. 184=62 Ind. Cas. 865=8 R. R. 596. Court to which execution has been transferred will exercise all the powers of the Court of first instance and will retain its jurisdiction to execute the decree even though there has been an appeal from the decree after such transfer and it has been affirmed in appeal, and the execution cannot be defeated merely by the fact that no fresh order of transfer was made by the Court which transferred the decree after such affirmation in appeal. A. I. R. 1931 Pat. 27=9 Pat. 829=129 Ind. Cas. 138. This section is intended to remove all questions arising out of the decree, such as those dealt with by s. 47 of the Code and the like, from the cognizance of the Court which made the transfer. A. I. R. 1924 All. 700=46 A. 560=22 A. L. J. 439=L. R. 5 A. 380 Civ.=83 Ind. Cas. 848. When a decree is transferred to a Court for execution the Court to which it is transferred has the power of attachment under Order XXI, rule 48 (1). A. I. R. 1927 Oudh 112=1 Luck. 46=13 O. L. J. 174=91 Ind. Cas. 1043. A Court executing a transferred decree cannot question legality or propriety of the order directing execution. A. I. R. 1930 Lah. 143=123 Ind. Cas. 531. The executing Court can determine the question under Order XXI, rule 50 (2) whether a person is a partner. A. I. R. 1929 Lah. 228=115 Ind. Cas. 536; 134 Ind. Cas. 1026=33 P. L. R. 598=A. I. R. 1931 Lah. 736. A Court to which a decree is transferred for execution cannot execute it in absence of regular application for execution. A. I. R. 1924 Nag. 413=80 I. C. 59. An appeal lies from an order passed in execution of a Small Cause decree which has been transferred to a Court where it is filed on original side. 14 A. L. J. 415=33 Ind. Cas. 523. Court to which a decree or order is transferred for execution is competent to determine the question under Order XXI, rule 50 (2) whether a certain person is a member of a firm. A. I. R. 1921 All. 193=43 A. 394=19 A. L. J. 187=61 Ind. Cas. 401. If order for the transfer of a decree for execution is made but the decree is not actually sent to the transferee Court, the Court which passed the decree retains jurisdiction to execute it. A. I. R. 1922 Pat. 301=1 Pat. 328=3 Pat. L. T. 298=65 Ind. Cas. 332. Order in execution of a Small Cause Court decree transferred for execution to the ordinary Court is appealable in the same way as order made in execution of decrees passed by that Court. A. I. R. 1921 Cal. 242=34 C. L. J. 477=67 Ind. Cas. 6. A revenue officer in the execution of a decree by ejectment cannot execute such a decree in favour of anyone but the person named in it. A. I. R. 1923 Nag. 195=71 Ind. Cas. 409. The fact that in section 42 the transferee Court is given the same powers in executing such decree as vested from the start in the Court which passed the decree, does not divest the parent Court of the jurisdiction which it alone enjoys of making an order of re-transfer and the application for re-transfer to a second Court lies to the Court which passed the decree. A. I. R. 1926 Lah. 113=89 Ind. Cas. 958. Even an application for the transfer of the decree again to another Court must be made in the first instance to the Court to which the decree has already been transferred. A. I. R. 1922 Bom. 359=24 Bom. L. R. 798=47 B. 56=68 Ind. Cas. 505. Although the Court to which a decree is transferred for execution has no power to entertain any objection regarding the legality or propriety of the order directing execution or the right of the person shown in the order as the person entitled to execute the decree yet it is the duty of the executing Court, on being acquainted with facts showing that the decree is no longer in existence to refuse to allow the sale to proceed. A. I. R. 1927 Rang. 104=4 Rang. 562=5 Bur. L. J. 239=100 Ind. Cas. 285. Section 42 applies to execution proceedings in the Madras Small Cause Court whether the decree sought to be executed was passed by the Madras Small Cause Court or transferred to that Court from a Court in the *Mofussil* but not where Madras Small Cause Court decree is transferred to a Court in *Mofussil*. A. I. R. 1925 Mad. 1179=22 L. W. 455=(1925) M. W. N. 713=49 M. L. J. 104=90 Ind. Cas. 509. In 43 A. 394, s. 42 was construed in effect to mean that by going to the executing Court a litigant was entitled to obtain the same reliefs that he would be able to obtain if he had been to the Court which passed the decree, that is to say, he is entitled to obtain in fact the same sort of relief which might have been obtained but was not in fact obtained before the Court which passed the decree.

This reasoning cannot be sustained. 11 P. 580=A. I. R. 1932 P. 323=13 P. L. T. 751=A. L. R. 1932 P. 628. In the case of an application for leave to execute under s. 21, R. 50, C. P. Code if the Court finds that it is not called upon to execute the decree, but to decide whether a particular person whose name does not appear on the face of the decree is or is not liable under it, s. 42, C. P. Code has no application. A. I. R. 1931 Sind 82=131 Ind. Cas. 712. A Court to which a decree has been transferred for execution must take the decree as it stands and is not entitled to question the validity of the decree upon the ground that the decretal Court had no jurisdiction, territorial, personal or pecuniary to pass it. A. I. R. 1931 Rang. 252=9 R. 480. The transferee Court cannot act under Order 21, rule 16. A. I. R. 1931 Lah. 690=133 Ind. Cas. 643. The Court to which a decree has been transferred can stay execution of a decree under Order 21, rule 29. 60 C. 1119=37 C. W. N. 846=57 C. L. J. 444. Court to whom decree is transferred can refuse to execute the decree being nullity. A. I. R. 1934 Lah. 217. According to s. 42, Civil Procedure Code the latter Court has generally the same powers as the former in the matter of execution of decrees and in the absence of any specific provision to the contrary it seems anomalous to hold that while the Court passing the decree is entitled to refuse to execute a decree which is a nullity, the Court to which the decree is transferred for execution cannot take notice of such an objection. A Court to which a decree is transferred for execution can entertain such an objection. A. I. R. 1934 Lah. 117=A. L. R. 1934 Lah. 702; 152 Ind. Cas. 135=35 P. L. R. 482=A. I. R. 1934 Lah. 652. Order 42 does not override the plain words of Order 21, rule 16. A. I. R. 1934 Lah. 648. But it is only the Court which has passed the decree that is competent to grant a certificate of non-satisfaction to the decree-holder in another Court and the Court to which a decree is transferred for execution by means of a certificate of non-satisfaction is not competent to grant such a certificate. The Court can only execute the decree itself and certify the result of execution before it to the original Court. A. I. R. 1934 Lah. 330=150 Ind. Cas. 905=36 P. L. R. 176. Section 42 does not empower the Court to which a decree is sent for execution to pass an order which has the effect of amending, altering, or varying the decree itself. An order for payment of a decree by instalments, which is made after the decree has been passed, undoubtedly has the effect of altering or varying the terms of the original decree, and consequently it is not within the competence of the transferee Court to make such an order. A. I. R. 1934 Rang. 165=12 Rang. 320=151 Ind. Cas. 937=7 R. R. 130=A. L. R. 1934 Rang. 183. Although the executing Court to which a decree has been transferred for execution has jurisdiction to decide whether the application to it is barred by limitation or not, it cannot, in considering the question of limitation, look further back than the order transforming the decree of the Court which passed the decree, for an order transforming a decree is a step-in-aid of execution and consequently provide a starting point for a period of limitation. A. I. R. 1936 Rang. 271=163 Ind. Cas. 403=14 Rang. 550=9 R. R. 17. In execution of a decree of the Bombay High Court against a firm certain properties within the jurisdiction of the Karachi Court were sold and purchased by the decree-holder. The auction purchaser was, however, resisted in possession thereof. The decree was then sent for execution to the Karachi Court: *Held* that once it was proved that the removal of obstruction was part of the execution of the decree, the High Court was not debarred from removing it merely because it did not pass the decree or sell the property. A. I. R. 1936 Sind 11=30 S. L. R. 290=161 Ind. Cas. 290.

**43. [S. 229.] Any decree passed by a Civil Court established in any part**

Execution of decrees passed by British Courts in places to which this Part does not extend or in foreign territory.

of British India to which the provisions relating to execution do not extend [or by any Court established or continued by the authority of the "the Central Government or the Crown Representative"\* in the territories of any foreign

Prince or State,] may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India.

**Amendment in Burma.**—The words within brackets have been omitted in British Burma by Government of Burma (Adaptation of Laws) Order, 1937. In Burma read "British Burma" for the words "British India."

\*Substituted by the Government of India (Adaptation of Indian Laws) Order, 1937.

**Soope.**—The Court of the Political Agent at Sikkim is a Court established or continued by the authority of the Governor-General in Council within the meaning of this section and decree of that Court can be executed by the Court of the Subordinate Judge at Darjeeling. 15 C. W. N. 992 ; see also 34 C. 576=11 C. W. N. 622=6 C. L. J. 30. But the Court of the Dewan *Ahlikar* of Cooch Behar is not a Civil Court within any part of the territory of British India, and is not a Court established by the authority of the Governor-General of India in the territories of a foreign State, within the terms of s. 284 of Act VIII of 1859(=s. 43) and consequently the Munsiff of Shahazadpoor has no jurisdiction to execute a decree of that Court. 4 B. L. R. A. C. 134=13 W. R. 154.

\* **"44. [229B.]** The Provincial Government may, by notification in the official Gazette, declare that the decrees of any Civil or Revenue Courts in any Indian State, not being Courts established or continued by the authority of the Central Government or of the Crown Representative, or any class of such decrees, may be executed in the Province as if they had been passed by Courts of British India."

This section has been amended in Burma thus :—

†44. The Governor\* may, by notification in the Gazette, declare that the decrees of any Civil or Revenue Courts situate in the territories of any Native Prince or State in alliance with his Majesty,† or any class of such decrees, may be executed in British Burma as if they had been passed by the Courts of British Burma.

**Soope of the section.**—Court to which a decree of a foreign Court is transferred for execution can enquire into jurisdiction of Court passing the decree. A. I. R. 1925 Cal. 955=30 C. W. N. 785=41 C. L. J. 508=89 Ind. Cas. 347 ; 1931 A. L. J. 653=A. I. R. 1931 All. 689. The words "as if they had been passed by the Courts in British India" in s. 44 relate only to the mode of execution and have not the effect of giving foreign judgment, all the incidents of a judgment of a British Court. 27 M. L. J. 535=16 M. L. T. 479 ; A. I. R. 1925 Mad. 788=21 L. W. 330=86 Ind. Cas. 492. A British Court executing a foreign decree has power to enquire whether the foreign Court had jurisdiction to pass the decree. 36 Ind. Cas. 363=18 Bom. L. R. 486=40 B. 551 ; A. I. R. 1925 Cal. 955=30 C. W. N. 785=41 C. L. J. 508=89 Ind. Cas. 347. Unless a decree, that is, produced for execution under provision of s. 44, is conclusive as to the matter directly thereby adjudicated it cannot and ought not to be executed. A. I. R. 1925 Mad. 788=21 L. W. 230=86 Ind. Cas. 492. A British Indian Court executing a foreign decree must of necessity issue notice to judgment-debtor before ordering execution. A. I. R. 1925 Mad. 788=21 L. W. 330=86 Ind. Cas. 492. Section 21 has no application to cases of foreign judgment sought to be executed in British Indian Courts under s. 44. A. I. R. 1925 Mad. 788=21 L. W. 330. British Indian Court has discretion to refuse execution which discretion is not limited to ss. 13 and 14 only. A. I. R. 1925 Mad. 788=86 Ind. Cas. 492. Presidency Small Cause Court Judge can execute foreign decree transmitted to it under s. 44. C. P. Code. 40 Ind. Cas. 670=1917 M. W. N. 498=6 L. W. 361=33 M. L. J. 539. Transmission of British Indian decree to Native State, is not justifiable even by long practice. 32 M. L. J. 487=5 L. W. 646=41 Ind. Cas. 41. Foreign decree transmitted under s. 44 to British Indian Court can be attacked in the latter Court on grounds given in s. 13. 39 M. 733=3 L. W. 90=19 M. L. T. 68=30 M. L. J. 148=(1911) 1 M. W. N. 83=32 Ind. Cas. 597. British Court executing a foreign decree can inquire into foreign Court's jurisdiction. *Ex parte* decree by foreign Court in a personal action against a non-resident foreigner is a nullity. 40 B. 551=18 Bom. L. R. 486=36 Ind. Cas. 363. Where a foreign decree is sought to be executed in British Indian Court under s. 44, C. P. Code, the law of limitation for such execution is the British Indian law in force and not that which prevailed when the decree was passed. 36 Ind. Cas. 369=40 B. 504=18 Bom. L. R. 481. Where in regard to the decree of any Native State, a notification has been issued under s. 44 of the Civil Procedure Code, the sole remedy of a decree-holder in a British Indian Court is

\* Substituted for the old section 44 by G. I. Order of 1937.

† Certain words have been omitted by G. B. Order of 1937.



to apply for execution of the decree. 40 C. 591. The concluding words of s. 44, namely, 'as if they had been passed by the Court in British India' do not in any way control the operation of the provisions of s. 13, clause (a). A. I. R. 1935 Lah. 551=37 P. L. R. 240.

[44A. (1) Where a certified copy of a decree of any of the Superior Courts of the United Kingdom or any reciprocating territory has been filed in a District Court, the decree may be executed in British India as if it had been passed by the District Court.

Execution of decrees passed by Courts in the United Kingdom and other reciprocating territory.

(2) Together with the certified copy of the decree shall be filed a certificate from such Superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of section 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of section 13.

*Explanation 1.*—'Superior Courts', with reference to the United Kingdom, means the High Court in England, the Court of Session in Scotland, the High Court in Northern Ireland, the Court of Chancery of the county Palatine of Lancaster and the Court of Chancery of the county Palatine of Durham.

*Explanation 2.*—'Reciprocating territory' means any country, or territory, situated in any part of His Majesty's Dominions or in India, which the [Central Government]\* may, from time to time, by notification in the "official Gazette"†, declare to be reciprocating territory for the purposes of this section; and "Superior Courts" with reference to any such territory, means such Courts as may be specified in the said notification.

*Explanation 3.*—'Decree' with reference to a Superior Court, means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, and

(a) with reference to Superior Courts in the United Kingdom, includes judgments given and decrees made in any Court in appeal against such decrees or judgment,  
but

(b) in no case includes an arbitration award event if such award is enforceable as a decree or judgment.‡

**Amendment in Burma.**—Read "British Burma" for "British India".

**Commencement.**—This section will come into force on such date as the Central Government in British India may, by notification in the official Gazette appoint. Similarly it shall come into force in British Burma on such date as the Governor may by notification in the Gazette appoint.

**Object of the section.**—On the 27th February, 1924, Government introduced a Bill further to amend the Code of Civil Procedure, 1908, the object of which was to provide for the enforcement in British India of judgments obtained in the United Kingdom and in other notified parts of His Majesty's Dominions, as part of a reciprocal arrangement, the other part of which consisted of the extension to British India of the provisions of Part II of the Administration of Justice Act, 1920, under which the judgment of Superior Courts in India would become enforceable in the United Kingdom. The Select Committee to which the Bill was referred expressed the opinion that the Bill would not ensure a fair measure of reciprocity. The

\* Substituted by G. I. Order, 1937. In Burma read "Governor", *vide* G. B. Order of 1937.

† Substituted by G. I. Order, 1937. In Burma read "Gazette", *vide* G. of Burma Order of 1937.

‡ Inserted by Act VIII of 1937.

difficulty arose from the fact that under the British Act reciprocity could not be applied to judgments of "Superior Courts" and most of the British Indian Courts of unlimited civil jurisdiction would not have come within the meaning of the term "Superior Courts" as used in that Act. No amendment of the Indian Bill could have altered that position, and for this reason it was decided to drop the Bill. The position has now been altered by the passing of the foreign judgments (Reciprocal Enforcement) Act, 1933, which provides for the extension of Part I thereof to His Majesty's Dominions outside the United Kingdom by an order in Council, and also leaves it to the order in Council to specify the Courts which shall be deemed as "Superior" within the meaning of the Act. The Government of India have ascertained that the Lord Chancellor has no objection to the Act being applied to all Indian Courts possessing unlimited original civil jurisdiction. This removes the obstacle which stood in the way of legislation in 1925, and the present Bill substantially embodies the provisions of the old Bill with some modifications mainly necessitated by the terms of the new English Act."—*Statement of objects and Reasons* to Bill No. 10 of 1935.

**\*45. [S. 229A.]** So much of the foregoing sections of this Part as empowers a Court to send a decree for execution in foreign territory, in tution to another Court shall be construed as empowering a Court in any Province to send a decree for execution to any Court established or continued by the authority of the Central Government or of the Crown Representative in the territories of any foreign Prince or State to which the Provincial Government has, by notification in the official Gazette, declared this section to apply.

**Amendment in Burma**—This section has been omitted in Burma, *vide* G. B. order of 1937.

**Scope**—This section contemplates Courts in the Native Indian States that are in alliance with the British Government. A. I. R. 1929 Sind 45=23 S. L. R. 205=114 Ind. Cas. 98. An order of attachment before judgment issued by British Indian Court against the partnership property in Dutch territory is not consistent with the supremacy of the Dutch Government and therefore the mandate issued to the British consul therein was illegal. A. I. R. 1929 Sind 45=23 S. L. R. 205=114 Ind. Cas. 98. Where application for transmission of British Indian decree to Travancore Court for execution, has been made, such transmission is not transfer of decree as provided in section 39, C. P. Code. 40 M. 1069=33 M. L. J 130=6 L. W. 203=22 M. L. T. 139=(1917) M. W. N. 712 (F. B.)=42 Ind. Cas. 294.

**46. [New.]** (1) Upon the application of the decree-holder the Court which passed the decree may, whenever it thinks fit, issue a precept to any other Court which would be competent to execute such decree to attach any property belonging to the judgment-debtor and specified in the precept.

(2) The Court to which a precept is sent shall proceed to attach the property in the manner prescribed in regard to the attachment of property in execution of a decree :

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is extended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been transferred to the Court by which the attachment has been made and the decree-holder has applied for an order for the sale of such property.

**Scope**.—The object of s. 46 is to attach property of the judgment-debtor in another Court in order to prevent the judgment-debtor from alienating or otherwise dealing with it to the detriment of the decree-holder till proper proceedings for the sale of the property in pursuance of an application for execution can be taken, and it is for this reason that the effect of an attachment in pursuance of a precept is limited to two months and power is given to the Court which passed the decree to extend this period of two months in order to meet contingencies which may arise due to the delay in transferring the decree to the Court to which passed the decree

\* Substituted by G. I. Order of 1937.

to end this period of the months in order to meet contingencies which may arise due to the delay in transferring the decree to the Court to which the precept has been sent. An indefinite order stating that the attachment is made permanently is not contemplated by s. 46. A. I. R. 1936 Lah. 486=163 Ind. Cas. 374. When money is attached in execution of a decree it cannot be paid over to another decree-holder who subsequently attaches it, but when money is not attached in execution of a decree but it is attached in pursuance of a precept under s. 46, C. P. Code, the effect of which is limited only for two months after which period the attachment no longer exists, the money attached under a precept can be paid over to another decree-holder who subsequently attaches it. A. I. R. 1936 Lah. 486=163 Ind. Cas. 374. When a receipt is received for the attachment of property in the custody of the Court, the attachment takes effect from the date when it is received by the Court holding the property; and the refusal of the presiding officer to acknowledge the attachment can not affect the validity of an attachment which would be otherwise good. A. I. R. 1935 Lah. 914. Under s. 46, C. P. Code, an attachment under precept is not invalidated by the fact that the order extending the statutory period of two months during which the attachment will remain in force is passed after the expiry of the said period, provided that the application for extension of time is put in before the expiry of the said two months. In such a case the order relates back to the date of the petition and has retrospective effect. 3 L. W. 336=34 Ind. Cas. 302. The Court to which the precept has issued has no jurisdiction to question the validity of the precept. The Court to which it is sent has only to carry it out. The issuing Court alone can vary it and not the Court to which it is sent. A. I. R. 1927 Cal. 581=31 C. W. N. 653=102 Ind. Cas. 513. A Court to which precept is issued has no power to do anything not warranted thereby. But it has inherent powers to deal with matters incidentally arisen in connection with proceedings for attachment. The Court to which precept is sent has therefore jurisdiction to accept money or security. A. I. R. 1926 Lah. 431=8 Lah. L. J. 164=27 P. L. R. 757=94 Ind. Cas. 119. "The Court which passed the decree" and not the Court to which a decree is transferred for execution is competent to issue precept. A. I. R. 1926 Sind 157=92 Ind. Cas. 621. An application for an attachment under s. 46 cannot be treated as an application for execution. A. I. R. 1926 Cal. 249. Even after transfer of a decree for execution, the Court which passed it retains jurisdiction for issue an *interim* attachment when there is ground to apprehend that the decree-holder may otherwise be deprived of the fruits of his decree. A. I. R. 1927 Cal. 581=31 C. W. N. 653. Extension order passed after expiry of statutory period has retrospective effect if application has been made before the expiry 3 L. W. 336=34 Ind. Cas. 302. Two applications for attachment of different properties can proceed simultaneously in the same Court in execution of the same decree, because this concurrent execution by the same Court is not different in principle from that provided by the new section 46 relating to precepts by which the parent Court and the transferee Court concurrently execute the same decree, and because besides section 46 there are other sections which indicate that the present Code does not view with disfavour concurrent execution A. I. R. 1923 Pat. 224=2 Pat 328=4 P. L. T. 99=(1923) Pat. 61=71 Ind. Cas. 741. A Court has jurisdiction to order attachment before judgment of properties situate outside its jurisdiction and it has also powers to order the raising of the attachment effected in pursuance thereof A. I. R. 1931 Rang. 279. A precept can be issued asking another Court to attach property within its jurisdiction. It cannot itself attach such property. 1933 A. L. J. 902=A. I. R. 1933 All. 844.

#### QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE.

47. [S. 244.] (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional Court-fee.

(3) Where a question arises as to whether any person is or is not the

representative of a party, such question shall, for the purposes of this section, be determined by the Court.

*Explanation.*—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.

**Object of numbering section.**—The object of numbering separately sub-sections is to make several sub-sections independent of each other. 20 C. W. N. 679=32 Ind. Cas. 524.

**Construction of S. 47.**—Section 47 should be construed liberally and the decree-holder should get his relief as expeditiously as possible. 15 Pat. 545=162. Ind. Cas. 830=17 Pat. L. T. 434=A. I. R. 1936 Pat. 289; see also 19 C. 683 (P. C.).

**Object and scope of the section.**—The intention of the Legislature appears to be to dispose, in a single litigation, of all questions in reference to the subject-matter of that litigation arising between the parties once properly brought before the Court. 17 B. 49. All objections to execution sales should be disposed of as speedily and as cheaply as possible. 19 A. 613 (P. C.); see also 32 C. 1032; 9 C. W. N. 134; 27 C. 810; 4 C. W. N. 638. The provision of this section is mandatory and the matter which falls under sub-section (1) must be decided by the Court in execution. 38 L. W. 714=1933 M. W. N. 1182=A. I. R. 1933 Mad. 825; 56 M. 447. In order to see whether this section is applicable, the application should be examined. 140 Ind. Cas. 779=A. I. R. 1933 Mad. 130. Question whether certain person was party at time of decree is within this section. 1 Pat. L. W. 282=2 Pat. L. J. 192. Question between parties but in different capacities is not under this section. A. I. R. 1923 Nag. 149=6 N. L. J. 25=69 Ind. Cas. 500. Question between representatives of assignor and assignee of a decree while they are dead can be decided under this section. A. I. R. 1927 Mad. 903=26 L. W. 308=39 M. L. T. 176=53 M. L. J. 568=105 Ind. Cas. 405; see also A. I. R. 1922 Lah. 396=4 Lah. L. J. 259=79 Ind. Cas. 546. Questions between defendants *inter se* are covered by s. 47. A. I. R. 1924 Mad. 365=45 M. L. J. 478=(1923) M. W. N. 662=77 Ind. Cas. 148. An order in question arising between judgment-debtor and representative of the decree-holder is decree. 30 M. L. J. 366=19 M. L. T. 235=(1916) M. W. N. 155=3 L. W. 236=33 Ind. Cas. 739. Question forming basis for independent action cannot be introduced under s. 47. A. I. R. 1922 P. C. 304=31 M. L. T. 131=49 I. A. 220=43 M. L. J. 589=1 Pat. 581=24 Bom. L. R. 1251=27 C. W. N. 29=36 C. L. J. 542=20 A. L. J. 988=68 Ind. Cas. 973. Order under s. 47 should conclusively and finally determine rights of parties and should not be contingent upon future events. A. I. R. 1925 Rarg. 271=3 Rang. 132=89 Ind. Cas. 300. Order of dismissal of execution case made on account of mutual mistake, may by consent be re-opened. Order of proceeding cannot be re-opened on ground of unilateral mistake of fact. A. I. R. 1929 Cal. 670=33 C. W. N. 739=124 Ind. Cas. 79. The words "shall be determined by the Court executing the decree" in s. 47 do not mean merely that the Court will be bound to determine the questions mentioned therein if they are raised but that the executing Court has exclusive jurisdiction to determine such questions. The fact that they are not raised in the execution proceedings will not give the party a right to raise them in a separate suit except in cases of fraud of the decree-holder. A. I. R. 1931 Nag. 27=130 Ind. Cas. 154. Where the judgment-debtor fails to object the description of property sold at the time, he cannot come in under s. 47 to contest the description after the sale is complete. (1931) A. L. J. 49=A. I. R. (1930) A. 865. An order passed by the Court on an application for amending a scheme of management is not an order passed in execution proceedings under s. 47 of the Civil Procedure Code, and is not appealable as a decree. 33 Bom. L. R. 520=A. I. R. 1931 Bom. 391=133 Ind. Cas. 740=55 B. 414; (1931) A. L. J. 1071=A. I. R. (1931) A. 765=133 Ind. Cas. 401. The question whether the Court has a discretion to decide the order in which the mortgaged items should be sold or whether the decree-holder can dictate in disregard of the rights of subsequent transferees involves adjudication of rights of parties and is a decree appealable under s. 47 read with section 2(2). (1931) A. L. J. 108. Where the decree is a nullity this section has no application for such a decree is not a decree at all. 148 Ind. Cas. 418=11 O. W. N. 416=A. I. R. 1934 Oudh 167. Whether irrespective of any question of the representative character of the auction purchaser, s. 47 should apply to this case where the question raised is one relating to the execution, discharge and satisfaction of the decree and

is one in which the decree-holder and the judgment-debtor are adversely interested. A. I. R. 1934 Lah. 105=148 Ind. Cas. 901. A decision of a dispute between two sets of persons who are claiming to be the heirs of the deceased judgment-debtor is not at all a dispute between the decree-holder on the one side and the judgment-debtor on the other. Hence section 47 has no application in such a case. A. I. R. 1934 All. 730=4 A. W. R. 456=151 Ind. Cas. 473. The question of rateable distribution when between the parties to the suit comes within s. 47. A. I. R. 1934 Pat. 350=150 Ind. Cas. 970. Section 47 draws no distinction between the functions of a Court executing a simple money-decree and one executing a decree under order 34. A. I. R. 1934 Lah. 438. But there is a difference between a decree which leaves the manner of its execution to be decided by the executing Court and one which specifies certain property and unconditionally directs its sale for the satisfaction of the decree. *Ibid.* An objection or application by a judgment-debtor that his property is not liable to attachment and sale under s. 60 is an objection under s. 47. A. I. R. 1934 Nag. 82=148 Ind. Cas. 200=30 N. L. R. 135. The question to be decided in an application under s. 173 (3) of the Bengal Tenancy Act, to set aside a sale is a question relating to the execution and satisfaction of the decree, as between the parties to the suit and falls under s. 47, C. P. Code. 60 C. L. J. 36.

Question of priority of heirs in execution proceedings can be determined in execution proceeding under s. 47 which bars a separate suit. A. I. R. 1935 Bom. 298=59 B. 417=157 Ind. Cas. 658=37 Bom. L. R. 150. Where a person who has been impleaded as the legal representative of a defendant or a judgment debtor claims certain properties attached as the property of the judgment-debtor as his own, his remedy is by an application under s. 47 and not by an application under Order 21, rule 58. A. I. R. 1935 Mad. 923=1935 M. W. N. 785=158 Ind. Cas. 410. It is not open to a decree-holder to re-open proceedings in execution of his decree, after satisfaction has entered by an application in Court, on a proper case being made out. A. I. R. 1935 Cal. 645=158 Ind. Cas. 585.

This section does not confer upon a decree-holder any right to proceed in execution against persons who are not judgment-debtors themselves. A. I. R. 1936 Mad. 870=71 M. L. J. 385=1936 M. W. N. 1028. Disputes between rival decree-holders seeking to attach the simple property or claiming against each other in the distribution of the assets or disputes between joint decree-holders *inter se* are not within the purview of s. 47. A. I. R. 1936 Oudh 277=1936 O. W. N. 559. Where under a contract of surrender between the last surviving of three Hindu daughters and the next reversioners, the latter take the estate on undertaking to pay the dues under rent decrees obtained against the daughters and their debts, the decree-holder, though a stranger to the contract, can without recourse to a separate suit, enforce the liability in execution and proceed against the estate in the hands of reversioners. 40 C. W. N. 601=63 C. L. J. 25=A. I. R. 1936 Cal. 67. A *puisne* mortgagee against whom a personal decree has been passed, behind his back, when there was no prayer for a personal decree in the plaint, can in execution take an objection to the executability of such a decree under s. 47, within 30 days if the sale of the property of the *puisne* mortgagee, and relief cannot be refused to him. A. I. R. 1936 Pat. 303=162 Ind. Cas. 867.

**Parties to suit.**—Section 47 does not apply unless the question arises between the parties to the suit in which the decree was passed or their representatives and relates to execution, satisfaction or discharge of the decree. A defendant who was not a necessary party would not be a party to the suit within the meaning of s. 47 if he is exonerated without his claim being adjudicated upon. A. I. R. 1937 Mad. 268; see also A. I. R. 1930 Mad. 817. This section is not necessarily confined to decree-holders on one side and judgment-debtors, on the other, and is wide enough to cover a dispute between co-defendants who may be parties in a partition suit. 1932 A. L. J. 1036=A. L. R. 1933 A. 27. In order to attract the provisions of s. 47, it is necessary that the dispute must be between parties who are opposed to each other in the suit. If the legal representatives of the deceased decree-holder are disputing as regards the shares to which they are entitled in the inheritance of the deceased decree-holder, they ought to settle the point in a regular suit and they cannot do so by way of application for execution of the decree. 13 P. L. T. 557=A. I. R. 1932 P. 329=140 Ind. Cas. 97=A. L. R. 1932 P. 732. "Parties to the suit" means parties who are opposed to each other in the suit, though not necessarily as plaintiff and defendant. The nature of the suit and the contentions between the

parties ought to be considered, and, if their rights conflict, the question is one within the meaning of s. 47. 59 C. 117 (123)=35 C. W. N. 877=138 Ind. Cas. 177=A. I. R. 1932 Cal. 126=A. L. R. 1932 Cal. 450; A. I. R. 1934 Pat. 627=152 Ind. Cas. 776. As the interest of auction purchaser and judgment-debtor is adverse, hence any question arising between them should be decided under this section. 56 M. 808=1933 M. W. N. 1031=143 Ind. Cas. 854=38 L. W. 138=A. I. R. 1933. Mad. 598=65 M. L. J. 253. This section is not applicable when one of the persons is not a party to the decree. 143 Ind. Cas. 843=10 O. W. N. 52=A. I. R. 1933 Oudh 146. All questions between the parties to the suit must be decided under the section. 1933 M. W. N. 152=37 L. W. 346=A. I. R. 1933 Mad. 340. Suit for declaration are clearly outside the purview of s. 47 and a prayer therefore is not barred by that section. 35 C. W. N. 877. Person not party to suit or execution proceedings cannot plead bar to suit. A. I. R. 1929 Mad. 850=(1929) M. W. N. 718=120 Ind. Cas. 565. "Parties" in section 47 refers to parties ranged on opposite sides and not as co-decree-holders. A. I. R. 1925 Nag. 186=21 N. L. R. 34=82 Ind. Cas. 734; A. I. R. 1924 Mad. 518=32 M. L. T. 118=70 Ind. Cas. 329. Decree-holder purchaser cannot sue separately for possession. A. I. R. 1925 Sind 171=18 S. L. R. 34=78 Ind. Cas. 930. Party impleaded is party for all purposes. A. I. R. 1927 Mad. 1043=51 M. 46=53 M. L. J. 824=26 L. W. 775=106 Ind. Cas. 230. This section applies not only to the dispute between parties who are opposed to each other but also to disputes between parties on the same side. A. I. R. 1927 Rang. 45=99 Ind. Cas. 418. "Between parties" means, parties on same or opposite sides. 20 L. W. 742=85 Ind. Cas. 209. Question between purchaser and attaching creditor of a decree is under s. 47. 20 C. W. N. 679=32 Ind. Cas. 524. Parties include representatives in interest. 5 Pat. L. W. 141=(1918) Pat. 243=46 Ind. Cas. 465; see also 65 Ind. Cas. 467; A. I. R. 1923 Bom. 450=25 Bom. L. R. 494=73 Ind. Cas. 402. A person is not party whose property is wrongfully attached must bring suit. 9 S. L. R. 213=34 Ind. Cas. 492.

The question whether or not a person is a legal representative must be decided by executing Court and not by a separate suit. 92 Ind. Cas. 575; 117 Ind. Cas. 122. Legal representative claiming property proceeded against in execution as his own cannot bring suit. 48 C. L. J. 551=115 Ind. Cas. 353; A. I. R. 1922 Pat. 572=3 P. L. T. 613=68 Ind. Cas. 369; 27 C. L. J. 572=46 Ind. Cas. 458.

In case of conflict between judgment-debtors this section is not applicable. A. I. R. 1929 All. 291=51 A. 752=(1929) A. L. J. 757=119 Ind. Cas. 440; 31 M. L. J. 41=35 Ind. Cas. 179. This section has no application to disputes between rival decree-holders. 113 Ind. Cas. 776; A. I. R. 1927 Pat. 288=6 Pat. 386=103 Ind. Cas. 724. Question between assignee of decree and purchaser of property included in decree is not one under s. 47. A. I. R. 1927 Mad. 240=38 Ind. Cas. 856. Question between rival decree-holders in different suits is not under section 47. A. I. R. 1926 Mad. 1104=51 M. L. J. 436=1926 M. W. N. 683=47 Ind. Cas. 1020. Decree-holder who purchases property of the judgment-debtor is still party to the suit in which the decree was passed. A. I. R. 1928 Oudh 199=3 Luck. 182=5 O. W. N. 108=110 Ind. Cas. 83; A. I. R. 1927 Cal. 57=97 Ind. Cas. 697.

Defendant discharged as not liable is party to suit. A. I. R. 1929 Nag. 179=123 Ind. Cas. 432; A. I. R. 1929 Pat. 472=10 P. L. T. 563=115 Ind. Cas. 691; 1928 M. W. N. 601=113 Ind. Cas. 547. A. I. R. 1926 Mad. 687=50 M. L. J. 307=23 L. W. 533=1926 M. W. N. 409=94 Ind. Cas. 123; see also 94 Ind. Cas. 265=50 M. L. J. 205=1927 M. W. N. 251=A. I. R. 1926 Mad. 484; A. I. R. 1925 Pat. 482=6 P. L. T. 725=87 Ind. Cas. 743; A. I. R. 1933 Nag. 246; 91 Ind. Cas. 181; 37 Ind. Cas. 673=1917 M. W. N. 93; 34 C. L. J. 477=67 Ind. Cas. 6; A. I. R. 1933 Mad. 435=143 Ind. Cas. 476=37 L. W. 582. A proforma defendant is a party to the suit. A. I. R. 1934 Lah. 105=148 Ind. Cas. 901. Where a suit has been dismissed against a person as having no concern in suit, such person does not remain a party to the suit for the purposes of this section, whether his name remains on record or not. A. I. R. 1930 Mad. 817=54 M. 81=59 M. L. J. 932=127 Ind. Cas. 805; A. I. R. 1927 Rang. 137=5 Rang. 110; A. I. R. 1926 Lah. 202=27 P. L. R. 194=93 Ind. Cas. 921; A. I. R. 1921 Mad. 559=1921 M. W. N. 698=66 Ind. Cas. 722. Whether a particular defendant against whom suit has been dismissed is or is not party to suit should be determined by the Court looking into decree, judgment and pleadings. A. I. R. 1930 Mad. 817=54 M. 81=59 M. L. J. 932=127 Ind. Cas. 805. Exonerated defendant is a party. 41 M. 418=22 M. L. T. 532=34 M. L. J. 17=(1918) M. W. N. 23=42 Ind. Cas. 935.

This section has no application where question arises between judgment-debtor and his partner who was not a party. 36 Ind. Cas. 681. Purchaser from decree-holder auction purchaser is representative and cannot bring separate suit unless judgment-debtor is holding as licensee from decree-holder. A. I. R. 1930 Cal. 586=51 C. L. J. 560=34 C. W. N. 1059=128 Ind. Cas. 244. Vendee from judgment-debtor before attachment does not become his representative and is not bound by any proceedings against the judgment-debtor subsequent to date of sale. A. I. R. 1927 Mad. 450=99 Ind. Cas. 989.

Surety is a party and can raise plea of fraud in execution. A. I. R. 1925 Lah. 618=7 Lah. L. J. 457=26 P. L. R. 561=92 Ind. Cas. 259 ; A. I. R. 1925 All. 344=23 A. L. J. 59=86 Ind. Cas. 105 ; A. I. R. 1930 Lah. 309=123 Ind. Cas. 126. Where objection by *puisne* mortgagee to execution sale is dismissed, this section does not apply. 2 Pat. L. J. 219=3 Pat. L. W. 422=39 Ind. Cas. 656 ; see also A. I. R. 1926 All. 475=48 A. 574. A transferee *pendente lite* is not a representative of the transferor. A. I. R. 1928 Bom. 65=52 B. 208=30 Bom. L. R. 102=108 Ind. Cas. 17 ; 66 Ind. Cas. 722=A. I. R. 1921 Mad. 559.

**Decree.**—Decree in money suit creating charge on immovable property can be executed without separate suit. A. I. R. 1930 Nag. 17=120 Ind. Cas. 218 ; A. I. R. 1929 Bom. 227=31 Bom. L. R. 439=119 Ind. Cas. 186. Validity of compromise decree cannot be questioned in executing Court. A. I. R. 1922 (L. B.) 22=10 L. B. R. 349=13 Bur. L. T. 170=64 Ind. Cas. 391. Where decree provides for injunction and for damages in case defendants sold goods to third parties, the paying of damages by defendants on breach of condition does not satisfy decree. A. I. R. 1928 P. C. 27=55 C. 238=55 I. A. 58=47 C. L. J. 162=54 M. L. J. 122=30 Bom. L. R. 243=33 C. W. N. 509=27 M. L. J. 655=26 A. L. J. 667=24 N. L. R. 17=107 Ind. Cas. 25. Execution of foreign decree in British India can be objected to. A. I. R. 1925 Mad. 788=21 L. W. 330=86 Ind. Cas. 492. The true test to be applied in determining the appealability of an order is whether the order is a decree within the meaning of s. 2 (2) A determination made under s. 47, in order that it would be tantamount to an order which amounts to a decree within the meaning of s. 2 (2), must affect the rights of parties with regard to all or any of the matters in controversy. A. I. R. 1937 Rang. 157.

**Defence to a suit.**—Question relating to execution, etc., can be raised in defence of suit. A. I. R. 1921 Mad. 279=41 M. L. J. 261=14 L. W. 424=(1921) M. W. N. 536=70 Ind. Cas. 303. Objection not available as plaintiff under s. 47 can be made ground of defence in suit by another. A. I. R. 1922 Cal. 311=38 C. L. J. 17=27 C. W. N. 280=71 Ind. Cas. 328. Person successfully opposing application under s. 47 on ground that that section did not apply, cannot subsequently resile and say suit is barred. A. I. R. 1929 Nag. 79=117 Ind. Cas. 285.

**Questions relating to execution sale.**—Executing Court can set aside sale on application under s. 47. 19 M. L. T. 357=3 L. W. 504=30 M. L. J. 611=34 Ind. Cas. 829 ; 37 Ind. Cas. 827=10 Bur. L. T. 249 ; 48 Ind. Cas. 39=5 O. L. J. 551. But application to set aside execution sale under Order XXI, rule 90 and s. 12 A, Chota Nagpur Encumbered Estates Act is to be decided under s. 47. A. I. R. 1931 Pat. 97=131 Ind. Cas. 533. Question whether there was suppression of sale processes can be raised under s. 47. A. I. R. 1926 Cal. 1219=44 C. L. J. 167=98 Ind. Cas. 206. But judgment-debtor not objecting to description cannot do so by application or suit after sale is held. A. I. R. 1930 All. 865=(1931) A. L. J. 49=125 Ind. Cas. 765. Objection as to want of or defect in attachment can be raised under this section. 77 Ind. Cas. 368=A. I. R. 1924 Rang. 124. Where the execution sale is impeached on the ground of fraud, the plea of purchaser without notice is not available. A. I. R. 1923 Cal. 538=27 C. W. N. 587=37 C. L. J. 145. Purchase by decree-holder without obtaining leave to bid or in spite of refusal of leave is not void but voidable. A. I. R. 1922 P. C. 336=3 P. L. T. 529=44 M. L. J. 718=37 C. L. J. 430=31 M. L. T. 209=16 L. W. 190=25 Bom. L. R. 680=49 I. A. 312=1 Pat. 733=21 A. L. J. 23=27 C. W. N. 294=67 Ind. Cas. 914. Where the sale has been duly confirmed and made absolute by Order XXI, rule 92, the remedy to set it aside is by suit. A. I. R. 1922 Mad. 63=(1922) M. W. N. 121=15 L. W. 272=70 Ind. Cas. 569. Objection that notice under Order XXI, rule 22 was not issued is not under s. 47. A. I. R. 1924 Pat. 11=(1923) Pat. 283=2 Pat. 916=4 P. L. T. 721=74 Ind. Cas. 383. Question of want of notice under Order XXI, rule 66, can be decided under s. 47. A. I. R. 1930 Mad. 489=127 Ind. Cas. 142. Modification of permission to bid in decree-holder's absence is

material irregularity and sale can be set aside under s. 47. A. I. R. 1925 Oudh 381=12 O. L. J. 321=2 O. W. N. 297=87 Ind. Cas. 997. Where execution was attacked before sale, sale can be challenged under s. 47. A. I. R. 1924 Pat. 67=(1923) Pat. 298=5 P. L. T. 61.

**Bar of suit.**—Fresh suit relating to execution is barred under s. 47 where plaintiff and defendant have been parties in former suit. A. I. R. 1931 Bom. 114=32 Bom. L. R. 1473=129 Ind. Cas. 737; see also 60 C. L. J. 251; 60 Cal. 1467=149 Ind. Cas. 221=A. I. R. 1934 Cal. 327; 38 C. W. N. 996; A. I. R. 1934 Lah. 535=35 P. L. R. 408. Suit by legal representative for declaring that he holds a charge is barred. A. I. R. 1929 Lah. 762=127 Ind. Cas. 12. Suit to declare that plaintiff is real owner of decree obtained by agent is not barred. A. I. R. 1931 Rang. 24=130 Ind. Cas. 366. Suit is barred if objection to attachment under s. 10 is dismissed. A. I. R. 1930 Lah. 628=31 P. L. R. 191=127 Ind. Cas. 858. If the profits are not ascertained, a fresh suit to ascertain their amount is maintainable. 33 Ind. Cas. 83. Purchaser obtaining symbolical possession against judgment-debtor can sue for actual possession after confirmation. 20 C. W. N. 675=23 C. L. J. 587. Suit against assignee of decree-holder for damages for breach of contract is not barred. (1917) M. W. N. 359=40 Ind. Cas. 549. Where decree is barred by time, a subsequent suit on same cause of action does not lie. 41 M. 641=7 L. W. 143=34 M. L. J. 167=23 M. L. T. 156=(1918) M. W. N. 205=49 Ind. Cas. 110. Section 47 does not bar suit by a person against whom decree has been passed without proper representation. 17 A. L. J. 257=50 Ind. Cas. 109. Suit by stranger to decree not claiming as representative lies. 1919 Pat. 465=53 Ind. Cas. 20. Party-purchaser can not bring a suit on grounds which he could not take in execution. A. I. R. 1923 All. 115=79 Ind. Cas. 486. Where decree is fraudulent, injunction restraining execution is remedy. A. I. R. 1924 Nag. 413=80 Ind. Cas. 59. Suit not relating to execution but to adjustment of decree is not barred. A. I. R. 1921 Sind 159 (F. B.)=16 S. L. R. 207. Where final decree for sale passed in suit on mortgage, but not executed for more than 3 years. Section 47 does not prevent mortgagor from suing for redemption. A. I. R. 1925 Mad. 1191=86 Ind. Cas. 527. Subsequent suit is barred by s. 47, if previous decree granted relief sought in subsequent suit. A. I. R. 1925 Mad. 1260=22 L. W. 195=91 Ind. Cas. 338. Separate suit lies where double payment is received by decree-holder. A. I. R. 1923 Bom. 253=25 Bom. L. R. 247=95 Ind. Cas. 410. Judgment-debtor's suit to recover property not liable to be sold against stranger auction-purchaser is not barred. A. I. R. 1926 All. 730=96 Ind. Cas. 771. Suit for declaration that auction sale was null and void, as auction-purchaser, the liquidator of the decree-holder Bank was not competent to purchase any property as liquidator is barred under s. 47. A. I. R. 1928 Lah. 666=108 Ind. Cas. 606. Suit by legal representative for declaring that he holds a charge is barred. A. I. R. 1929 Lah. 762=127 Ind. Cas. 12. Where a decree for partition did not include house not in possession but recorded agreement of parties to divide it when it should fall into possession, it is open to parties either to effect partition by mutual agreement or enforce their rights by a separate suit. A. I. R. 1928 Bom. 365=30 Bom. L. R. 912=113 Ind. Cas. 173. Suit for declaration that decree has been satisfied and is incapable of execution is barred. A. I. R. 1922 Lah. 428 (F. B.)=3 Lah. 319=67 Ind. Cas. 593. Court passing decree has to ascertain *mesne profits*. A. I. R. 1931 Pat. 1=12 P. L. T. 127=130 Ind. Cas. 175.

A plea that a suit is barred under this section cannot be taken for the first time in the second appeal. A. I. R. 1934 Oudh. 55=11 O. W. N. 193=9 Luck. 365=147 Ind. Cas. 910. Where two decree-holders are proceeding in execution against the same property and the claim for priority made by one is disallowed by the executing Court, the decision does not bar a regular suit by such decree-holder for establishing his priority. A. I. R. 1934 Lah. 478=150 Ind. Cas. 964. A suit by the judgment-debtor to have a declaration that certain lands which were sold in execution were not saleable being *inam* lands is one relating to execution, discharge or satisfaction of the decree. The judgment debtor's remedy is under s. 47 and a separate suit is not maintainable. A. I. R. 1935 Nag. 30=31 N. L. R. 217=156 Ind. Cas. 995.

Where in proceedings in execution for enforcement of an award, the objection challenging the decree and award are overruled, a subsequent suit challenging the award on same grounds does not lie. A. I. R. 1935 Cal. 396=60 C. L. J. 572=156 Ind. Cas. 405. Where a scheme decree is executable in itself, a suit to declare invalid acts done under such a decree will be barred. 18 N. L. J. 110.



Where a decree was merely a decree declaring a charge of maintenance, a suit to recover arrears of maintenance by enforcing the charge was competent and not barred by s. 47. 39 C. W. N. 725. Where the real question at issue is the validity and not the satisfaction of the decree it can properly be raised in an independent suit and the fact the plaintiff's interests were technically represented by the administrator in execution proceedings at the time of sale ought not to prejudice him. 39 C. W. N. 1284. But a suit for a declaration that the decree was extinguished by the agreement to accept and the acceptance of 500 baskets of paddy is not maintainable as it is a question relating to satisfaction of the decree. A. I. R. 1935 Rang. 225=157 Ind. Cas. 814=8 R. R. 114. A suit for rectification of a petition for adjustment of a decree and the order thereon, on the ground that the same did not correctly represent the agreement of the parties is not barred by s. 47 of the C. P. Code, as the question whether the petition of adjustment and the order passed thereon represented correctly the agreement between the parties, could not be decided by the executing Court, as an executing Court. 39 C. W. N. 967. Section 47 is a bar to a regular suit if the object of the suit is to decide a question between a decree-holder and the judgment-debtor. But where the object of the suit is to settle dispute between decree-holder purchaser and persons other than the judgment-debtor, s. 47 cannot be a bar. A. I. R. 1936 Mad. 733; see also A. I. R. 1936 Pesh. 85; A. I. R. 1936 Mad. 571=1936 M. W. N. 325. The question whether a sale in execution of a mortgage decree is valid and binding is clearly a question relating to execution arising between the parties to the mortgage suit and as such it should have been determined by the Court executing the mortgage decree and not by a separate suit at all. 40 C. W. N. 428. A suit by a decree-holder for the rectification of a petition of adjustment, in which a mistake has crept in and upon which an order recording satisfaction of the decree has been passed of is maintainable and is not barred by s. 47 of the C. P. Code. 165 Ind. Cas. 756=40 C. W. N. 914=A. I. R. 1936 Cal. 400. Where a decree-holder purchases certain property belonging to the judgment-debtor in a sale held in execution of his own decree but is dispossessed by the judgment-debtor after the execution proceedings have concluded, a subsequent suit by the decree-holder for possession against the judgment-debtor cannot be said to fall within the scope of s. 47 as the matter in dispute does not relate to execution or satisfaction of the decree, having arisen after the satisfaction of the decree. A. I. R. 1936 Rang. 298=164 Ind. Cas. 260. Question of paramount title can be raised under s. 47. A subsequent suit to set aside a previous decree by a party claiming paramount title, that party having been a party in a previous suit and execution proceedings is not maintainable having regard to Order 21, rule 92 (3). A. I. R. 1936 Mad. 675=43 L. W. 740=1936 M. W. N. 449=163 Ind. Cas. 619. Where subsequent to a contract to sell certain property, it is attached by a decree-holder of the vendor and the sale in pursuance of the contract takes place, the vendee is not a representative of the judgment-debtor within the meaning of s. 47 and as such a suit by him (vendee) for a declaration that the property is not liable to attachment is not barred by s. 47. A. I. R. 1936 Nag. 163. A suit to set aside adjustment of decree by next friend of minor decree-holder without sanction of Court is barred. A. I. R. 1936 Pat. 506=17 Pat. L. T. 743.

**Representatives.**—"Representatives" include assignees or successors to the interest of party. A. I. R. 1926 Cal. 798=53 C. 781=43 C. L. J. 345=30 C. W. N. 649=95 Ind. Cas. 494. Representative when taken with reference to the judgment-debtor, does not mean only his legal representative, but his heir, executor or administrator, but it means his representative-in-interest, and includes a purchaser of his interest, who, so far such interest is concerned, is bound by the decree. 26 A. 447=A. W. N. 1904, 61=1 A. L. J. 65. A receiver is a representative of both parties. A. I. R. 1929 Bom. 270=31 Bom. L. R. 320=118 Ind. Cas. 694. Transferee of interest of tenant against whom rent decree has been passed, is not representative, unless he is bound by decree. A. I. R. 1921 Pat. 189=57 Ind. Cas. 289. Mortgagee holding prior to decree is not representative of judgment-debtor. 78 P. W. R. 1917=122 P. L. R. 1917=39 Ind. Cas. 772. Prior mortgagee party to subsequent mortgagee's suit remains party. A. I. R. 1924 All. 752=82 Ind. Cas. 80. Purchaser of judgment-debtor's attached property is his representative. A. I. R. 1926 Lah. 134=6 Lah. 544=93 Ind. Cas. 30. Purchaser of mortgaged property covered by decree is properly a party in execution. A. I. R. 1924 Pat. 367=1 Pat. L. R. 139. Purchaser from decree-holder purchaser is not representative of the decree-holder. A. I. R.

1922 L. B. 18=11 L. B. R. 17=64 Ind. Cas. 68 ; see also 80 Ind. Cas. 249=26 Bom. L. R. 333=A. I. R. 1924 Bom. 426. Purchaser from judgment-debtor who was ostensibly owner is not his representative. A. I. R. 1921 Bom. 45=45 B. 812=23 Bom. L. R. 254=61 Ind. Cas. 809 ; see also 42 Ind. Cas. 1. The term representative is wider than legal representative. Test of determining whether person is representative within s. 47 of any party is whether any interest of any party has vested in him by act of party or operation of law and whether that person is bound by decree to the extent of interest devolved. 142 Ind. Cas. 408=A. I. R. 1933 Lah. 352. Transferee *pendente lite* of mortgagor is his representative. 55 A. 235=144 Ind. Cas. 70=(1933) A. L. J. 113=A. I. R. 1933 All. 201. The question as to whether money attached in execution of a decree is property of a deceased judgment-debtor which has come to the hands of his representatives as such or belongs to the representatives in their own right can be and ought to be decided under s. 47. A. I. R. 1934 Mad. 621=67 M. L. J. 317=1934 M. W. N. 1026=40 L. W. 347=152 Ind. Cas. 293 ; see also A. I. R. 1934 Bom. 296=36 Bom. L. R. 608=58 B 513 ; A. I. R. 1935 Sind 214. A liquidator is not a representative of the judgment-debtor. 30 N. L. R. 240=148 Ind. Cas. 714=17 N. L. J. 47=A. I. R. 1934 Nag. 207. A claim by the legal representative impleaded in the case on his own behalf, though under a different right comes within the purview of this section. 60 C. L. J. 251. Representatives within the meaning of this section include not only legal representatives (heirs, executors and administrators) but also representatives in interest such as purchasers whether at a private or Court sale ; But a purchaser *pendente lite* is not a representative of the judgment-debtor. A. I. R. 1934 Pat. 413=151 Ind. Cas. 683 ; see also A. I. R. 1934 Cal. 258=58 C. L. J. 487=149 Ind. Cas. 926 ; A. I. R. 1934 Rang. 127=151 Ind. Cas. 227=7 R. R. 59 ; A. I. R. 1935 Sind 214 ; A. I. R. 1935 Lah. 306=158 Ind. Cas. 229. Whether a person who attaches money lying in Court is a representative of the person entitled to it or not, must be decided on the facts of each case. A. I. R. 1935 Sind 214. The same rule is applicable to a receiver in insolvency of the judgment-debtor. 39 C. W. N. 424=A. I. R. 1935 Cal. 503=62 C. 457=157 Ind. Cas. 863. A mortgagee auction purchaser is a representative of his judgment-debtor. 18 N. L. J. 274. A person who is liable as a surety for the performance of the decree, shall, under s. 145, be deemed to be a party within the meaning of s. 47. A. I. R. 1935 Rang. 39=155 Ind. Cas. 511. Where an Official Receiver applies to stay certain execution proceedings or to release property from attachment the question whether he is a "representative" within the meaning of s. 47 depends on the true character of the proceedings. A. I. R. 1935 Mad. 151=68 M. L. J. 78=41 L. W. 28=1935 M. W. N. 23=58 Mad. 403. The expression 'representatives' is not confined to a legal representative but includes a representative in interest and this expression has been liberally construed : (See 11 B. L. R. 149 ; 19 I. A. 166 and 30 M. L. J. 238). In determining whether a person is a representative of a party to the suit, two tests are to be applied, first whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has by act of parties or by operation of law vested in the person who is sought to be treated as representative, and secondly, if there has been a devolution of interest, whether so far as such interest is concerned, such person is bound by the decree. [9 C. L. J. 485 (488)]. A receiver under s. 47 is not the representative of the judgment-debtor within the meaning of this section. A. I. R. 1936 Cal. 573. Nephews of judgment-debtor who were survivors of the family and were in possession of his property are his representatives. 160 Ind. Cas. 119=A. I. R. 1936 Pat. 126. As to when purchaser decree-holder is a representative of the judgment-debtor, *vide* A. I. R. 1936 Pat. 289=17 Pat. L. T. 434=15 Pat. 545. Where A attached the mortgage decree obtained by G he is the representative of G in mortgage decree in view of Order 21, rule 53. A. I. R. 1937 Cal. 177.

**Auction purchaser, whether representative.**—Representative when taken with reference to judgment-debtor means not only his legal representative, but his representative in interest and includes a purchaser of his interest, whether he has purchased the judgment-debtor's interest at a private sale or at execution sale, and he can be made a party to the execution proceedings and he can have an opportunity to raise objections against the execution proceedings, if any. The real test to be applied in determining the question whether the auction-purchaser is to be regarded as the representative of the judgment-debtor or decree-holder depends upon the nature of the question raised and who the contesting party is. If the question is

between the judgment-debtor and the auction purchaser and the interests of the two are conflicting the auction purchaser can in no sense be considered to be a representative of the judgment-debtor. A. I. R. 1928 Oudh 412=3 Luck. 719=116 Ind. Cas. 49; see also 24 C. 62 (F. B.)=1 C. W. N. 37; 24 M. 689; 43 M. 107 (F. B.)=54 Ind. Cas. 209; 26 A. 447 (F. B.). Purchaser at a sale held in execution of a money decree is representative of judgment-debtor. 43 M. 107=38 M. L. J. 32=26 M. L. T. 391=54 Ind. Cas. 209 (F. B.); see also 25 C. W. N. 863=57 Ind. Cas. 874; 50 Ind. Cas. 931=9 L. W. 596; 42 B. 411=20 Bom. L. R. 495=46 Ind. Cas. 113; 42 Ind. Cas. 552=(1917) M. W. N. 861. Auction purchaser does not represent decree-holder. (1917) M. W. N. 88=37 Ind. Cas. 825. Auction purchaser is not a representative of judgment-debtor, in another suit against same judgment-debtor when the latter decree is sought to be executed by attachment and sale of the same property. 3 L. W. 377=34 Ind. Cas. 759. A decree-holder purchaser does not lose the character of a party. Section 47 is a bar to his suit for possession. 44 Ind. Cas. 563; but see 44 Ind. Cas. 169=8 P. R. 1918. Section 47 applies to a case where question raised concerns auction purchaser as well as parties to suit. 41 M. 403=23 M. L. T. 198=27 C. L. J. 367=34 M. L. J. 463=22 C. W. N. 553=16 A. L. J. 352=20 Bom. L. R. 580=8 L. W. 427 (P. C.)=44 Ind. Cas. 855; 24 Ind. Cas. 187=27 M. L. J. 213 (P. C.) Auction purchaser not party to suit, is representative of judgment-debtor. 12 P. R. 1919=49 Ind. Cas. 140. Question between decree-holder purchaser and judgment-debtor relating to possession are not under s. 47. 5 O. L. J. 551=48 Ind. Cas. 39; A. I. R. 1923 Cal. 345=84 Ind. Cas. 525; 47 A. 304=84 Ind. Cas. 746. Auction purchaser in inferior Court can object to sale in Superior Court as representative of judgment-debtor. A. I. R. 1924 Mad. 889=47 M. L. J. 720=20 L. W. 864=84 Ind. Cas. 265. Dispute between judgment-debtor and auction purchaser even if latter is representative of the former does not fall under s. 47. A. I. R. 1930 Rang. 281=127 Ind. Cas. 849; see also 119 Ind. Cas. 226; A. I. R. 1926 All. 509=95 Ind. Cas. 46; 78 Ind. Cas. 665=A. I. R. 1924 All. 856; A. I. R. 1921 Mad. 81=13 L. W. 15=61 Ind. Cas. 961; but see A. I. R. 1924 Nag. 328=20 N. L. R. 170=79 Ind. Cas. 636; 78 Ind. Cas. 665=A. I. R. 1924 All. 856; A. I. R. 1923 All. 470=45 A. 96=74 Ind. Cas. 995; A. I. R. 1923 B. 214=25 Bom. L. R. 147=72 Ind. Cas. 256.

An auction purchaser who is a stranger is not a representative of a decree-holder or the judgment-debtor. A. I. R. 1934 Lah. 105=148 Ind. Cas. 901; see also 38 C. W. N. 983=A. I. R. 1934 Cal. 827=60 C. L. J. 7; A. I. R. 1936 Pat. 561=15 Pat. 414. But a question which arises between the judgment-debtor and the auction purchaser, who is also a decree-holder, is one which arises between parties to decree. A. I. R. 1935 Nag. 30=31 N. L. R. 217=156 Ind. Cas. 995. An auction purchaser purchasing property at a sale in execution of a simple money decree against a judgment-debtor whose property has been ordered to be sold in a mortgage suit, is a representative of the judgment-debtor within the meaning of s. 47. 163 Ind. Cas. 926=1936 A. L. J. 541=A. I. R. 1936 All. 479; see also A. I. R. 1937 Lah. 347. Where *Agha Haider J.* observed: "It is admitted that he could only appeal if the case came within s. 47 and under no other provision of law. *Mr. S. L. Puri* who represents the respondents, has raised a preliminary objection to the effect that in view of the fact that *Khazana Mal* was an auction purchaser in execution of mortgage decree, he must, on the authorities be deemed to be the representative of the judgment-debtors and therefore any question arising between him and the judgment-debtor cannot be said to be one between the parties to the suit or their legal representative within the meaning of s. 47, Civil Procedure Code, and therefore he had no *locus standi* to maintain an appeal as from a decree passed under the provisions of s. 47. He relies upon 26 All. 447 and 31 All. 82. He further relies upon 12 P. R. 1919 and 79 Ind. Cas. 57. These authorities undoubtedly support his contention and, if I may say so with respect I am in full agreement with the view of law laid down in these cases. As pointed out by the Court below the contest is between the judgment-debtor and *Khazana Mal*, his representative, and the auction sale in which *Khazana Mal* purchased the property was in a mortgage decree. Therefore 26 All. 447 fully applies. In fact the learned Judges have gone further in the subsequent Full Bench decision in 31 All. 82. *Mr. Ratan Lal*, who was followed by *Mr. Meher Chand Mohajan* has invited my attention to 19 Cal. 683 and 41 Mad. 403. He has also referred to 43 Mad. 107. The Privy Council ruling 19 C. 683 was referred to in 26 All. 447. The Madras view seems to lend support to the contention of *Mr. Meher Chand Mohajan*, but the volume of judicial opinion on the other side is over-

whelming. Allahabad, Patna, Rangoon and Bombay are all against the contention of the learned Counsel for the appellant. There are two cases of the Lahore High Court, one in 12 P. R. 1919 and the other in A. I. R. 1925 Lah. 176, which seem to go even further and lay down that an auction purchaser is not even a party to the suit. In this state of authorities I hold that *Khazana Mal* had no *locus standi* and could not maintain the present appeal." An order passed on application under Order 21, rule 95, Civil Procedure Code by an auction purchaser, who is also a decree-holder, is an Order under s. 47, C. P. Code, and appealable as such. A. I. R. 1937 Lah. 145.

**Benamidar.**—The word "representative" has a wide import, and includes not only heirs and executors, but also assignees, all legal representatives in the strict sense of the words that is, persons interested in saving the property being sold, and whose interest would be jeopardized if the sale were not set aside. A person, for whom the predecessor of the judgment-debtors was the *benamidar* and who is therefore, really interested in protecting the property is a "representative" of the judgment-debtor within the meaning of s. 244 (=s. 47) of the C. P. Code of 1882. 7 C. L. J. 299; see also A. I. R. 1928 Cal. 835=114 Ind. Cas. 495. But a *benamidar* is neither party nor representative of party under this section. A. I. R. 1926 Mad. 1081=51 M. L. J. 391=24 L. W. 634; see also 44 Bom. L. R. 352=22 Bom. L. R. 296=56 Ind. Cas. 349; 46 Ind. Cas. 748.

**Court of Wards.**—Manager of Court of Wards in possession of judgment-debtor's property is his legal representative. A. I. R. 1925 Pat. 179=4 Pat. 172=6 P. L. T. 400=84 Ind. Cas. 520.

**Mortgagee.**—A person who claims as a mortgagee under the judgment-debtor must be regarded as representative of the judgment debtor for the purpose of this section. 4 M. L. T. 85. A person, to whom a transferable occupancy holding was mortgaged, before its sale in execution of a rent decree, is a representative of the judgment-debtor. 11 C. W. N. 312. A mortgagee from the judgment-debtor of property attached in execution of a money-decree, who takes his mortgage subsequent to the attachment is a representative of the judgment-debtor within the meaning of this section. 20 M. 378=7 M. L. J. 195; 22 A. 243=A. W. N. 1900, 51. Mortgagee of *patni* is representative of *patnidar*. A. I. R. 1926 Cal. 316=90 Ind. Cas. 955; see also 1 Pat. L. T. 267=56 Ind. Cas. 646. A person in the position of a second mortgagee who has obtained his mortgage during the pendency of the suit by the first mortgagee, is a representative of the mortgagor. 163 Ind. Cas. 926=1936 A. L. J. 541=A. I. R. 1936 All. 479; see also A. I. R. 1936 Pat. 552.

**Lessee.**—In a suit for possession against trespasser defendant, his lessee pending suit is not his representative. A. I. R. 1922 P. C. 304=31 M. L. T. 131=49 I. A. 220=43 M. L. J. 589=1 Pat. 581=24 Bom. L. R. 1251=27 C. W. N. 29=36 C. L. J. 542=20 A. L. J. 988=4 P. L. T. 1=68 Ind. Cas. 973 (P. C.).

**Which Court can be executing Court.**—The executing Court must have jurisdiction to execute the decree in the suit. 151 Ind. Cas. 860=A. I. R. 1934 Pesh. 107.

**Power of executing Court.**—The executing Court can refuse to execute a decree passed without jurisdiction. A. I. R. 1930 Rang. 337=8 Rang. 514=129 Ind. Cas. 519. Executing Court must construe but can not question validity of decree, even when it is voidable. A. I. R. 1930 Mad. 688=59 M. L. J. 160=32 L. W. 100=53 M. 750=125 Ind. Cas. 539; A. I. R. 1930 Pat. 840=11 P. L. T. 185=125 Ind. Cas. 787; A. I. R. 1930 All. 826=1930 A. L. J. 1135. Executing Court can question validity of decree within certain limits where question of jurisdiction is involved. A. I. R. 1929 Nag. 35=26 N. L. R. 60=120 Ind. Cas. 732. Nullity of decree for want of jurisdiction is a question within s. 47. A. I. R. 1929 Lah. 449=11 Lah. L. J. 306=120 Ind. Cas. 279; see also A. I. R. 1927 Bom. 53=28 Bom. L. R. 1367=98 Ind. Cas. 927; see also A. I. R. 1926 Mad. 128=46 M. L. J. 664=22 L. W. 567=91 Ind. Cas. 98; A. I. R. 1925 Cal. 507=53 C. 166=42 C. L. J. 1=29 C. W. N. 948 (F. B.); A. I. R. 1925 Lah. 494=6 Lah. 313=26 P. L. R. 474=88 Ind. Cas. 865. Where decree is alleged to be nullity proceedings can be treated as suit and relief granted. A. I. R. 1926 All. 387=48 A. 362=24 A. L. J. 379=93 Ind. Cas. 376. Judgment-debtor failing to object to attachment in execution cannot do so in suit for possession by auction purchaser as executing Court has exclusive jurisdiction to

decide the point. A. I. R. 1931 Nag. 27=130 Ind. Cas. 154. When decree is *prima facie* legal objection regarding jurisdiction of Court passing it cannot be raised in execution. A. I. R. 1929 Mad. 383=119 Ind. Cas. 33; see also A. I. R. 1921 Mad. 85=13 L. W. 143=61 Ind. Cas. 759. The executing Court is competent to make an enquiry as regards the validity of a decree. 38 C. W. N. 1124=60 C. L. J. 102. Whether an award can be filed and enforced as a decree under s. 15 of the Arbitration Act can be enquired into by an execution Court. 152 Ind. Cas. 135=35 P. L. R. 482=A. I. R. 1934 Lah. 652. But an execution Court has no jurisdiction to go into the question whether the trial Court had jurisdiction to pass a mortgage decree. A. I. R. 1934 Pat. 426=149 Ind. Cas. 457. But a decree beyond the inherent jurisdiction of the Court is a nullity and it cannot be executed and the executing Court is competent to decide the question whether the decree is or is not a nullity. There is a clear distinction between the manner of exercise of jurisdiction and the existence of jurisdiction. The existence of jurisdiction is dependent upon the place where the cause of action has accrued, the value of the subject-matter while the proper exercise of the jurisdiction depends upon other considerations including correct procedure. A. I. R. 1934 Lah. 623. An executing Court has no power to discuss the validity of the terms of the decree which it is ordered to execute. 13 Pat 17=151 Ind. Cas. 368=A. I. R. 1934 Pat. 203. An executing Court is competent to entertain a claim to set off even if the case does not fall under Order 21, rule 19. 60 C. L. J. 281=39 C. W. N. 106. It is only members and persons claiming through members against whom the Registrar can pronounce a decision which can be executed as a Civil Court decree. A. I. R. 1934 Pat. 145=15 Pat. L. T. 111=148 Ind. Cas. 730. Where a plot is mentioned in the decree as belonging to a particular survey number, that cannot be altered into a separate number in execution. 60 C. L. J. 286. An executing Court is not ordinarily entitled to go behind the decree but in view of the mandatory provisions of s. 16 an executing Court can refuse to sell the land belonging to a member of a notified agricultural tribe in any circumstances, in view of the mandatory provisions of s. 16 of the Punjab Alienation of Land Act, even though a decree has been obtained against him. 151 Ind. Cas. 730=35 P. L. R. 400=A. I. R. 1934 Lah. 609; see also A. I. R. 1924 (Pat.) 666 (F. B.)=15 P. L. T. 661. Execution sale of a part of the judgment-debtor's share in a property cannot be stayed merely on the ground that another Court in different suit has issued an injunction staying sale of the remaining part of the judgment-debtor's share in the property. A. I. R. 1934 Cal. 781=61 C. 568=152 Ind. Cas. 35. The objection as regards valuation cannot be taken for the first time before an executing Court. 13 Pat 290=150 Ind. Cas. 373=A. I. R. 1934 Pat. 240. An application for recording adjustment can be entertained by the executing Court. A. I. R. 1935 Bom. 303=37 Bom. L. R. 230. The executing Court has no power to question the correctness or propriety of the decree sought to be executed. A. I. R. 1935 Mad. 593=156 Ind. Cas. 145=42 M. L. W. 254=1935 M. W. N. 1250.

**Questions relating to execution, etc.**—Delivery of possession is not a question relating to execution. A. I. R. 1930 Pat. 311=9 Pat. 775=11 P. L. T. 331=126 Ind. Cas. 849; A. I. R. 1930 Rang. 61=8 Rang. 162=126 Ind. Cas. 209; A. I. R. 1930 Bom. 375=32 Bom. L. R. 619=54 B. 479=125 Ind. Cas. 703; A. I. R. 1930 Pat. 308=9 Pat. 332=11 P. L. T. 315=125 Ind. Cas. 516. Where the question arises in proceedings for delivery of possession as to the kind of possession to be delivered it is a question relating to execution. A. I. R. 1926 Cal. 798=53 C. 781=43 C. L. J. 345=30 C. W. N. 649 (F. B.)=95 Ind. Cas. 494. Proceedings for delivery of possession relate to execution. A. I. R. 1926 Cal. 798=53 C. 781=43 C. L. J. 315=30 C. W. N. 649=95 Ind. Cas. 494 (F. B.). Where possession for wrong property has been delivered, rectification of mistake is not under s. 47. A. I. R. 1929 Pat. 391=123 Ind. Cas. 400. Event subsequent to sale in execution are part of execution. A. I. R. 1929 Pat. 559=119 Ind. Cas. 881. Proceedings for delivery of possession after sale are part of execution. A. I. R. 1929 Mad. 757=57 M. L. J. 381=30 L. W. 424=52 M. 899=120 Ind. Cas. 567. Objection as to the defect or absence of necessary attachment of the property sold is under s. 47. A. I. R. 1930 Mad. 414=120 Ind. Cas. 863. Application to set aside the sale on the ground that sale was held contrary to directions in decree is one under s. 47. A. I. R. 1928 Mad. 140=106 Ind. Cas. 242. Question whether certain property is included in decree is one under s. 47. A. I. R. 1927 Cal. 614=54 C. 419=103 Ind. Cas. 233. Question relating to legality of sale is also one under s. 47. A. I. R. 1926 All. 457=24 A. L. J. 519=96 Ind. Cas. 137. An agreement before the passing of the decree not to execute it cannot be dealt with by the executing Court under this section. A. I. R. 1928 Rang. 36=5

Rang. 685=107 Ind. Cas. 860; A. I. R. 1926 Rang. 140=5 Bur. L. J. 41=96 Ind. Cas. 773. Order on question of notice under r. 22, Order XXI, is one in execution. A. I. R. 1926 Pat. 397=8 P. L. T. 28=97 Ind. Cas. 798. Decision whether a decree-holder is entitled to enforce default clause of an instalment-decree, because he has accepted part payments after defaults adjudicates a question relating to execution of decree. A. I. R. 1929 Lah. 390=113 Ind. Cas. 541. If there is question relating to the execution, arising between decree-holder and judgment-debtor, the mere fact that auction-purchaser is also interested does not make s. 47 less applicable. A. I. R. 1928 Mad. 806=111 Ind. Cas. 551. Application to set aside the sale, on the ground that decree-holder induced Court to sell more property than allowed by judgment, comes within s. 47. A. I. R. 1928 Rang. 215=114 Ind. Cas. 679; see also A. I. R. 1928 Lah. 936=110 Ind. Cas. 859. Application for enquiry into *mesne profits* is not under s. 47. A. I. R. 1929 Mad. 785=57 M. L. J. 515=30 L. W. 738=123 Ind. Cas. 6. In case of excess execution under fraud, application under s. 47 is proper remedy and no separate suit lies. A. I. R. 1928 Cal. 776=115 Ind. Cas. 581; A. I. R. 1925 Cal. 1258=42 C. L. J. 22=30 C. W. N. 41=89 Ind. Cas. 744. Question with regard to waste committed by judgment-debtor after date of decree for specific performance is question relating to execution and must be determined by executing Court and not by separate suit. A. I. R. 1925 Bom. 385=27 B. 687=89 Ind. Cas. 205. Proceedings for setting aside a sale are not proceedings in execution. 149 Ind. Cas. 445=P. L. R. 375=A. I. R. 1934 Lah. 508. In execution of a decree the decree-holder sought to attach a decree which had been obtained in the name of the judgment-debtor and his wife. The judgment-debtor died before the execution proceedings: *Held* that as between the decree-holder and the judgment-debtor, the question of whether the decree was the decree of the wife or of the husband was a matter that can be gone into and determined under s. 47 between these parties. A. I. R. 1934 Pat. 188. When an entry has been made of the full satisfaction of the decree on the date of confirmation of sale at the instance of the judgment-debtor but the decree-holder objected the same on the ground of fraud, the Court is competent to go into the question under s. 47. A. I. R. 1934 Pat. 202=148 Ind. Cas. 549. Immovable property given by a judgment-debtor as security for the due performance of a decree can be realized in execution without attachment the matter being one relating to execution under s. 47. A. I. R. 1934 Rang. 231. When the question does not relate to "execution, discharge or satisfaction" of a decree, a subsequent suit is not barred. 60 C. 1401. The provisions contained in Order 21, rule 19, C. P. Code cannot and should not be taken to be applicable and exhaustive in regard to questions arising for consideration under s. 47 of the Code relating to execution, discharge or satisfaction. A. I. R. 1936 Cal. 409. Where the objection raised related to the execution or discharge of the consent decree it can be taken up under s. 47. A. I. R. 1937 Cal. 271. Where property is claimed not under or in execution of a decree but the claim is for delivery of property on the ground that the decree is not binding on the claimant, the question is one that cannot be tried in execution and therefore s. 47 has no application A. I. R. 1937 Mad. 268.

Order on petition under rule 101 deciding objections to sale of property between parties is under s. 47. 31 Ind. Cas. 102. Decision on question whether property attached in execution forms part of deceased judgment-debtor's property, comes under s. 47. 22 C. L. J. 304=31 Ind. Cas. 321. Enquiry of allegations of misappropriation of attached movables by the decree-holder in collusion with Court Amin should be made under s. 47. 1 Pat. L. J. 558=36 Ind. Cas. 280. Proceedings for setting aside execution sale are under s. 47. (1916) 1 M. W. N. 256=33 Ind. Cas. 692. Executing Court cannot investigate the fact of receipt of decretal amount which was not certified. 24 C. L. J. 462=37 Ind. Cas. 738. An order declining in view of s. 63 to proceed with application in execution is one relating to execution within s. 47. 26 C. L. J. 42=42 Ind. Cas. 466. Order on application, impeaching satisfaction of decree, is one under s. 47. 26 C. L. J. 317=40 Ind. Cas. 839. Agreement for stay of execution of decree before decree is passed is a matter to be inquired into and decided by the executing Court. 40 M. 233=5 L. W. 132=37 Ind. Cas. 836 (F. B.).

A decree in execution of which immovable property was attached for sale was set aside, but upon further hearing another decree was passed and in execution of that decree the property under attachment was without a fresh attachment sold and purchased by the decree-holder. The decree itself though passed on a mortgage was

not passed in accordance with the provisions of the T. P. Act : *Held* that the sale should be taken, as at the time it was understood to be, a sale under the latter decree ; and any objection that the decree or the sale were not in compliance with the law was one to be raised under s. 244 of C. P. Code of 1882 before executing Court and not by a fresh suit. 22 C. W. N. 553 (P. C.)=41 M. 403=23 M. L. T. 198=27 C. L. J. 367=34 M. L. J. 463=4 P. L. W. 310=16 A. L. J. 353=45 I. A. 54=20 Bom. L. R. 530=44 Ind. Cas. 855 ; affirming 24 Ind. Cas. 187=27 M. L. J. 213. An application to set aside an execution sale on the ground of fraudulent suppression of sale proceeds is governed by s. 47. 27 C. L. J. 528=46 Ind. Cas. 221. Where properties not included in a sale certificate are delivered to purchaser proper remedy for re-delivery is by application under section 47 and not by separate suit. 45 Ind. Cas. 608.

Executing Court should see whether cattle of agriculturist sought to be attached, are necessary for him to earn livelihood. 13 S. L. R. 210=56 Ind. Cas. 69. Question whether judgment-debtor satisfied decree and was fraudulently kept out all means of exercising his right to apply in Court comes within s. 47. 30 C. L. J. 248=53 Ind. Cas. 67. Questions relating to possession of property purchased by decree-holder in executions are not questions relating to execution. 4 Pat. L. J. 716=52 Ind. Cas. 711=(1919) Pat. 354 ; 3 Pat. L. J. 571=48 Ind. Cas. 129 ; see also 47 Ind. Cas. 844. Orders passed relating to scheme for the management of public Hindu temple formed and sanctioned by Court is scheme in suit and are not orders in execution. A. I. R. 1925 P. C. 155=41 C. L. J. 628=30 C. W. N. 459=23 A. L. J. 555=27 Bom. L. R. 872=49 M. L. J. 25=87 Ind. Cas. 313.

Dismissal of previous objection to attachment bars second objection. A. I. R. 1931 Lah. 6=32 P. L. R. 413=130 Ind. Cas. 406. Proceedings for restitution under s. 151, can come under s. 47. 35 C. W. N. 105=53 C. L. J. 49. Order of restitution on setting aside of sale is not one under section 47. A. I. R. 1930 Pat. 280=11 P. L. T. 156=9 Pat. 685=122 Ind. Cas. 589. Court executing decree for jurisdiction to restore the property. A. I. R. 1928 Pat. 502=113 Ind. Cas. 217. Applications for restitution also come under s. 47. A. I. R. 1922 Nag. 198=67 Ind. Cas. 319 ; see also 40 M. 780=5 L. W. 267=38 Ind. Cas. 806 ; 72 Ind. Cas. 875=A. I. R. 1923 Oudh 16 ; A. I. R. 1925 Sind 126=19 S. L. R. 302=78 Ind. Cas. 1039 ; A. I. R. 1923 All. 394=21 A. L. J. 228=45 A. 369=74 Ind. Cas. 873 ; A. I. R. 1925 Pat. 577=4 Pat. 294=7 P. L. T. 415=92 Ind. Cas. 474. Proceeding relating to delivery of possession after confirmation of sale is not a proceeding in execution, whoever may be purchaser. A. I. R. 1925 Cal. 1250=89 Ind. Cas. 196 ; see also A. I. R. 1924 Bom. 429=26 Bom. L. R. 601=48 B. 550 (F. B.)=83 Ind. Cas. 932. An *interim* receiver making an application under s. 52 of the Provincial Insolvency Act cannot be said to be a representative of the judgment-debtor. 56 M. 453=141 Ind. Cas. 817=A. I. R. 1933 Mad. 152=64 M. L. J. 119. When a decree has been discharged and one of the parties applies to Court on the ground that the order has been wrongly passed and as such should be reviewed or reconsidered, the case is one under s. 47. 144 Ind. Cas. 468=1933 A. L. J. 738=A. I. R. 1933 All. 429. An independent suit for declaration that a decree has been fully satisfied and as such incapable of being executed is barred by s. 47. A. I. R. 1933 Lah. 1051. An executing Court is competent to decide whether a decree is capable of execution. 14 Lah. 230=140 Ind. Cas. 533=34 P. L. R. 546=A. I. R. 1933 Lah. 41. Where on the face of the decree it is valid, the executing Court is not competent to enquire into its validity. 142 Ind. Cas. 643=1933 M. W. N. 187=37 L. W. 358=A. I. R. 1933 Mad. 362 ; 142 Ind. Cas. 487=A. I. R. 1933 Nag. 211. Question whether property attached before judgment can be attached or not can be considered under s. 47. 58 C. L. J. 289=37 C. W. N. 978=A. I. R. 1933 Cal. 757. A *puisne* mortgagee who was a party to the suit cannot question the decree in execution proceeding. 144 Ind. Cas. 472=1933 M. W. N. 1371=38 L. W. 199=A. I. R. 1933 Mad. 569. Compensation for waste committed by a tenant after decree cannot be claimed under this section. A. I. R. 1933 Lah. 168=145 Ind. Cas. 117. An order under s. 73 of C. P. Code determining a question of rateable distribution as between rival decree-holders in which judgment-debtor is not interested does not fall under s. 47 of the Code. 33 Bom. L. R. 537=A. I. R. (1931) Bom. 350=133 Ind. Cas. 817=55 B. 473 ; see also A. I. R. 1931 Bom. 252=133 Ind. Cas. 737=33 Bom. L. R. 503. The order refusing to execute the order granting rateable distribution is appealable under s. 47. 12 P. L. T. 477=A. I. R. 1931 Pat. 359=133 Ind. Cas. 166. When a decree binding on a temple declared that the decree-holder had rights as Periaithaikkor and gave an injunction restraining the temple trustees from interfering with the decree-holder's exercise of these

rights but the decree did not specifically say what those rights were : *Held* that it did not mean that the decree-holder had no rights at all and that the executing Court had power to deal with the disputes which had arisen subsequent to the decree. A. I. R. 1935 Mad. 576=1935 M. W. N. 879=156 Ind. Cas. 125. A matter which arises after the satisfaction of the decree cannot relate to the execution or satisfaction thereof. A. I. R. 1936 Rang. 298=164 Ind. Cas. 260.

**Sub-section (2).—**Under s. 47 (2) a proceeding may be treated partly as a suit and partly as a petition. The section is intended to obviate the injustice caused by a mistake in imitation of proceedings. A. I. R. 1931 Mad. 588=133 Ind. Cas. 12. Intention of s. 47 (2) is to correct *bonafide* mistake. A. I. R. 1931 Mad. 270=60 M. L. J. 471=33 L. W. 549=130 Ind. Cas. 475 ; see also A. I. R. 1931 Oudh 45=7 O. W. N. 1159=130 Ind. Cas. 152. A plaint can be treated as application but limitation of application will apply. A. I. R. 1930 Oudh 468=7 O. W. N. 887=128 Ind. Cas. 728 ; see also 34 Ind. Cas. 774=4 L. W. 440. Under clause (2) the Court is competent to treat a proceeding in execution as a suit and payment of additional Court-fees may be ordered. 149 Ind. Cas. 1003=A. I. R. 1934 Pat. 9. Where a party to suit filed in a Small Cause Court objects to an attachment made in execution of the decree taken in the Small Cause Court itself and such objection is dismissed and the objector files a declaratory suit in a Munsiff's Court, the suit must be dismissed and Munsiff's Court cannot treat the suit as a petition under s. 47 as such an application can be made only in execution proceeding in the Small Cause Court. A. I. R. 1934 All. 699. It is doubtful whether s. 47 of the Civil Procedure Code applies to the original sale and whether a suit to set aside a sale of properties not included in the mortgage may be treated as an application under that section. 40 C. W. N. 428. Conversion into application cannot be allowed when forum is different. 35 Ind. Cas. 473. Appellate Court can treat proceedings in execution as proceedings in suit and can grant necessary relief. A. I. R. 1926 All. 387=48 A. 362=24 A. L. J. 379=93 Ind. Cas. 376. Where through error in decree application for an enquiry into *mesne profits* is made by execution petition and where no other point is involved, the Court can treat the petition as application in suit. A. I. R. 1930 Mad. 30=57 M. L. J. 728=30 L. W. 810=53 M. 838=124 Ind. Cas. 290. Failure to convert suit as application is revisable. A. I. R. 1921 Nag. 130=59 Ind. Cas. 477. No appeal lies from an order merely allowing the conversion of an execution petition into a suit as permitted by s. 47 (2) for the reason that the order though passed under s. 47 is not one relating to the execution, discharge or satisfaction of the decree. But where the lower Court was invited to exercise the power to set aside the order on the footing, *held* that the respondent could not turn round and say that no appeal lay at appellant's instance to correct the error. 130 Ind. Cas. 475=60 M. L. J. 471=A. I. R. (1931) Mad. 270. If proceeding is to be treated as suit, objector should pay Court-fee and not decree-holder. A. I. R. 1934 Pat. 9.

**Sub-section (3).—**It is doubtful whether this sub-section is wide enough to cover a question between decree-holder and his representative. 146 Ind. Cas. 502=37 C. W. N. 909=A. I. R. 1933. Cal. 809. This sub-section is ancillary to sub-section (1) and is not applicable where the question is between rival representatives of one party, the other party having throughout disclaimed any interest. 57 Bom. 641=146 Ind. Cas. 336=35 Bom. L. R. 609=A. I. R. 1933 Bom. 396. Under sub-section (3) a statutory obligation is laid on the Court seized of execution proceedings to determine the question whether a particular person is or is not the representative of a party to the decree. It is also clear that when such a question arises in the appellate stage of the proceedings taken under s. 47, that question must be decided by the Court of appeal. 150 Ind. Cas. 425=11 O. W. N. 917=A. I. R. 1934 Oudh 337 ; see also 39 C. W. N. 313. Sub-section (3) must be read as ancillary to sub-section (1) and only comes into operation where there is a question arising between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree, and it does not apply to a case in which the question is between the rival representatives of one party, the other party having throughout disclaimed any interest in the question. A. I. R. 1935 Lah. 384=37 P. L. R. 145=157 Ind. Cas. 73.

**Limitation —**Application under s. 47 falls within Art. 181 and not within Art. 166 although applicant asks for setting aside sale. A. I. R. 1928 Cal. 1865=116 Ind. Cas. 634 ; 145 Ind. Cas. 113=A. I. R. 1933 Lah. 570 ; 132 Ind. Cas. 493=32 P. L. R. 440=A. I. R. 1931 Lah. 586 ; A. I. R. 1927 Cal. 614=54 C. 419=103 Ind.



Cas. 57; A. I. R. 1924 Mad. 431 (F. B.)=47 M. 288=46 M. L. J. 104=19 L. W. 179=34 M. L. T. 37=1924 M. W. N. 182=80 Ind. Cas. 92. An application by a judgment-debtor to set aside the attachment and sale of his property, of which he is in possession on the ground that it is not so liable under s. 60, falls under s. 47 of the C. P. Code, and is governed by Art. 181 and not by Art. 165 of the Limitation Act; and the period of limitation runs from the date on which the notice of attachment is served on the judgment-debtor. 33 Bom. L. R. 781=A. I. R. 1931 Bom. 446=133 Ind. Cas. 858. Application for setting aside sale on ground of want of notices under Order XXI, rules 22 and 66, though falling under s. 47 is governed by Limitation Act, 1908, Art. 166. A. I. R. 1931 All. 145=(1931) A. L. J. 119=130 Ind. Cas. 708. Art. 166 and not Art. 181 applies to application to set aside sale under Order XXI, r. 90. A. I. R. 1922 Mad. 95=1922 M. W. N. 514=16 L. W. 934=74 Ind. Cas. 458; see also A. I. R. 1931 Cal. 381=54 C. L. J. 991. Section 181 and not Art. 165 governs application which are filed by parties to the suit as objections to the execution proceedings under s. 47. A. I. R. 1929 Oudh 76=4 Luck. 209=115 Ind. Cas. 444.

**Appeal.**—Where an order under this section operates as a decree it is appealable. 137 Ind. Cas. 258=33 P. L. R. 496=A. I. R. 1932 Lah. 376=1 R. 1932 Lah. 315. An appeal lies where an order states that the executive application is dismissed, because it is an order under s. 47. A. I. R. 1933 All. 734; see also 144 Ind. Cas. 255=14 Pat. L. T. 271=A. I. R. 1933 Pat. 248. Generally speaking an order under section 47 is a decree and as such is appealable. 37 C. W. N. 671=A. I. R. 1933 Cal. 680=60 Cal. 832; see also 35 Bom. L. R. 360=A. I. R. 1933 Bom. 185=144 Ind. Cas. 927; 56 C. L. J. 520=A. I. R. 1933 Cal. 311; 34 P. L. R. 851=A. I. R. 1933 Lah. 383. The objection to the attachment of the claimant, who is not a party to the suit is one under Order 21, rule 58 and is not appealable. 139 Ind. Cas. 785=1932 A. L. J. 125=A. I. R. 1932 All. 263=A. L. R. 1932 All. 380; see also A. I. R. 1934 Mad. 435=67 M. L. J. 36=57 M. 822=40 L. W. 144. An order refusing the objection of the judgment-debtor and directing the execution to proceed is not appealable. 1933 M. W. N. 460=37 L. W. 749=A. I. R. 1933 Mad. 500=64 M. L. J. 735. Where an order really falls under s. 47 but was misdescribed as falling under Order 21, r. 58 and dealt with by Court under a misconception as such, an appeal is competent from such order. 137 Ind. Cas. 258=33 P. L. R. 496=A. I. R. 1932 Lah. 376=1 R. 1932 Lah. 315. Where section 47 is applicable a second appeal lay to the High Court. 59 C. 956=36 C. W. N. 125=55 C. L. J. 85=139 Ind. Cas. 186=A. I. R. 1932 Cal. 672=A. L. R. 1932 Cal. 1003. An order refusing to accept a security bond given by a surety for the judgment-debtor pursuant to an order for stay of execution made by the appellate Court, is not a decree and such is not appealable. 136 Ind. Cas. 793=A. I. R. 1932 Lah. 120=1 R. 1932 Lah. 278. Order refusing to execute a decree is appealable. 10 Bur. L. T. 159=36 Ind. Cas. 10; 52 Ind. Cas. 401. Order authorizing temporary alienation but refusing to sell agricultural land is appealable. A. I. R. 1931 Lah. 141=32 P. L. R. 60=131 Ind. Cas. 274. Decision as to the mode of execution is not appealable. A. I. R. 1931 All. 129. No appeal lies from an order merely allowing the conversion of an execution petition into a suit. A. I. R. 1932 Mad. 270=60 M. L. J. 47=33 L. W. 549=130 Ind. Cas. 475. No appeal lies, where no objection was taken to legality or jurisdiction. A. I. R. 1929 Rang. 161=7 Rang. 110=117 Ind. Cas. 245. Order refusing to alter valuation in sale proclamation is not appealable. A. I. R. 1928 Bom. 245=52 B. 444=30 Bom. L. R. 679=111 Ind. Cas. 892. An appeal lies from an order that judgment debtor is not entitled to the benefit of Order 21, rule 40. A. I. R. 1929 Lah. 141=111 Ind. Cas. 707. Order granting or refusing extension of time in decree for specific performance is not appealable. A. I. R. 1927 Rang. 311=5 Rang. 615=6 Bur. L. J. 216=105 Ind. Cas. 467; see also A. I. R. 1929 Cal. 140=112 Ind. Cas. 124. In order to be appealable an order under s. 47 must be such as to come within s. 2(2). A. I. R. 1927 All. 208. 99 Ind. Cas. 208. Interlocutory order that defendants are liable to account as legal representatives of judgment-debtor is not appealable when amount due is not determined. A. I. R. 1925 All. 588=47 A. 543=23 A. L. J. 458=87 Ind. Cas. 322. Where question is one under s. 47, appeal lies from order passed under s. 173. B. T. Act, though no provision for appeal is made in the Act itself. A. I. R. 1925 Cal. 1223=85 Ind. Cas. 750. Where objection by judgment-debtor was dismissed by default, no appeal lies. A. I. R. 1925 Oudh 485=28 O. C. 124=85 Ind. Cas. 393. Decision on question of right of applicant to be brought on record as legal representative of judgment-debtor is decree. A. I. R. 1925 All. 578=47 A. 365=86 Ind. Cas. 1048. An order for re-sale is a decree within s. 47. A. I. R. 1925 Oudh 397=12 O. L. J.

261=2 O. W. N. 212=28 O. C. 327. No second appeal lies from an order under Order 21, rule 92. 42 C. L. J. 176=90 Ind. Cas. 228=A. I. R. 1926 Cal. 400. No appeal lies from an order staying execution. A. I. R. 1926 Cal. 830=94 Ind. Cas. 352. All orders under s. 66 are not appealable, only such as come under s. 47 are appealable. A. I. R. 1926 Mad. 834=51 M. L. J. 135=23 L. W. 765=(1926) M. W. N. 566=96 Ind. Cas. 492. Order of re-sale under Order 21, rule 71 is appealable. A. I. R. 1927 Nag. 112=23 N. L. R. 14=100 Ind. Cas. 691. Order rejecting application for delivery of possession is appealable under s. 47. A. I. R. 1925 Mad. 1198=51 M. L. J. 106=(1926) M. W. N. 599=1925 M. W. N. 577=90 Ind. Cas. 952. Orders in pursuance of the scheme are not appealable. A. I. R. 1930 Mad. 918=32 L. W. 605=54 M. 315=60 M. L. J. 514=128 Ind. Cas. 515. Order refusing execution is appealable. A. I. R. 1930 Oudh 268=7 O. W. N. 523=127 Ind. Cas. 865. No appeal lies from an order of Court declaring security satisfactory to Court after elaborate enquiry. A. I. R. 1931 Mad 38=59 M. L. J. 892=32 L. W. 742=(1930) M. W. N. 1096=54 M. 237=129 Ind. Cas. 462. No appeal also lies from an order refusing execution of a decree on the ground that it has been attached. 154 Ind. Cas. 678=1935 O. W. N. 331=A. I. R. 1935 Oudh 272. Questions relating to the execution of the decree are generally questions arising between the decree-holder and judgment-debtor and any dispute between co-judgment-debtors alone with which the decree-holder is not concerned is *prima facie* not a matter, which relating to the execution of the decree, and therefore no appeal lies from orders on such questions. A. I. R. 1935 Mad. 714=1935 M. W. N. 593=156 Ind. Cas. 141. An order passed under Order XXI, rule 95, on an application by a decree-holder auction purchaser is an appealable order. 38 P. L. R. 621. An order directing the arrest of the judgment-debtor on failure of giving the security is also appealable. A. I. R. 1936 Rang. 367=164 Ind. Cas. 459. An appeal lies against an order disallowing the judgment-debtor's plea that the execution of the judgment-debtor is time-barred. 164 Ind. Cas. 670=1936 M. W. N. 515=44 L. W. 486=A. I. R. 1936 Mad. 801=71 M. L. J. 388. An order in the nature of an interlocutory order does not come within the provision of s. 47. 164 Ind. Cas. 424=1936 O. W. N. 644=A. I. R. 1936 Oudh 369. An order refusing an application by the judgment-debtor to raise the attachment effected in execution is appealable as a decree. 165 Ind. Cas. 59=1936 M. W. N. 1037=44 L. W. 460=A. I. R. 1936 Mad. 812. An order made under the inherent powers of the Court is not *per se* appealable. But if that order is in fact an order passed on application made by one of the parties as against another party, and relating to the execution, discharge or satisfaction of the decree, it falls under s. 47 and is therefore appealable. A. I. R. 1936 Mad. 636=1936 M. W. N. 503=43 L. W. 773. Where the question related only to a dispute between rival decree-holders in which the judgment-debtors were not interested, and the question was not one which arose under s. 47, C. P. Code, the decision was not appealable. A. I. R. 1936 Mad. 136=70 M. L. J. 33=1936 M. W. N. 44=43 L. W. 31=59 M. 399=165 Ind. Cas. 573. When the impleading of a party in a suit was in one capacity and question are raised in execution proceedings in another capacity, they are not matters falling under s. 47 and should be decided in a regular suit or no appeal lies against an order in execution. A. I. R. 1936 Mad. 733.

Order staying execution of a decree till decision of the appeal is appealable as a decree. A. I. R. 1930 Lah. 187=11 Lah. 402=31 P. L. R. 617=124 Ind. Cas. 249. Where decree-holder is the purchaser, order under Order 21, rule 90 is open to second appeal. A. I. R. 1930 Nag. 191=124 Ind. Cas. 250. An order directing Receiver's remuneration to be paid by one party is not appealable. A. I. R. 1930 Lah. 352. Order under Order XX, rule (2) is appealable. A. I. R. 1929 Rang. 191=119 Ind. Cas. 751. No appeal lies against order under Order XXI, rule 99 passed on an application by decree-holder auction purchaser for reversing resistance to possession. A. I. R. 1930 Lah. 363=120 Ind. Cas. 593. Order of arrest is not appealable. A. I. R. 1929 Mad. 718=30 L. W. 230=1929 M. W. N. 74=119 Ind. Cas. 43. An *ex parte* order granting leave to apply for execution is not a decree nor has the force of a decree. A. I. R. 1929 All. 395=(1929) A. L. J. 553=115 Ind. Cas. 865. Appeal lies from order of Court refusing to decide executability of decree. A. I. R. 1928 Rang. 40=5 Rang. 775=6 Bur. L. J. 225=106 Ind. Cas. 857. No second appeal lies against order setting aside or refusing to set aside sale, although matter is one between decree-holder, auction purchaser and judgment-debtor. A. I. R. 1927 Cal. 657=45 C. L. J. 557=104 Ind. Cas. 188. Appeal lies against order determining whether party applying for execution is or is not the representative of the decree-holder. 24

L. W. 660=98 Ind. Cas. 783. Order in execution determining rights between parties is only appealable. A. I. R. 1928 All. 268=48 A. 260=92 Ind. Cas. 644. Order in execution to be appealable must fall within definition of decree. A. I. R. 1926 All. 401. Order in execution determining rights between parties is only appealable. A. I. R. 1928 All. 268=48A. 260. Order made by Court exercising power given by provision in the scheme of management of trust is not appealable. A. I. R. 1926 Mad. 130=22 L. W. 796=92 Ind. Cas. 558. Order that mortgaged properties be sold in particular order is final on question relating to execution. A. I. R. 1925 Pat. 484=6 P. L. T. 393=1925 Pat. 164. No second appeal lies from suit of Small Cause nature. A. I. R. 1925 Mad. 742=48 M. L. J. 499=90 Ind. Cas. 794. Order under section 47 is decree only if question relating to rights and liabilities of parties sought to be determined is decided and not when order on incidental question of procedure is passed. A. I. R. 1924 Pat. 683=2 Pat. L. R. 222=84 Ind. Cas. 576. Appeal lies against order of arrest where the judgment-debtor is arrested on ground that arrest is invalid. A. I. R. 1924 Mad. 900=47 M. L. J. 678=(1924) M. W. N. 781=35 M. L. T. 102=84 Ind. Cas. 513. Order on objection to sale proclamation on ground of misdescription of the boundaries, is within s. 47 and appealable. A. I. R. 1925 Cal. 318=29 C. W. N. 556=80 Ind. Cas. 861. Order staying proceeding is not decree. A. I. R. 1924 All. 794=80 Ind. Cas. 39. Order refusing arrest is not appealable. A. I. R. 1922 Lah. 259=4 Lah. L. J. 266=79 Ind. Cas. 551. Order refusing postponement or alteration in sale proclamation is not appealable. A. I. R. 1924 Mad. 234=46 M. L. J. 71=18 L. W. 615=75 Ind. Cas. 901. Direction to sell properties in particular order is not appealable. A. I. R. 1924 Mad. 527=46 M. L. J. 122=33 M. L. T. 275=78 Ind. Cas. 829.

There is no provision of appeal in the Code on an order passed under Order 21, rule 97. But if an order is passed under that rule in a dispute between the auction purchaser who is the decree-holder himself and a person who was a party to the suit, such an order falls under the provisions of s. 47 and is therefore appealable. A. I. R. 1934 Cal. 541=38 C. W. N. 497=150 Ind. Cas. 313. An objection that a sum paid in part satisfaction of a rent decree is not given credit falls within s. 47 and so can legitimately form subject-matter of appeal. A. I. R. 1934 Cal. 761. The proceedings for enforcement of an award under s. 47, C. P. Code and an appeal is competent for an order rejecting such application. The fact that an objection was raised that the award was given without jurisdiction does not preclude the applicability of s. 47. A. I. R. 1934 Lah. 49=35 P. L. R. 635=151 Ind. Cas. 881. Section 145, Civil Procedure Code itself provides that any person who has become liable as surety and against whom a decree may be executed shall be deemed for the purpose of appeal to be a party within the meaning of s. 47. It follows that the surety has a right of appeal against an order directing execution against him. 152 Ind. Cas. 693=35 P. L. R. 466=A. I. R. 1934 Lah. 538. An order passed under Order 21, r. 16 allowing a transferee of a decree his right to execute the decree though not appealable is appealable as a decree within s. 47 in as much as the transferee is a representative of the decree-holder within the meaning of that section and the order allowing his right to execute is one which decides therefor a question relating to the execution of the decree as between transferee and the judgment-debtor. A. I. R. 1934 Lah. 328.

Where a decree is assigned and the assignee assigns it to another but the second assignee's application for permission to execute the decree and to recognize the assignment is offered by the first assignee and the application is dismissed, an appeal is competent from the order of dismissal as s. 47 applies. A. I. R. 1934 Mad. 181. Where in consequence of a decree removing a *mohant* from office, an order is made in a miscellaneous application for appointing a committee which was to appoint a new *mohant*, the order is not appealable as it is neither a decree nor an order under s. 47, Civil Procedure Code, for an order made appealable under Order 43, rule 1. A. I. R. 1934 Pesh. 43. Where the judgment-debtor himself applies to have an execution sale set aside a second appeal does lie from the appellate order dismissing an appeal from the lower Court's order dismissing the application as in such a case provision of s. 47, C. P. Code apply. A. I. R. 1935 Mad. 438=1935 M. W. N. 403=42 L. W. 39=156 Ind. Cas. 699. A dispute between the decree-holder, who is also the auction purchaser and the judgment-debtor relating to the delivery of possession of property purchased by the decree-holder auction purchaser is a dispute relating to the execution or satisfaction of the decree, and arises between the parties to the suit or their legal representative. A. I. R. 1935 Lah. 144=37 P. L. R. 116=153 Ind. Cas. 85. Though no appeal lies against an order passed

wholly and singly under s. 73; an order which decides a matter covered by s. 47 (1) may although it be passed ostensibly under s. 73 be the subject of appeal. A. I. R. 1935 Lah. 302=16 Lah. 909=156 Ind. Cas. 845.

An appeal by judgment-debtor from an order upholding the assignment from the decree-holder is not maintainable. A. I. R. 1935 Lah. 609=37 P. L. R. 305=155 Ind. Cas. 974. It is not every order in execution which is a decree; it is only such orders as conclusively determine a question between the parties to the suit relating to the execution of the decree. So no appeal lies from an order by which the executing Court granted extension of time for payment of money. A. I. R. 1935 Rang. 500.

Section 47 applies to execution proceedings of rent decree also and as such an appeal lies from an order passed on question relating to execution, in satisfaction of such a decree between the parties. A. I. R. 1935 Pat. 227=16 Pat. L. T. 443=156 Ind. Cas. 881. Long after mortgage decree had been obtained, the mortgagor died and his sons were brought on the record as his legal representatives. They raised objections in execution that the mortgaged house was their personal property and was not liable to sale in execution of the mortgage decree: *Held* that s. 47 had no application as that section deals with the cases of execution, discharge or satisfaction of the decree and takes for granted that a valid decree subsists. A. I. R. 1935 Lah. 549=37 P. L. R. 123=A. I. R. 1935 Lah. 103. In considering whether an application is under s. 47 or not, a Court must examine the substance of the application to find out its true nature and should not be guided solely by the heading given to it by the applicant. Where money decree was fully satisfied before executing Court, and an application under s. 151, C. P. Code was made to inquire how much money was due by the judgment-debtor: *Held*, reading the application as a whole there could not be any manner of doubt that it related to matter touching the discharge or satisfaction of the decree and was therefore in reality and substance an application under s. 47 of the Code and therefore the order was appealable. A. I. R. 1936 Lah. 725=161 Ind. Cas. 21. But an order is not appealable when it is made under s. 151, C. P. Code. 40 C. W. N. 89; see also A. I. R. 1936 Sind 166. In proceedings under Order 34, rule 5, the auction purchaser is not a necessary party. The decision of an executing Court on an application under Order 34, rule 5 falls within the purview of s. 47, C. P. Code as is appealable. A. I. R. 1936 Lah. 562=38 P. L. R. 259=164 Ind. Cas. 53. An order setting aside a sale on the ground that the executing Court had no jurisdiction to sell the property without attachment, in the first instance, falls under s. 47 and a second appeal is competent against such an order. A. I. R. 1936 Lah. 573=164 Ind. Cas. 140. Where an order is one under s. 73, C. P. Code and not under s. 47 of the Code, no appeal lies. A. I. R. 1936 Lah. 181=162 Ind. Cas. 309. An order under Order 21, rule 66, which overruled the objection of the judgment-debtor that only a part of the property was saleable is an order under s. 47 and as such an appeal lies against such an order. 1936 A. M. L. J. 13. During the sale in execution of a mortgage decree the judgment-debtor died. As the sale proceeds were insufficient his legal representative was brought on record, and decree under Order 34, rule 6 was obtained against the assets in his hands. He made no objection that the property sold was his personal property. The execution Court disallowed the objection, and directed him to bring a regular suit. In a suit for declaration that the person belonged to the local representative: *Held* the objection of the local representative could not be treated as under Order 21, rule 58, but one under s. 47. Therefore the order of dismissal of objection was appealable and a separate suit did not lie from the order dismissing objection. A. I. R. 1937 All. 97.

#### LIMIT OF TIME FOR EXECUTION.

48. [S. 230, 3rd and 4th paras.] (1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

- (a) the date of the decree sought to be executed, or
- (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at

recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application ; or

(b) to limit or otherwise affect the operation of Artical 180 of the second Schedule to the Indian Limitation Act, 1877.\*†

**Soope.**—This section prescribes a period after the lapse of which an application for the execution of a decree though not barred by limitation, shall not be granted. 9 P. R. 1891 ; 109 P. R. 1889. This section contains an unqualified prohibition subject to exceptions contained in the cl.(2) thereof against execution of certain kinds of decree more than 12 years old and is not controlled by s. 15 (1) of the Limitation Act. The period mentioned in s. 48 C. P. Code is not a period of limitation in the strict sense; and consequently s. 15(1) of the Limitation Act is not applicable to it. 7 Lah. 49=A. I. R. 1931 Oudh 351=132 Ind. Cas. 257=14 O. L. J. 459=8 O. W. N. 642 ; see also 131 Ind. Cas. 345 ; A. I. R. 1928 Mad. 1154=113 Ind. Cas. 260 ; A. I. R. 1922 Mad. 268=16 L. W. 68=(1922) M. W. N. 424=31 M. L. T. 140=43 M. L. J. 168=45 M. 785=70 Ind. Cas. 396. Section 7 of the Limitation Act does not exempt a minor decree-holder from the operation of s. 230 which is enacted absolutely for the benefit of the judgment-debtor that he might not be harassed for ever and for every execution proceedings. 128 P. R. 1894 ; A. I. R. 1928 Mad. 1154=113 Ind. Cas. 260. The term "application to execute a decree" in the paragraph means any application for the purpose. And it should not be restricted to the last application immediately preceding an application made after 12 years from the date of the decree sought to be enforced, on which the sum decreed became payable. 15 A. 198=A. W. N. 1893, 93. As the Code by s. 48 prohibits the Court from making any order upon an application presented after expiration of 12 years, the statutory obligation of the Court cannot be got rid of on account of any private contract to the contrary. It will be the duty of the Court to ignore the private agreement and to give effect to the statute. The agreement may give rise to a separate suit, but cannot estop the judgment-debtor from objecting to the further execution of the decree. 54 A. 573 (590)=1932 A. L. J. 365=138 Ind. Cas. 583(2)=13 L. R. 199 (Rev.)=A. I. R. 1932 All. 273=A. L. R. 1932 A. 272 (F. B.). Section 48 does not prescribe a period of limitation in the strict sense, it imports limitation on the right of decree-holder to apply for execution after the expiry of 12 years from the date of the decree and in that sense 12 years period in effect lays down the period of limitation applicable to an application for execution of the decree within the meaning of s. 78 (2) of the Provincial Insolvency Act. 8 O. W. N. 1186. An application for execution of a decree stayed by an injunction or order of the Court filed after 12 years from the date of the decree cannot be saved from the bar under s. 48, C. P. Code by excluding under s. 15 (1) of the Limitation Act the time during which execution was stayed. 8 O. W. N. 642=A. I. R. (1931) Oudh 351=14 O. L. J. 459=132 Ind. Cas. 257. Section 48 is not controlled by s. 15, Limitation Act, and the only exception to sub-section (1), is that contained in sub-section (2). A. I. R. 1929 Pat. 597=120 Ind. Cas. 315. Section 48 has retrospective effect. It governs an application for execution of a mortgage decree passed before the new Code came into force. A. I. R. 1925 Bom. 326=27 Bom. L. R. 461=87 Ind. Cas. 769. The period of limitation prescribed by s. 48 is a part of the substantive law of limitation, as will appear from the wording of Arts 181 and 182, Limitation Act. It has nothing to do with the manner of executing the decree. A. I. R. 1932 Sind 116=26 S. L. R. 91=A. L. R. 1932 Sind 82. A preliminary as well as final decree should be taken as single and indivisible decree. Date of decree means date of final decree. 33 Ind. Cas. 180. Application for execution of mortgage decree made more than 12 years barred under s. 48 though the decree was passed under the old Code. 20 C. W. N. 952=2 Pat. L. W. 370=1 Pat. L. J. 314=34 Ind. Cas. 27. Where an execution application is filed within limitation but arrested without fault of decree-holder and

\* See now the Indian Limitation Act, 1908 (IX of 1908), Sch. I, Art. 183.

† XV of 1877.

application to continue the execution is made beyond limitation the latter application is merely ancillary to first and is not barred. A. I. R. 1926 All. 331=24 A. L. J. 437=94 Ind. Cas. 613. An order under s. 48 must be passed by the Court which made the decree and acting as that Court. An adjustment sanctioned by executing Court to pay decree by instalments will not alter original decree nor will the limitation get a fresh starting point. A. I. R. 1923 Lah. 678. "Period of limitation" in strict sense means such a period that a proceeding to which it is sought to be applied will be in time, if filed within the period, and beyond time, if filed after it. In loose sense it means a secondary period which applies as a further check to an application or suit which is found not wanting when the primary or strict period of limitation is applied. Section 48, C. P. Code, 1908, for example prescribed a period of limitation in the loose sense. A. I. R. 1922 Mad. 268=16 L. W. 68=(1922) M. W. N. 424=31 M. L. T. 140=45 M. 785=43 M. L. J. 168=70 Ind. Cas. 396. A decree-holder has the undoubted right to waive a default where the decree directing payment of money by instalments contains a clause giving an option to the decree-holder to execute for the whole balance of the decretal amount on the happening of any default and if there is a default s. 48 is a bar to the execution of the decree only in respect of instalments payable more than 12 years before the date of the application is no bar to the execution in respect of instalments payable within 12 years of the date of application. A. I. R. 1932 Lah. 564=138 Ind. Cas. 255=I. R. 1932 Lah. 436. The 12 years' period prescribed by s. 48 ought to be taken to run from the date of the original decree and not from the date of any subsequent amendment. Paragraph (3), Schedule 3, controls s. 48. But where property sought to be sold was included amongst the properties in the previous execution application, the decree-holder cannot be said to have been temporarily deprived of his present remedy. A. I. R. 1934 Oudh 465=11 O. W. N. 1103=151 Ind. Cas. 541. Section 29, Limitation Act, does not include the Code of Civil Procedure in its scope. Ss. 19 and 20, Limitation Act, do not apply to s. 48, Civil Procedure Code, and the reason is that so to apply then would be to render the provisions of s. 48, Civil Procedure Code largely nugatory. *Ibid.* An application praying for time to file a fresh list of properties is not an application for execution. 60 L. L. J. 123. As regards waste amounts to continuance of the application for execution, *vide* 148 Ind. Cas. 1017=1934 A. L. J. 202=A. I. R. 1934 All. 481 (F. B.). If an application for execution by issue of precept is filed within 12 years of decree, precept can be issued even after the expiry of 12 years provided the application is pending and the precept has not been issued previously. 152 Ind. Cas. 685=35 P. L. R. 548=A. I. R. 1934. Lah. 610. Where a decree contains several items of payments to be made and they are to be paid on different dates limitation of 12 years for each item runs from the date when it is to be paid. *Ibid.* The execution Court is competent to decide whether the application is barred under s. 48, C. P. Code. 61 C. 234=38 C. W. N. 348=151 Ind. Cas. 253=A. I. R. 1934 Cal. 282=59 C. L. J. 35. By section 48 Court is prohibited from passing orders on an execution petition filed after the time limit prescribed by the section, but that section does not prohibit orders being passed on applications, like applications to issue notice to a judgment-debtor. 1936 M. W. N. 1366=44 L. W. 805=71 M. L. J. 808. A decree which provides that the whole decree shall become payable in the event of a default in the payment of any instalment is not a decree for money payable on a certain date within the meaning of the first part of s. 48. A. I. R. 1936 Lah. 159=162 Ind. Cas. 673. Section 48 is applicable only to fresh applications and not to revival applications. A. I. R. 1937 Pat. 43. An application for execution for revival of previous execution, by re-sale of some property, is governed for limitation by Art 181, Limitation Act and not by s. 48, C. P. Code. A. I. R. 1937 Pat. 42.

**Section whether retrospective.**—Section 48 is retrospective in effect in regard to decree passed prior to the coming into force of the new Code. A. I. R. 1921 Bom. 40=45 B. 365=59 Ind. Cas. 790 ; see also A. I. R. 1926 All. 93=48 A. 121=23 A. L. J. 277=90 Ind. Cas. 974.

**Sub-section (1) Clause (a).**—The period of twelve years prescribed by this section ought to be taken to run from the date of the original decree. The period so fixed is final and cannot be extended by an amendment of the decree. 151 Ind. Cas. 541=11 O. W. N. 1103=A. I. R. 1934 Oudh 465 Upon a decree the amount with interest was payable within 12 years and in default the mortgaged property was to be sold after 12 years but an option was given to the decree-holder to recover the entire amount by sale of the property before the expiry of the 12 years in case

interest for 2 years remained unpaid, interest for 2 years being in default, the decree-holder exercised his option by applying to execute the decree, but did not pursue the application. He applied again more than three years afterwards but the application was dismissed. More than 12 years after the date of the decree he again applied to execute the decree : *Held* that the application was barred under s. 48 (1). 33 Bom. L. R. 459=A. I. R. (1931) B. 263=132 Ind. Cas. 437. The date of the decree is the date when the decree becomes executable. Till then time will not begin to run A. I. R. 1924 All. 26=46 A. 73=21 A. L. J. 861=79 Ind. Cas. 605. In case of amendment of decree the date of amendment is the date of decree within s. 48. 60 Ind. Cas. 318. An order postponing execution of a decree or ordering payment by instalments is an order amending the decree and an application for execution made within 12 years of the order is not barred. 34 Ind. Cas. 393. Where a mortgage decree is passed for sale of properties and for recovery of balance from mortgagor's person the limitation for execution of latter part of decree runs from date of decree. A. I. R. 1925 Mad. 331=82 Ind. Cas. 827. Where appeal is filed against same defendants limitation for execution against others will run only from date of original decree. A. I. R. 1933 Bom. 400=25 Bom. L. R. 371=73 Ind. Cas. 310. Where an appeal is filed from a non-applicable decree and is hence dismissed the time will begin to run from the trial Court's decree. A. I. R. 1926 All. 440=48 A. 377=24 A. L. J. 465=94 Ind. Cas. 961; see also A. I. R. 1926 Cal. 664=30 C. W. N. 306=95 Ind. Cas. 257. Where an appeal is dismissed for default, only decree of original Court is executable and limitation runs from date of original decree. 5 O. L. J. 252=47 Ind. Cas. 125. Fresh start for limitation from a new personal decree in mortgage suit is given if no objection is taken. Application for execution is within time if made within 12 years from the date of the new decree. 57 Ind. Cas. 507. Decree in suit for foreclosure incapable of execution owing to absence of formal order for delivery of possession. The twelve years' period runs from the date of the formal order for delivery of possession. 54 Ind. Cas. 924. Limitation for execution in a personal mortgage decree runs from the date of such decree. 31 C. L. J. 167=66 Ind. Cas. 758. Where through mistake of Court decree was dated wrongly and application for execution was barred from correct date, but within time from mistaken date, held that the execution was within time in as much as the act of Court should prejudice no man. 141 Ind. Cas. 114=56 C. L. J. 185=A. I. R. 1933 Cal. 239.

**Clause (b) of Sub-section (1)**—The wording of s. 48 (1) (b) is quite general and contains nothing to indicate that the subsequent order must be passed by the Court that passed the decree acting as such. The subsequent order must be passed by a competent Court and an order under Order 21, rule 2, certifying an adjustment made by the Court executing the decree is a subsequent order within the meaning of the clause. 27 N. L. R. 150=A. I. R. (1931) Nag. 50=132 Ind. Cas. 456. Where the Court passes a decree for maintenance but leave the amount of maintenance to be determined in execution of decree is not an executable decree for the purpose of s. 48 of the C. P. Code until the amount of maintenance is determined by the Court. 33 Bom. L. R. 1082=A. I. R. 1931 Bom. 492. "Any subsequent order" mean any order made by a competent Court. An order made by a Court executing a decree allowing a judgment-debtor time to pay up the balance of the decretal money by instalments is a subsequent order within the meaning of s. 48, and gives a fresh period to the decree holder to execute his decree A. I. R. 1925 Bom. 503=27 Bom. L. R. 961=49 B. 695=88 Ind. Cas. 949. A subsequent compromise order made in execution proceedings is not a "subsequent order". 14 Pat. 816=156 Ind. Cas. 297=16 Pat. L. T. 506=A. I. R. 1935 Pat. 380. So also an order passed by an executing Court regarding the realization of a decretal sum by means of instalments does not amount to a subsequent order. 162 Ind. Cas. 715=1936 O. W. N. 517=A. I. R. 1936 Oudh 266. Where on a compromise an order is passed to pay the decretal amount by instalments s. 48(b) applies and limitation is extended. A. I. R. 1923 Lah. 381=73 Ind. Cas. 671. Where the decree directs that *mesne profits* should be ascertained in execution limitation runs from the date of decree and not from the date when *mesne profits* are ascertained. A. I. R. 1927 Mad. 842=53 M. L. J. 440. Where a decree directs recovery of money from A on failure to recover from B the execution against A is barred after 12 years from date of decree. *Per Wallace J.* in 91 Ind. Cas. 597. *Per Wallace J.* in *Ibid* :—The decree-holder's remedy against A accrues not from date of decree but on date of B's failure to satisfy decree. To render s. 48 (1) (b) applicable there must be an order of Court directing the payment of money on a certain date. 72 Ind. Cas. 477. Subsequent order directing payment in s. 48 is one by trial Court

and not by executing Court. A. I. R. 1921 Pat. 340=2 P. L. T. 80=58 Ind. Cas. 393. Where the Court passes a decree for maintenance to be determined in execution the decree is not executable for the purpose of s. 48 of the Civil Procedure Code until the amount of maintenance is determined by the Court. 33 Bom. L. R. 1082=A. I. R. 1931 Bom. 492, following 36 B. 368; 40 M. 989 (F.B.); 40 A. 211; 13 A. 53 (P. C.). Section 48 contains the substantive provision of the Code whereas Order 28, rule 11 can be altered by High Courts and other similar provisions can be also added in the rules. Further more, Order 20, rule 11, applies only to decrees for payment of money, whereas s. 48 (1) (b) covers decrees for the delivery of property also. S. 48 is accordingly of a wider scope, and there is no reason to confine it to particular order passed under Order 20, rule 11. 54 A. 573=1932 A. L. J. 365=138 Ind. Cas. 583=A. I. R. 1932 All. 272 (F. B.). Subsequent order must be order in suit in which decree is made and must direct payment by debtor. 141 Ind. Cas. 760=60 I. A. 43=12 Pat. 195=14 Pat. L. T. 167=37 L. W. 335=1933 A. L. J. 359=37 C. W. N. 548=35 Bom. L. R. 526=141 Ind. Cas. 760=1933 M. W. N. 112=10 O. W. N. 226=57 C. L. J. 276=A. I. R. 1933 P. C. 52=64 M. L. J. 599 (P. C.).

**Fresh application.**—Where an execution application is pending for a long time due to no fault of decree-holder, another application is filed to supplement list of properties to be attached 12 years after date of decree, the second application is in substance a fresh application for execution and is barred by time. A. I. R. 1928 Lah. 808=120 Ind. Cas. 622; see also 120 Ind. Cas. 369=A. I. R. 1929 Mad. 745=(1929) M. W. N. 633=120 Ind. Cas. 369. Where decree was passed for arrears of rent in 1896, and execution application was filed in 1908, to attach and sell *patni* and the sale was subsequently set aside and a subsequent application for execution was filed in 1915 to convert the decree into a money decree and in 1917 to attach the personal property of the judgment-debtor and in 1918 also against the personal property of the purchaser of *patni* and where the last application to attach *patni* was made in 1922: *Held*, that the last application was time-barred as it could not be deemed to be a continuation of the 1908 application it being very different in character. A. I. R. 1929 P. C. 209=33 C. W. N. 977=57 M. L. J. 184=30 L. W. 407=31 Bom. L. R. 1383=50 C. L. J. 345=10 P. L. T. 807=118 Ind. Cas. 268. Where subsequent to the appointment of a Receiver for the execution of a decree, execution applications are made they are valid for purposes of saving limitation. A. I. R. 1929 Bom. 279=31 Bom. L. R. 320=118 Ind. Cas. 694. Section 48 applies to a fresh application for execution after the expiration of 12 years from the date of the decree and does not apply where previous application for execution treated as rightly amended while it was pending though the amendment ordered after the expiry of the 12 years. Application for amendment though made after 12 years from date of decree is not as such *ultra vires*. But if amendment cannot be allowed and application for amendment was in substance a fresh application for the execution of the decree then it will be clearly barred under s. 48. Whether amendment can or cannot be allowed depends upon the circumstances of each case and is discretionary with Court. While exercising this discretion the Court should not allow the statutory provision of s. 48 to be evaded. A. I. R. 1928 Mad. 1154=113 Ind. Cas. 260. Where application for execution was made within three years of the previous execution proceedings for rateable distribution but after 12 years from the decree, wherein heir of the judgment-debtor asked to be brought on record and amount due asked to be realized by attachment and sale of judgment-debtor's movables. Such proceedings should be treated as application in continuation of the previous execution cases and prayer to bring the heir on the record and issuing notice to him would not make it a new application but the application, in so far as it sought to attach the movables, was a new application for execution within the provisions of s. 48 and was clearly barred by time. A. I. R. 1928 Cal. 241. Where a decree-holder seeks to attach fresh properties not mentioned in any previous application it is a fresh application within the meaning of the section. 1931-A L. J. 894. An application which seeks to attach fresh properties not included in the pending application is a fresh application within the meaning of the section. A. I. R. (1931) All. 134=129 Ind. Cas. 716=53 A. 419. An application by a decree-holder to continue execution proceedings against the legal representatives of a deceased judgment-debtor is not a fresh application within the meaning of this section. 33 Bom. L. R. 858=A. I. R. 1931 Bom. 425. Where the execution of a decree is ordered, but owing to some interruption not attributable to the decree-holder himself the order for execution can not be carried out, and subsequently on the removal of the interruption the decree-holder applies to carry out the previous



order for execution, such an application is not a fresh application for execution but merely one to receive or to continue the previous execution proceedings. 33 Bom. L. R. 1082=A. I. R. (1931) B. 492. Where the relief asked for is different and is directed against property not touched by the first application, an application for execution cannot be treated as a continuation of a prior application. 20 C. W. N. 952=2 Pat. L. W. 370=1 Pat. L. J. 214=34 Ind. Cas. 27. Where an instalment decree has ceased to be so on default the Court cannot restore decree to original status. A. I. R. 1925 Bom. 326=27 Bom. L. R. 461=87 Ind. Cas. 769. An application to summon a necessary witness is a step-in-aid of execution and will start a fresh period of limitation when execution has not become time-barred just as an application for execution would save limitation. A. I. R. 1924 Oudh 177=74 Ind. Cas. 816. Where a complete execution application is filed within 12 years and application for execution against other properties is filed beyond 12 years it cannot be allowed as one for amendment of the first. A. I. R. 1927 Mad. 347=52 M. L. J. 137=38 M. L. T. 42=100 Ind. Cas. 20. Application for execution is different from application for the transfer of decree. Therefore, the former can in no sense be treated as one in continuation of the latter application. A. I. R. 1926 All. 600=95 Ind. Cas. 26. Where a combined order for relief against property and person of the mortgagor is passed time runs from the date of decree in absence of fresh order in execution. If an order is passed that, for the balance, other properties of the mortgagors should be proceeded against an application filed within 12 years of that order would be in time. A. I. R. 1926 Mad. 954=52 M. L. J. 256=50 M. J. 23 L. W. 26=(1926) M. W. N. 140=92 Ind. Cas. 846. Where the character of the second application is different from that of the former the second application will be deemed to be a fresh application within the meaning of s. 48. A. I. R. 1936 Pesh. 209. Where after attachment a person raises the objection that he is not a partner of the judgment but where the Court holds that he is so, a request by the decree-holder for re-attachment of the property after such binding by the Court is not a fresh application for execution. 161 Ind. Cas. 960=A. I. R. 1936 Lah. 843.

**Minority.**—The fact of minority is wholly irrelevant to the decision of a question under s. 48. A. I. R. 1929 Mad. 394=(1929) M. W. N. 158=30 L. W. 361=1119 Ind. Cas. 39.

**Clause (a) of sub-section (2)**—The expression "fraud" in this section should be construed in a broad sense, and a deliberate evasion of the process of the Court with intention to defeat the execution of the decree would amount to "fraud." If the judgment-debtor, by fraud or force, at some time prevented the execution it is not necessary for the decree-holder to show that the judgment-debtor, guilty of fraud, had means to pay the decretal amount or that the decree-holder exercised continuous diligence and would have realised the fruits of his decree but for such fraud or force. (1911), 2 M. W. N. 434 ; A. I. R. 1935 Pat. 380=16 Pat. L. T. 506=14 Pat. 816=156 Ind. Cas. 297. It is not necessary to show that the fraud or stratagem of the judgment-debtor extended continuously for the whole period of 12 years following the date of the decree. It is sufficient to show that the judgment-debtor, on various occasions within the aforesaid period, dishonestly prevented the execution of the decree against him by frivolous devices. Such devices clearly constitute fraud within the meaning of s. 48 of C. P. Code. 14 O. C. 238 ; see also 9 A. L. J. 17 ; A. I. R. 1929 Pat. 597=120 Ind. Cas. 315. What is quite clearly contemplated, apart from the definition of the term fraud itself, is some action on the part of the judgment-debtor which prevents the decree-holder from taking out execution proceeding and thus allowing time to run against him or some action by the judgment-debtor which entices the decree-holder to hold his hand. Hence merely because the judgment-debtor is taking advantage of the procedure allowed by law, however obstructive that may be, he cannot be said that he is preventing the decree-holder from executing his decree by fraud. A. I. R. 1935 Pat. 380=16 Pat. L. T. 506=14 Pat. 816=156 Ind. Cas. 297. The mere raising of objections so as to prolong execution proceedings beyond the period of limitation cannot in all cases, be regarded as fraud for the purposes of clause (a) of sub-section (2). 161 Ind. Cas. 960=A. I. R. 1936 Lah. 843 ; A. I. R. 1934 Pat. 532 ; 40 L. W. 694=67 M. L. J. 751. The term fraud in s. 48 is used in wider sense than in English law. Locking house, evading arrest or payment or fictitious transfer is fraud. A. I. R. 1925 Nag. 82=22 N. L. R. 67=80 Ind. Cas. 905 ; A. I. R. 1924 Mad. 836=47 M. L. J. 428=20 L. W. 475=80 Ind. Cas. 731. Keeping door closed is

not fraudulent conduct on the part of a *pardanashin* lady unless she deliberately does so or attempts to do so against the executing officer. 4 O. L. J. 345=40 Ind. Cas. 399. Where there is no fraud or force, pendency of appeal by judgment-debtor does not cause suspension of execution. 20 C. W. N. 686=32 Ind. Cas. 931. Section 48 does not mean that the fraud on the part of one judgment-debtor gives a new starting point against his co-debtors. One party should not suffer for the wrong doing of another. (1930) M. W. N. 729=32 L. W. 615=128 Ind. Cas. 455. Where there are more judgment-debtors than one, the fraud of any particular judgment-debtor would give the decree-holder further time for execution only as against him under s. 48 (2). (1911) 2. M. W. N. 434 ; see also 35 M. 670 ; 125 Ind. Cas. 830=A. I. R. 1030 Sind 218. Pleading a payment found not to have been made amounts to fraud. (1930) M. W. N. 729=32 L. W. 615=128 Ind. Cas. 455. Fraud includes not merely deceit but also circumvention. A. I. R. 1927 All. 668=25 A. L. J. 842=103 Ind. Cas. 277. The mere fact that there has been a prolongation of the execution proceedings due to objection however frivolous raised by the judgment-debtor would not itself amount to fraud. Fraud must be of a nature which the decree-holder is not liable to discover at the time. (1931) A. L. J. 894. The mere fact that consequent upon frivolous objection of judgment-debtor execution proceedings have been prolonged would not amount to 'fraud' within the meaning of sub-section 2. Fraud must be something which the decree-holder is not able to discover at the time and which enables the judgment-debtor in getting time. A. I. R. 1931 All. 134=129 Ind. Cas. 716=53 A. 419. Intentional avoiding of arrest under a warrant to avoid payment of decretal amount amounts to fraud and gives a fresh start to the period of limitation. 12 L. W. 710=(1920) M. W. N. 788=60 Ind. Cas. 630. If a force or fraud is proved, it gives a fresh starting point of limitation under s. 48 (2) (a). The period during which execution proceedings have been stayed cannot be deducted from the period of 12 years. 54 Ind. Cas. 279. Execution after 12 years from the date of the decree fraud or force need not be proved within three years of the application. Benefit of the proviso can be given even if the fraud or force was long anterior in date. 10 L. W. 566=53 Ind. Cas. 862. The proposition that any action of the judgment-debtor which puts off the decree-holder from executing his decree at once must be taken as fraud if it results thereof is to bar the execution of the decree under the 12 years' rule is much too broadly stated. 54 A. 573=1932 A. L. J. 365=138 Ind. Cas. 583=A. I. R. 1932 All. 273 (F. B.).

Clause (b) of Sub-section (2).—*Vide* 20 C. 551 ; 24 C. 244 ; 36 C. 543.

#### TRANSFEREES AND LEGAL REPRESENTATIVES.

49. [S. 233.] Every transferee of a decree shall hold the same subject to the equities (if any) which the judgment-debtor might have enforced against the original decree-holder.

Transferee.

**Scope.**—Section 49 only applies to the stage of execution and not to a suit for damages. A transferee from a decree-holder executing a decree in spite of adjustment is not inferentially a trustee for the judgment-debtor for the decree-amount. 42 M. 338=36 M. L. J. 376=9 L. W. 443=(1919) M. W. N. 248=50 Ind. Cas. 584. Decree-holder on record is entitled to execute decree. Transferee of a decree when brought on record can execute it and will be entitled to benefits arising from execution only when he takes out execution of the decree. A. I. R. 1927 Rang. 55 ; 4 Rang. 426=5 Bur. L. J. 181=92 Ind. Cas. 309. Where consideration for assignment is partly unpaid assignee's right to execute depends on parties' intention about transfer of title. A. I. R. 1925 Pat. 449=4 Pat. 120=86 Ind. Cas. 564. For purposes of s. 49 equities have to be enforced though assignee is assignee without notice, otherwise very object of s. 49 would be frustrated. A. I. R. 1933 Mad. 215=145 Ind. Cas. 767. So a right of set off available to a judgment-debtor against assignor decree-holder is equally available against assignee of decree. *Ibid.* The right is not however available where there is no cross-decree on the date of the assignment of the decree. 37 C. W. N. 758=A. I. R. 1933 Cal. 865. Where on assignment of a decree a cross-decree is obtained by the judgment-debtor against assignor the amount deposited under the assigned decree can be attached by judgment-debtor for his own decree. A. I. R. 1924 Nag. 46=1924 Nag. 46=19 N. L. R. 164=75 Ind. Cas. 752. Execution by assignee of a decree cannot be made conditional upon equities which the mortgagor judgment-debtors may have against the mortgagee judgment-debtor for

whom he is said to be the *benamidar*. A. I. R. 1925 Pat. 449=4 Pat. 120=86 Ind. Cas. 564.

50. [S. 234.] (1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased.

(2) Where the decree is executed against such legal representative, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability, the Court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

**Scope.**—The language of s. 50, C. P. Code is permissive. But this does not mean that recourse to the section may not be obligatory. If a decree-holder does not desire to proceed with the execution after the judgment-debtor's death or if there are other parties on record against whom the decree can be executed, there will be no occasion to have recourse to s. 50. But if execution of the decree is necessary against the legal representative of the deceased judgment-debtor the decree-holder has no option but to proceed under s. 50. A. I. R. 1936 Mad. 205=1936 M. W. N. 60=70 M. L. J. 162 (F. B.)=59 M. 461. Section 50 provides for execution of decree against legal representatives of deceased judgment-debtor. A. I. R. 1933 Pesh. 41. There can be no personal liability for the debts of the deceased. Liability can be placed only on estate of the deceased. A. I. R. 1931 Bom. 229=33 Bom. L. R. 130; 89 Ind. Cas. 477=A. I. R. 1925 Nag. 449. Question of determination of assets is entirely for executing Court and a suit against legal representative cannot be dismissed merely for want of possession of assets left by deceased. 120 Ind. Cas. 333. Execution Court is competent to deal with complaint of the decree-holder as regards mismanagement of the estate left by the deceased judgment-debtor, by his legal representative. A. I. R. 1933 Mad. 369. When the representative has come into possession of the assets of the deceased judgment-debtor, it is for him to satisfy the Court as to the extent of the assets received by him and to account for them. A. I. R. 1933 Rang. 309. No specific application to bring the legal representative on the record is contemplated by the C. P. Code. Ordinarily a prayer is added in the execution petition. So an application for execution against legal representative saves limitation even in the absence of any prayer for making him a party. 1933 M.W. N. 1233=38 L. W. 224=A. I. R. 1933 Mad. 568. Step-sons inheriting only occupancy fields are bound to maintain step-mother and other defendants of father. 142 Ind. Cas. 274=29 N. L. R. 103=A. I. R. 1933 Nag. 57. Decree passed against dead person cannot be executed against his legal representative. 16 N. L. R. 138=55 Ind. Cas. 449. Order permitting execution against legal representatives can be made *ex parte*. A. I. R. 1928 Rang. 40=5 Rang. 775=6 Bur. L. J. 225=106 Ind. Cas. 857.

Where legal representative of Hindu debtor held liable to the extent of assets of the deceased in his hands, ancestral property cannot be exempted from liability. A. I. R. 1929 Lah. 424=30 P. L. R. 593=118 Ind. Cas. 396; see also 38 Bom. L. R. 977=A. I. R. 1936 Bom. 456. Gratuity given to heir of an employee is not asset in the hands of the heir. A. I. R. 1923 Oudh 21=9 O. L. J. 401=26 O. C. 53=69 Ind. Cas. 893. If a decree-holder desires to make a legal representative or administrator liable under s. 50 (2), the burden of proving both the amount of assets left by the deceased and receipt of the same by them is on the decree-holder. A. I. R. 1924 Mad. 466=19 L. W. 119=(1924) M. W. N. 207=79 Ind. Cas. 894. *Mesne profits* whether accruing in the shape of rent or interest, are assets in the hands of the legal representative. (1916) 2 M. W. N. 92=30 M. L. J. 391=35 Ind. Cas. 224. The crops grown and reaped by the heir of a tenant under the Punjab Colonisation of Government of Lands Act after his death are not assets of the deceased tenant in the hands of the heir under s. 50. 33 Ind. Cas. 741=84 P. W. R. 1916.

Where a judgment-debtor dies leaving minor son and a widow, the procedure to be adopted is same as under Orders XXXII and XXI, r. 22. A. I. R. 1921 Nag. 126=59 Ind. Cas. 757. Where decree-holder can apply for execution on default under decree, legal representative need not be brought on record till such default after death of judgment-debtor. A. I. R. 1921 Mad. 693=14 L. W. 632. The

decree-holder should get at least six months within which to make an application to bring legal representative on record. 62 Ind. Cas. 52 (Pat.). Pending execution proceedings do not abate on death of judgment-debtor, and there is nothing to prohibit the executing Court from bringing judgment-debtor's heirs on record, on application by decree holder. 18 A. L. J. 735=2 U. P. L. R. 236=42 A. 570=57 Ind. Cas. 610. Execution sale held after judgment-debtor's death and without bringing legal representative on record is a nullity. A. I. R. 1926 Mad. 138=22 L. W. 828=50 M. L. J. 662=92 Ind. Cas. 308 ; see also 68 Ind. Cas. 667=41 M. L. J. 547=15 L. W. 123. Execution cannot only proceed against legal representative but against transferees from them pending execution proceedings. A. I. R. 1927 Bom. 93=51 B. 57=29 Bom. L. R. 60=100 Ind. Cas. 582. A decree cannot be passed against legal representative making him personally liable, and any error in this respect can be remedied at any stage of execution proceedings. A. I. R. 1923 Bom. 414=80 Ind. Cas. 180. In a proper case the execution Court will exercise its equitable jurisdiction and consider the equities between the several legal representatives. 13 S. L. R. 138=52 Ind. Cas. 906. Substitution of legal representative by transferee Court pending execution in contravention of s. 50 is an irregularity curable under s. 99 and any acquiescence by legal representative stops him from challenging jurisdiction. A. I. R. 1925 Oudh 448=12 O. L. J. 146=2 O. W. N. 73=28 O. C. 330=87 Ind. Cas. 21. Execution by Court of transfer against legal representative, without application to Court which passed the decree is a mere irregularity covered by s. 99. A. I. R. 1926 Lah. 34=26 P. L. R. 740=90 Ind. Cas. 1050.

If a judgment-debtor dies before certificate under s. 41 is issued, the Court of transfer does not lose jurisdiction over the execution proceedings provided that before the execution proceeds the decree-holder obtains an order from the Court passing decree for substitution of legal representative. Non-compliance with this form of procedure is not fatal to execution and party acquiring is estopped from challenging legality of execution at last stage. A. I. R. 1928 P. C. 162=3 Luck. 314=55 I. A. 227=5 O. W. N. 502=26 A. L. J. 681=48 C. L. J. 23=32 C. W. N. 790=28 L. W. 25=30 Bom. L. R. 1373=55 M. L. J. 545=109 Ind. Cas. 417. Whether the property held by the legal representative is the property of the deceased within the meaning of s. 50(2) depends upon whether the property could be claimed as the property of the deceased by those in whom the inheritance vested in respect of that property after the death of the propositus. A. I. R. 1924 Oudh. 364=27 O. C. 262=11 O. L. J. 441=81 Ind. Cas. 464.

Section 50 uses the word "dies" apparently in its natural sense and there is nothing in the section or anywhere in the Code to indicate that it is intended to include civil death. A. I. R. 1931 All. 306=1931 A. L. J. 263=131 Ind. Cas. 598 ; see also A. I. R. 1935 Cal. 713=159 Ind. Cas. 370. Where a decree for injunction is obtained against the father, the son not having been joined as a party, and the father dies during the pendency of the execution proceedings, the decree can be enforced under s. 50 of the C. P. Code against the son as his legal representative, by proceeding under Order 21, rule 32. 33 Bom. L. R. 1118=A. I. R. 1931 B. 482 ; 33 Bom. L. R. 1144=A. I. R. 1931 Bom. 484 ; 33 Bom. L. R. 266=A. I. R. 1931 Bom. 280. The undivided interest of a co-parcener does not after his death constitute his assets. 1931 A. L. J. 1123=A. I. R. 1931 P. C. 294=33 Bom. L. R. 1526=(1931) P. C. 263=35 C. W. N. 1278=34 L. W. 589=(1931) M. W. N. 848=61 M. L. J. 522=8 O. W. N. 1039=134 Ind. Cas. 1048 (P.C.). An application to execute the decree against the legal representative of a deceased judgment-debtor need not necessarily be made by a fresh application for execution, but it may be made by an application in the pending *darkhast* against the deceased judgment-debtor. 33 Bom. L. R. 858=A. I. R. (1931) Bom. 425. Under s. 42 the Court executing the decree sent it for execution shall have the same powers as if the decree was passed by itself including substitution of legal representative. 1931 A. L. J. 166=A. I. R. 1931 All. 320=133 Ind. Cas. 609. Section 50 does not exclude cases where the judgment-debtor dies before the passing of the decree, but only refers to the death of the judgment-debtor before the decree has been fully satisfied. 11 P. 445=139 Ind. Cas. 397=A. I. R. 1932 P. 261=13 P. L. T. 717=A. I. R. 1932 Pat. 360 ; 1935 O. W. N. 1087=158 Ind. Cas. 149. Where a suit filed against the father alone is decreed after a partition is effected between the father and sons and the father dies, though the sons are liable for the pre-partition debts of the father, the decree against the father alone cannot be executed against the separate share of the sons. To such a case ss. 50, 52 and 53, C. P. Code have no application. A. I. R. 1935 Pat.

275=14 Pat. 732=157 Ind. Cas. 53=16 Pat. L. T. 393. A decree for rent was passed against daughters for arrears which accrued after the death of the last male owner. As the daughters were in enjoyment of the rents and profits of the tenure the liability for rent ought to be regarded as their personal liability and ought not to be held as attaching to the reversion unless the appellants proceed to bring the tenure itself to sale under the special provisions of the Bengal Tenancy Act. The respondents reversioners therefore are not the legal representatives of the judgment-debtor, in respect of the properties which the applicants want to sell in execution of the rent decree within the meaning of s. 50, C. P. Code. A. I. R. 1935 Cal. 713. Where a decree is transferred to another Court for execution subsequent to the death of the judgment-debtor, an application to bring his legal representatives on the record must be made to the Court which passed the decree and not to the Court to which the decree is transferred for execution. A. I. R. 1934 Bom. 214=36 Bom. L. R. 443. Where judgment-debtor dies during execution, a Court which has not passed decree cannot proceed with execution against legal representatives without fresh order from Court passing decree. A. I. R. 1937 Pat. 239.

#### PROCEDURE IN EXECUTION.

51. [New.] Subject to such conditions and limitations as may be prescribed, the Court may, on the application of the decree-holder, order execution of the decree—

- (a) by delivery of any property specifically decreed ;
- (b) by attachment and sale or by sale without attachment of any property ;
- (c) by arrest and detention in prison ;
- (d) by appointing a receiver ; or
- (e) in such other manner as the nature of the relief granted may require :

“Provided that where the decree is for the payment of money execution by detention in prison shall not be ordered unless, after giving the judgment-debtor an opportunity of showing cause why he should not be committed to prison, the Court, for reasons recorded in writing, is satisfied—

(a) that the judgment-debtor, with the object or effect of obstructing or delaying the execution of the decree,—

(i) is likely to abscond or leave the local limits of the jurisdiction of the Court, or

(ii) has, after the institution of the suit in which the decree was passed, dishonestly transferred, concealed, or removed any part of his property, or committed any other act of bad faith in relation to his property, or

(b) that the judgment-debtor has or has had since the date of the decree, the means to pay the amount of the decree or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same, or

(c) that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account.

*Explanation.*—In the calculation of the means of judgment-debtor for the purposes of clause (b) there shall be left out of account any property which, by or under any law or custom having the force of law for the time being in force, is exempt from attachment in execution of the decree.”

*Scope.*—An application under s. 51 may be inferred from an act of the Court. 52 Ind. Cas. 356. Compromise decree granting allowances to parties to a suit and also to a stranger. Latter cannot apply for execution, though he can sue separately for his claim. 3 O. L. J. 570=37 Ind. Cas. 133. The five separate methods for executing a decree, provided by section 51 are quite distinct from each other and *prima facie* an application asking that one method should be adopted is not in continuation of a previous application asking for some other methods. A. I. R. 1936 Pesh. 209. Section 51, C. P. Code lays down the mode in which a Court may execute a decree. It does not, however, give the Court any discretion to choose one particular mode of execution as against another. The Court has therefore no juris-

\* Added by Act XXI of 1936.

diction to direct a decree-holder to proceed against the property of the judgment-debtor when he denies to proceed against the person. A. I. R. 1936 Pesh. 46 ; see also 1926 Lah. 110 ; 1934 Nag. 140.

**Clause (b).—**If a decree in a mortgage suit based upon compromise does not indicate that attachment is necessary before taking out execution, there is no objection to executing the decree without attachment. A. I. R. 1921 Pat. 320=2 P. L. T. 38=60 Ind. Cas. 652. Failure to attach does not vitiate sale unless substantial injury is caused thereby and the Court has jurisdiction to sell without attachment. A. I. R. 1923 Pat. 45=3 P. L. T. 765=2 Pat. 207=(1922) Pat. 321=68 Ind. Cas. 363. No attachment is necessary in mortgage decree directing sale of property. A. I. R. 1929 Lah. 90=10 Lah. L. J. 491=30 P. L. R. 6=10 Lah. 543=113 Ind. Cas. 907. Though ordinarily a decree is a saleable property and as such is liable to be sold in execution, yet the High Court is competent to frame rules under Ss. 51 and 122, C. P. Code prohibiting the sale of a decree in execution of another decree. 152 Ind. Cas. 789=40 L. W. 599=1934 M. W. N. 1001=A. I. R. 1934 Mad. 692=67 M. L. J. 669. Section 51 contemplates sale without attachment. A. I. R. 1937 Cyl. 199.

**Clause (c).—**Every personal decree does not carry with it a right to arrest the judgment-debtor in execution. Exceptions are females, legal representatives and minors. A. I. R. 1922 Nag. 98=18 N. L. R. 145=5 N. L. J. 49=65 Ind. Cas. 53. So where a decree-holder comes before the Court for process against the judgment-debtor for his arrest, it is not open to the Court, in the absence of special circumstances, to say that the decree-holder must proceed against the properties of the defendant before applying for his arrest. 38 C. W. N. 1085. Decree-holder applying for arrest of judgment-debtor in execution of decree cannot be compelled to accept payment in instalments instead. A. I. R. 1930 Lah. 220=30 P. L. R. 736=125 Ind. Cas. 61. Order committing a judgment-debtor to jail passed without jurisdiction. No objection made to committal and question of legality not then raised. Order is not under s. 47 and therefore not appealable. A. I. R. 1929 Rang. 161=7 Rang. 110=117 Ind. Cas. 245.

**Clause (d).—**Execution of decree by appointment of receiver can be appointed only when ordinary execution cannot be effected with advantage and when such case made out and sole purpose of appointments is to have immovable property realized by sale, application for such appointment is to be made as application in execution to Court within whose territorial jurisdiction property is situate. A. I. R. 1930 Cal. 502=34 C. W. N. 238=51 C. L. J. 209=57 C. 964=128 Ind. Cas. 97. Section 51 does not give any right to the judgment-debtor to apply for the appointment of a receiver but prescribes the mode in which the decree-holder may seek an execution of his decree. A. I. R. 1922 Pat. 369=4 P. L. T. 58=(1922) Pat. 66=67 Ind. Cas. 606. A Court can appoint receivers of rents of the estate of the deceased person for the purpose of liquidating debts against the estate. 22 O. C. 194=52 Ind. Cas. 305. Executing Court can appoint receivers for realisation of property outside jurisdiction. A. I. R. 1921 Mad. 119=13 L. W. 150=(1921) M. W. N. 106=61 Ind. Cas. 753. Although the Court has jurisdiction to appoint receivers in execution, of immovable properties outside the jurisdiction, still if the judgment-debtor objects to the appointment of a receiver in execution, and if there is a reasonable clause of the decree-holder being able to satisfy the decree by means of attachment and sale of such properties, he should be relegated to that remedy. 40 C. W. N. 1065. Where judgment-debtor possesses a share in a firm it is doubtful if receiver can be appointed in execution. A. I. R. 1937 Lah. 313. Appointment of receiver under this section is subject to provision of Order 40, rule 1. A. I. R. 1937 Oudh 232. An order appointing a receiver made in execution proceedings may fall within the purview of Order 40, rule 1 so as to be appealable under Order 43, rule 1 (s.). A. I. R. 1927 Lah. 190=100 Ind. Cas. 298. Receiver appointed under s. 51 (d) is not agent of decree-holder nor do moneys received by him become *ipso facto* moneys belonging to decree-holder. A. I. R. 1930 Mad. 4. A receiver appointed by the Court is appointed on behalf and for the benefit of all persons interested, as parties to the suit or proceeding and moneys in the hands of the receiver belong to the Court which appointed him and he cannot spend them except under the orders of the Court. A. I. R. 1930 Mad. 4. Receiver can be appointed by way of equitable execution in respect of agricultural land of judgment-debtor in Santhal Parganas. A. I. R. 1929 Pat. 700=10 P. L. T. 896=118 Ind. Cas. 721. Where a decree can be executed in the ordinary manner, an appointment of receiver is not proper. A. I. R. 1933 Sind 231. A reasonable ground for the appointment of a receiver must be

made out by the person, applying for the same. *Ibid.* There must be danger of waste or destruction of property. *Ibid.* Court has no power to appoint receiver in respect of property not subject-matter of suit. *Ibid.* In a proper case a receiver may be appointed. 1933 A. L. J. 51=A. I. R. 1933 All. 227. Section 51 clause (d) recognises the appointment of a receiver as a mode of execution. It gives only legislative sanction to previous decision which hold that execution may be had by appointment of a receiver where that course is equitable. Decree-holder cannot have it as a matter of right and as of course. It is only way of equitable execution and this section must be read with Order 40, rule 1, 35 C. W. N. 1066. The Nawab Bahadur of Murshidabad has disposing power over the income of his properties. The Civil Court is competent to appoint a receiver of the rent and profits. 58 I. A. 215=A. I. R. (1931) P. C. 160=(1931) A. L. J. 495=35 C. W. N. 791=53 C. L. J. 493=61 M. L. J. 208=132 Ind. Cas. 727 (P.C.) ; see also A. I. R. 1936 Nag. 288.

**Clause (e).**—Where judgment-debtor is in possession of movable property sufficient to satisfy a decree but has successfully resisted the execution for about 10 years, the executing Court can mortgage the land of the judgment-debtor for the decretal amount. A. I. R. 1930 Lah. 77=119 Ind. Cas. 231. Clause (e) does not authorize a Court to read into a decree supplementary or alternative relief which is not there. A. I. R. 1922 Mad. 299=42 M. L. J. 356=16 L. W. 589=70 Ind. Cas. 259.

**Object of the newly added proviso.**—This proviso is the outcome of the recommendation of the Royal Commission. On Labour in India to the effect that in the case of industrial workers in respect of wages less than Rs. 100 a month arrest and imprisonment for debt should be abolished except where the debtor has been proved to be both able and unwilling to pay. This section seeks to amend the Civil Procedure Code, 1908, so as to protect honest debtors of all classes, and not the industrial workers only, from detention in civil prison and to confine such detention to debtors proved to be recalcitrant or fraudulent. It also provides *inter alia* that no order for execution by detention in prison shall be issued unless the debtor has been given an opportunity of showing cause why he should not be committed to prison and the Court is satisfied for reasons recorded in writing that (i) the debtor is likely to leave the local limits of the jurisdiction of the Court, or has after the institution of the suit fraudulently disposed of his property and (ii) that he is able to pay the amount of the decree otherwise than from the protected assets. This section applies to all judgment-debtors—*Statement of objects and Reasons to Act XXI of 1936.*

**52. [S. 252.] (1)** Where a decree is passed against a party as the legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may be executed by the attachment and sale of any such property.

(2) Where no such property remains in the possession of the judgment-debtor and he fails to satisfy the Court that he has duly applied such property of the deceased as is proved to have come into his possession, the decree may be executed against the judgment-debtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

**Sub-section (1).**—A person holding a decree against the assets of a deceased person can obtain satisfaction by attachment and sale of only such property as is shown to have formed part of the assets of the deceased. It is his duty to prove, at least *prima facie*, that any particular property which is attached at his instance is part of the assets of the deceased. A. I. R. 1934 All. 249=148 Ind. Cas. 1113. Decree obtained against *Karnavan* when no executor is appointed by Will is valid against estate. A. I. R. 1928 Mad. 243=1927 M. W. N. 894=108 Ind. Cas. 409 : Provided the debt on a pro-note is not tainted with immorality, a suit brought against the father and sons of the deceased debtor who formed a joint Hindu family can be decreed under s 52 and it would be for the execution department to decide whether the joint family property was liable. 26 A. L. J. 799=166 Ind. Cas. 86. Executor *de son tort* is a legal representative. 50 Ind. Cas. 951. Rights and profits accruing from immovable property of deceased debtor are his assets. A. I. R. 1928 Oudh 40=2 Luck. 408=4 O. W. N. 98=99 Ind. Cas. 897. Decree-holder

must first prove that legal representative did take some assets; burden is then shifted to legal representatives to show extent of assets. A. I. R. 1934 Lah. 106; see also A. I. R. 1934 Lah. 101; A. I. R. 1934 All. 249. Where the Court is satisfied that at the time when the suit was brought the defendants had received no part of the assets of the deceased, the only course open to it is to dismiss the suit. 1936 A. W. R. 32; but see 1935 A. L. J. 293=A. I. R. 1935 All. 390. Where the estate in the hands of the heirs of the original debtor against whose estate the decree was passed is liable for the satisfaction of the decree, then even the produce and income of that estates which has accrued after the death of the original debtor is liable to attachment and sale in satisfaction of such decree. 165 Ind. Cas. 802=A. I. R. 1936 Lah. 236. The creditors of the ancestor have a general lien upon the assets of the ancestor's estate for the payment of their debts and can follow such assets into the hands of the heirs but it does not follow that the creditors can follow such assets into the hands of the other persons. If the heir has disposed of the ancestor's property to other persons, who took the property without notice of the creditors' claims; then the creditors' right to follow the property is lost. A. I. R. 1934 Rang. 162=12 Rang. 603=152 Ind. Cas. 558. A decree must be against a person, and not merely against something which is not a person, as *e. g.*, the estate of a deceased person. The phrase "out of the assets of the deceased" is merely a restrictive qualification. And though payment has to be made only out of the assets of the deceased, the decree is nonetheless a decree against the legal representative. A. I. R. 1934 Mad. 562=1934 M. W. N. 800=151 Ind. Cas. 617. Where joint-family consists of grand-father, father and son and where father died in the lifetime of the grand father, a decree against son as legal representative of his father can be executed against the joint-family property in the hands of the son. A. I. R. 1934 Lah. 101=148 Ind. Cas. 930. Where the debtor is not himself sued but dies before the suit and a defendant is sued as representing the deceased person's estate, the defendant, in order to bind the estate and the rightful owner, must substantially represent the estate, and that where the defendant does not substantially represent the estate, the Court has no jurisdiction to sell the estate and the decree would not bind the real heir. A. I. R. 1934 All. 474=150 Ind. Cas. 323.

**Sub-section (2).**—Sub-section (2) applies only when no property of deceased is in possession of judgment-debtor and he fails to satisfy that he has duly applied property proved to have come into his possession. A. I. R. 1930 Lah. 354=31 P. L. R. 29=121 Ind. Cas. 289; A. I. R. 1930 Lah. 204=31 P. L. R. 298=125 Ind. Cas. 187; A. I. R. 1930 Lah. 332=124 Ind. Cas. 338. Right of creditor to follow assets in legatee's hands can be exercised only by suit and not by execution against assets in the hands of the legatee under a judgment against the legal representative. A. I. R. 1930 Cal. 762=34 C. W. N. 761=52 C. L. J. 16=58 C. 170=129 Ind. Cas. 419. Legal representatives in the possession of assets, not being executors or administrators appointed by or subject to an administration order of a Court, may show preference in the payment of debts and may retain a debt due to themselves. A. I. R. 1927 All. 459=49 A. 645=25 A. L. J. 359=101 Ind. Cas. 507. The questions arising in an enquiry under s. 52 (2) are questions arising between the parties to the suit in which the decree was passed relating to the execution, discharge or satisfaction of the decree to be decided by Court exercising the decree and not by a separate suit. A. I. R. 1927 Rang. 127=5 Rang. 44=101 Ind. Cas. 431. Where a plaintiff without any fraud or collusion sues a person who would be the ordinary legal representative, under the law, and some other person turns out to be the real and actual legal representative the decree obtained against the former is binding in the same manner and to the same extent on the real legal representative. A. I. R. 1928 Mad. 243=1927 M. W. N. 894=108 Ind. Cas. 409. The fact that the plea of "*plene administravit*" can be taken in execution proceedings when events justifying such a plea may have occurred subsequent to the decree, is no reason why it cannot be taken in the suit as a reason for no decree being passed. A. I. R. 1927 All. 459=49 A. 645=25 A. L. J. 359=101 Ind. Cas. 507. "Assets" include those acquired after decree. 14 A. L. J. 889. A decree making the assets of the father and the joint properties of sons liable for the amount due by the father is perfectly legitimate. (1916) 2 M. W. N. 217=31 M. L. J. 502=20 M. L. T. 320=4 L. W. 366=36 Ind. Cas. 387. In a suit against the legal representative of a debtor, plaintiff can get a decree on proof that assets exist without proving extent of such assets. 56 Ind. Cas. 962. A decree obtained against the assets of a deceased person by joining only some of the legal representatives can only be executed against those not joined in the suit.



A. I. R. 1927 Mad. 197=98 Ind. Cas. 613. Personal decree for debts of the deceased can be passed against person in possession of the assets of the deceased and disposing of without right portion of it enough to discharge debts of the deceased. A. I. R. 1922 Oudh 200=77 Ind. Cas. 306. Suit against the legal representative of a deceased debtor should not be dismissed merely because defendant is not in possession of assets. A. I. R. 1929 Nag. 170=89 Ind. Cas. 236. Mortgage decree against mortgagor's legal representative can be executed personally against him after exhausting the mortgaged property, to the extent of the property he has failed to duly account for. 30 M. L. J. 391=(1916) 2 M. W. N. 92=35 Ind. Cas. 224. Income from impartible Raj passing from deceased *zamindar* to his representatives and that accruing since death of the *zamindar* are assets of deceased *zamindar*. A. I. R. 1924 Mad. 530=47 M. L. J. 261=34 M. L. T. 17=(1924) M. W. N. 346=80 Ind. Cas. 163. Where the executant of a *hundi*, the father of a *Mitakshara* family is dead and his son is sued on the *hundi*, he is sued on the representative capacity and is liable only to the extent of the assets of the coparcenary property held by him. 2 P. L. T. 396=65 Ind. Cas. 224; see also 92 Ind. Cas. 787=A. I. R. 1926 Oudh 301. A decree for payment of money out of the assets of deceased debtor, and passed against a heir as legal representative can be executed against any property in possession of the heir without waiting for any partition among heirs, and in the absence of any fraud or collusion purchaser in execution is not responsible for neglect on the part of heir in possession in allowing a larger portion to be sold than was necessary. A. I. R. 1925 Oudh 515=2 O. W. N. 407=12 O. L. J. 512=89 Ind. Cas. 534. Where son is proved to have received assets from father, onus is on son to prove amounts of assets received from father. A. I. R. 1933 Lah. 447; see also A. I. R. 1934 Lah. 106=148 Ind. Cas. 980. In a suit on promissory-note executed by deceased grand-father decreed against estate of deceased, decree is against defendants as legal representatives and limited to joint family estate in their hands. 34 Bom. L. R. 1005=A. I. R. 1932 Bom. 522. Where the defendant is sued as the heir of her deceased mother and contends that she has no assets of the deceased in her hands, the question as to assets should not be determined in the suit itself when no issue is framed on it. Such a plea is confined to execution only. A. I. R. 1931 Nag. 173=27 N. L. R. 247. Rents and profits are legal incidents of immovable property and must be of the same character as the property itself. 9 O. W. N. 315=137 Ind. Cas. 632=1. R. 1932 Oudh 261. An application for execution of a money decree obtained against his brother and, notwithstanding objections raised by the brother, a portion of the amount was realised from out of the assets of the deceased in his hands. The brother did not then raise the plea that the assets in his hands were insufficient for the payment of the decree debt, although he could have done so. On such a plea being raised by him in bar of a subsequent application filed by the same decree-holder for the realization of the balance due to him under his decree, held that the plea was barred by *res judicata*. 9. O. W. N. 315=137 Ind. Cas. 632=1. R. 1932 Oudh 261. Though heir is legal representative of deceased, his personal property is not liable. A. I. R. 1934 Rang. 93.

53. [New.] For the purposes of section 50 and section 52, property in

the hands of a son or other descendant which is  
 Liability of ancestral pro- liable under Hindu law for the payment of the  
 perty. debt of a deceased ancestor, in respect of  
 which a decree has been passed, shall be deemed to be property of the  
 deceased which has come to the hands of the son or other descendant as his  
 legal representative.

**Scope.**—Section 53 does not diminish or decrease the ordinary liability of a Hindu son which existed prior to the enactment of the section under the Hindu law. A. I. R. 1934 All. 590=1934 A. L. J. 483=150 Ind. Cas. 411=A. L. R. 1934 All. 582 (F. B.). The word property includes all proprietary interest in such property. *Ibid*. The words, "which is liable under the Hindu law for the payment of the debt of a deceased ancestor" in s. 53 do not mean that the representatives of the judgment-debtor in the mortgage decree can resist execution on ground that the decree ought not to have been passed as it stands but with a qualification in favour of the representatives that it has turned out to have succeeded by survivorship they could show that the debt on which the decree is based ought not to have been contracted. A. I. R. 1934 Lah. 438. A person is entitled to sue the legal representatives of his

deceased debtor and to obtain a decree against them without proving that any assets have come into their hands or even that the deceased debtor left any assets. A. I. R. 1934 Rang. 196. Section 53 is only meant to cover the case of a son or other descendant who under the section is to be deemed the legal representative of his ancestor with respect to property which was liable under the Hindu law for the payment of the debt of the deceased ancestor in respect of which a decree had been passed. It does not apply where a share of the brother of the father has come to the son and no decree has been passed against the father's brother. A. I. R. 1935 Lah. 650=159 Ind. Cas. 233. Where the ancestor against whom a decree is passed is still alive there is no question of enforcement of the decree against his legal representatives or against ancestral property in the hands of such legal representatives and the entire family property is, therefore, not liable to attachment and sale under the section. 1935 O. W. N. 1113=158 Ind. Cas. 490; see also 155 Ind. Cas. 574=1935 M. W. N. 38=41 L. W. 61=A. I. R. 1935 Mad. 145=68 Ind. Cas. 104. Section 53 enacts a rule of procedure only and is not intended to affect in any way the extent of a son's liability for his father's debts under the Hindu law. The expression "property in the hands of a son" in s. 53 does not necessarily signify tangible property exclusively possessed by the son without any co-sharers or co-parceners, it means and includes the undivided share of the son in the joint family property held by himself and the other co-parceners who may be in existence. A. I. R. 1935 Oudh 510=1935 O. W. N. 1005=157 Ind. Cas. 945. Section 53 which speaks of "a deceased ancestor" and "property of the deceased" which has come to the hands of the sons cannot be stretched to apply to the property which the sons obtain on partition with the father. A. I. R. 1937 Nag. 45. Decree against Hindu father can be executed against the entire joint property in the hands of his sons and ancestral property is to be deemed assets of deceased. 32 Bom. L. R. 919=127 Ind. Cas. 507; A. I. R. 1925 All. 471=23 A. L. J. 467=88 Ind. Cas. 290; 81 Ind. Cas. 15=27 O. C. 111=11 O. L. J. 202; A. I. R. 1933 Pat. 605. The ancestral property in the hands of the son is liable under Hindu law for the payment of decree on debt due by father unless and until the son can prove that there was in fact no debt at all or that the debt was tainted with immorality. A. I. R. 1923 All. 124=20 A. L. J. 969=L. R. 4 A. Civ. 31=71 Ind. Cas. 417; A. I. R. 1930 Mad. 257=(1927) M. W. N. 776=120 Ind. Cas. 375; see also A. I. R. 1933 All. 110=1932 A. L. J. 873; A. I. R. 1933 Oudh 309. Gratuity to heirs of a deceased employee by a railway administration is not assets. A. I. R. 1923 Oudh 21=9 O. L. J. 401=4 U. P. L. R. Oudh 96=25 O. C. 53. Order for attachment of the property in execution of a mortgage decree against son as legal representative is not necessary. A. I. R. 1923 Pat. 193=3 P. L. T. 43=6 Pat. L. J. 451. Nephew is not descendant for purposes of s. 50. A. I. R. 1923. All. 539=21 A. L. J. 353=45A. 455=73 Ind. Cas. 958. It is only in case of son or other descendant and not brother that a person taking property by survivorship can be joined as legal representative. A. I. R. 1924 All. 873=78 Ind. Cas. 637. A decree cannot be passed against son as legal representative and a separated Hindu brother for appropriating crops sown by the deceased father. A. I. R. 1927 All. 683=103 Ind. Cas. 338. Collector has power to deliver possession of standing crops. A. I. R. 1927 Nag. 300=103 Ind. Cas. 231. In order to determine whether a certain person is the legal representative of the deceased with regard to the property sought to be attached the crucial date is the death of the deceased and not the date of the attachment of that property. A. I. R. 1926 All. 220=48 A. 245=24 A. L. J. 273=91 Ind. Cas. 785. Compensation in respect of dues from Government becoming due after the death of the father and received by the son is liable to attachment in execution of the decree passed against son simply but really against assets of the deceased father. A. I. R. 1930 Nag. 134=121 Ind. Cas. 664. Section 53 is not confined to money decrees. A. I. R. 1924 Mad. 571=46 M. L. J. 471=19 L. W. 484=34 M. L. T. 209=83 Ind. Cas. 985. Although the land belonging to Hindu father is exempt from attachment in the hands of the agriculturist son under the Daccan Agriculturists Relief Act the rents thereof are liable to attachment to the extent of the property inherited. A. I. R. 1929 Bom. 233. The legal representative of a deceased lamberdar is, so far as the assets of the deceased in his hands are concerned, liable to the same extent as the lamberdar that is to say, not only for the money actually collected by the lamberdar, but also for money left uncollected owing to his negligence or misconduct. 1932 A. L. J. 873=13 L. R. 363 (Rev.)=A. L. R. 1932 A. 1103. In execution of money decree against *watander*, *watan* property in hands of son is not liable. A. I. R. 1934 Bom. 116. Provident fund of deceased judgment-debtor paid to depen-

dant minor son under Provident Funds Act s. 4 (1) is not asset in hands of son liable to attachment for father's debt. A. I. R. 1934 Mad. 173.

**54. [S 265.]** Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Partition of estate or separation of share. "Crown",\* or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares of such estates.

**Scope.**—This section is applicable where the decree relates to partition of the whole of the revenue paying estate. It is not applicable where the decree is for separate possession of a share of a portion of an undivided estate. 54 M. 443=141 Ind. Cas. 181=36 M. L. W. 914=64 M. L. J. 63=A. I. R. 1933 Mad. 259. Partition of revenue also is not necessary for applicability of the section. *Ibid.* This section has no application where no separate allotment of revenues is asked for. 146 Ind. Cas. 201=A. I. R. 1933 Pesh. 101 (2); but see 34 C. W. N. 895=A. I. R. 1931 Cal. 104=130 Ind. Cas. 287. Where it has been held that it is not necessary that the plaintiff should ask for a decision of Government Revenue. Section 54 contemplates a suit for partition by a tenure-holder having a right to ask for partition of the whole estate. 34 C. W. N. 895. In a suit by *patnidar* of share of revenue-paying estate, prayer for decision of revenue is not necessary. A. I. R. 1931 Cal. 93=58 C. 122=34 C. W. N. 892=130 Ind. Cas. 129. Words "for the separate possession of a share of such an estate" contemplate the case of a man whose right is to the possession of an adequate portion or share of the whole undivided estate considered as one. A. I. R. 1931 Cal. 93=58 C. 122=34 C. W. N. 892=130 Ind. Cas. 129. This section is meant to apply only in case of estates assessed to revenue in one lump sum for the whole estate and not to estates assessed at acre rates. A. I. R. 1926 Rang. 80=5 Rang. 206=4 Bur. L. J. 260=95 Ind. Cas. 39. Civil Court has no power to interfere with the Collector's proceedings. 42 B 689=20 Bom. L. R. 411=46 Ind. Cas. 10. Section 54 does not cover a decree of a Civil Court on an application to partition the lands of an estate under the Bengal Estates Partition Act. 1 P. L. W. 51=38 Ind. Cas. 593. Decree for partition of a revenue paying estate where separate allotment of the revenue is not asked for is permissible. 1 P. L. W. 335=2 Pat. L. J. 221=39 Ind. Cas. 173. Section 54 only applies where the decree is for partition of land by metes and bounds, that is, where land held jointly and assessed to Government Revenue as a whole is to be divided up into two or more plots between the sharers to be held by them separately and it cannot apply to execution of a decree in administration suit. 8 L. B. R. 338=10 Bur. L. T. 206=36 Ind. Cas. 385. Section 54 does not apply to a suit for partition of a revenue-paying estate when no separate allotment of revenue is asked for. 13 Pat. 637=150 Ind. Cas. 608=A. I. R. 1934 Pat. 365. Section 54 does not apply to a suit for partition of a revenue-paying estate when no separate allotment of revenue is asked for. A. I. R. 1934 Pat. 365=150 Ind. Cas. 680=13 Pat. 367.

#### ARREST AND DETENTION.

**55. [S. 336.]** (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and shall Arrest and detention. as soon as practicable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation, in any other place which the "Provincial Government"† may appoint for the detention of persons ordered by the Courts of such district to be detained :

Provided, firstly, that, for the purpose of making a arrest under this section no dwelling-house shall be entered after sunset and before sunrise :

\* Substituted for the word "Government" by G. I. Order of 1937 but in British Burma the word "Government" has been retained because this order is not in force in Burma.

† Substituted by G. I. Order. In Burma read the word "Governor."

Provided, secondly, that, no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe the judgment-debtor is to be found :

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer, authorized to make the arrest shall give notice to her that she is at liberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the arrest :

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The "Provincial Government"\* may, by notification in the "official Gazette",† declare that any person or class of persons whose arrest might be attended with danger or inconvenience to the public shall not be liable to arrest in execution of a decree otherwise than in accordance with such procedure as may be prescribed by the "Provincial Government"\* in this behalf.

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he† [may be discharged] if he has not committed any act of bad faith regarding the subject of the application and if he complies with the provisions of the law of insolvency for the time being in force.

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the decree in execution of which he was arrested, the Court‡ [may release] him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to the civil prison in execution of the decree.

Sub-section (1).—A money decree is executable by arrest of judgment-debtor. A. I. R. 1922 Nag. 98=5 N. L. J. 49=18 N. L. R. 145=65 Ind. Cas. 53. Warrant of arrest issued by Civil Court need not be shown in the first instance to the person to be arrested. A. I. R. 1921 Cal. 79=25 C. W. N. 815. Unless there is submission to the custody by word or action, person making arrest shall effect it by touching the body of the person arrested. A. I. R. 1930 Rang. 131=7 Rang. 598=123 Ind. Cas. 137. The provisions of this section are mandatory. A. I. R. 1928 Cal. 62=54 C. 782=106 Ind. Cas. 66. Bar of arrest does not preclude decree-holder from proceeding with execution by attachment and sale of movable or immovable property of the judgment-debtor. A. I. R. 1924 All. 707=L. R. 5 A. 408 Civ.=82 Ind. Cas. 1. No trespass has been committed by the defendant where he enters the plaintiff's house with bailiff and *naiib* sheriff to arrest the plaintiff's brother who usually come and live with the plaintiff. 146 Ind. Cas. 543=A. I. R. 1935 Lah. 723.

Sub-section (3).—Mere absence of note in record and provisions of law under s. 55 (3) have been complied with does not connote failure to comply nor does failure to comply with those provisions invalidate an arrest. A. I. R. 1930 Lah. 736=31 P. L. R. 188=128 Ind. Cas. 51.

Sub-section (4).—A bond executed by a surety under s. 55 (4) cannot be made to certain conditions not covered by the section. 30 S. L. R. 177=A. I. R. 1936

\* Substituted by G. I. Order. In Burma read the word "Governor".

† Substituted by G. I. Order. In Burma read "Gazette."

‡ These words were substituted for the words "will be discharged" by s. 2 of the Code of Civil Procedure (Amendment) Act, 1921 (3 of 1921).

§ These words were substituted for the words "shall release ;" *Ibid*.

Sind 244. But the security bond furnished for the appearance of the judgment-debtor is in the nature of a continuing guarantee and when the surety produces the judgment-debtor before the Court and requests to be allowed from further liability under the bond the Court should not refuse to grant the prayer. It is open to the decree-holder to apply to the Court for the arrest of the judgment-debtor until he furnishes a fresh security. 151 Ind. Cas. 154=A. I. R. 1934 Lah. 962. Where a security is given under s. 55 and the bond itself is clear that the liability of the surety arises on the failure of the judgment-debtor to apply for insolvency of the surety's liability arises on such failure itself and not on further failure of the judgment-debtor to appear when called upon. A. I. R. 1935 Lah. 918 ; see also A. I. R. 1935 Mad. 543=156 Ind. Cas. 113. Court cannot extend the period of one month allowed under s. 55 (1). A. I. R. 1926 Mad. 68=50 M. L. J. 477=1926 M. W. N. 390. The surety bond under this sub-section is in favour of the Court though the ultimate beneficiary may be the decree-holder and s. 135 of the Contract Act does not apply. A. I. R. 1927 Lah. 336=106 Ind. Cas. 762. A Court can refuse to accept security of a person over whose property or person it has no jurisdiction. A. I. R. 1929 Lah. 161=112 Ind. Cas. 689. Surety becomes liable when judgment-debtor fails to apply for insolvency within time fixed. A. I. R. 1928 Lah. 974=116 Ind. Cas. 554 ; see also A. I. R. 1936 Mad. 963=44 L. W. 647=A. I. R. 1936 Mad. 963=71 M. L. J. 646=1936 M. W. N. 1031=165 Ind. Cas. 864. Security bond has to be interpreted according to the conditions expressly mentioned therein. A. I. R. 1930 Lah. 575=125 Ind. Cas. 324. Surety producing the judgment-debtor before the Court and requesting for being absolved from further liability under the bond, shall be discharged. A. I. R. 1929 Lah. 262=30 P. L. R. 595=118 Ind. Cas. 438 ; see also A. I. R. 1928 Lah. 974=116 Ind. Cas. 554. Court cannot proceed both against the judgment-debtor and the security under s. 55 (4). A. I. R. 1929 Lah. 479=117 Ind. Cas. 910. Serious illness of the judgment-debtor is a valid excuse for non-production so as to absolve surety from liability under the bond. A. I. R. 1929 Lah. 479=117 Ind. Cas. 910. Security can be realised on failure to comply with either of the two conditions under s. 55 (4). A. I. R. 1927 Mad. 108=52 M. L. J. 523=26 L. W. 49=101 Ind. Cas. 525. On judgment-debtor failing to apply for insolvency within one month under s. 55 (4) it is optional with the executing Court and not the decree-holder either to commit him to civil prison or realise security. A. I. R. 1929 All. 377=119 Ind. Cas. 500. Judgment-debtor is immune from arrest and detention on production of detention order from the Insolvency Court. 128 Ind. Cas. 314=A. I. R. 1930 Lah. 1070. This section should be interpreted to mean to apply in the proper form and after the compliance with the formalities prescribed by law or the rules framed thereunder within the prescribed period or within such extension thereof as may have been granted by the Court and failure to do likewise does not discharge surety. A. I. R. 1928 Sind 192=111 Ind. Cas. 258. The surety is liable even after the dismissal of the execution proceedings against the judgment-debtor. A. I. R. 1926 Mad. 286=86 Ind. Cas. 304. Surety is liable where judgment-debtor does not apply and dies after prescribed date. A. I. R. 1924 Bom. 428=48 B. 500=26 Bom. L. R. 415=85 Ind. Cas. 257. Liability of surety under bond does not cease with the dismissal of the execution case, and such dismissal Court failing, decree-holder can enforce it. A. I. R. 1924 Pat. 487=5 P. L. T. 336=81 Ind. Cas. 702. The surety under s. 54 (4) should be directed to continue until a final order is made on his petition to be declared an insolvent. A. I. R. 1922 Bom. 340=23 Bom. L. R. 1263=46 B. 702=64 Ind. Cas. 648. Court can refuse to execute decree against deposit of security in first instance or realization of it under order of Court. A. I. R. 1922 Bom. 340=46 Bom. 702=23 Bom. L. R. 1263=64 Ind. Cas. 648. Amount realised on forfeiture of security under s. 55 (4) is to be credited against the decretal amount and not given to decree-holder over and above the decretal amount. A. I. R. 1921 Cal. 552=25 C. W. N. 35=59 Ind. Cas. 778. Surety's liability is not terminated by mere filing of an insolvency petition by the judgment-debtor or the dismissal of an execution petition. (1916) 2 M. W. N. 273=34 Ind. Cas. 407 ; see also A. I. R. 1921 Pat. 72=1921 Pat. 19=1 P. L. T. 694=5 P. L. J. 417=57 Ind. Cas. 303 ; A. I. R. 1933 Mad. 560=145 Ind. Cas. 531. A surety is bound by the terms of the bond executed by him. 55 A. 548=144 Ind. Cas. 731=A. I. R. 1933 A. 382 ; A. I. R. 1933 Nag. 40=29 N. L. R. 28=144 Ind. Cas. 615. Simultaneous execution against surety and judgment-debtor not allowed. A. L. R. 1933 Nag. 193=29 N. L. R. 83=144 Ind. Cas. 339=A. I. R. 1933 Nag. 38 ; see also A. I. R. 1931 Bom. 443=33 Bom. L. R. 820=134 I. C. 718. A surety bond is to be charged under

Art. 6 of the Second Schedule of the Court Fees Act, it is not chargeable under the Stamp Act. 34 P. L. R. 480=143 Ind. Cas. 12 ; 14 Lah. 284=12 Lah. L. T. 52=141 Ind. Cas. 30=34 P. L. R. 132=A. I. R. 1933 Lah. 89 (S. B.). In enforcing a bond under this section the Court is not competent to reduce the amount for which the bond is executed. 30 S. L. R. 177=A. I. R. 1936 Sind 244. As regards the meaning of "called upon" to appear *vide* A. I. R. 1936 Rang. 168=162 Ind. Cas. 251=14 Kang. 190. Dismissal of a petition for execution absolves the surety. A. I. R. 1934 Lah. 92=148 Ind. Cas. 570.

By the absence of the decree-holder on a particular date the liability of the surety does not come to an end and is matured when application for insolvency is not made within the time given by the Court. 33 P. L. R. 676=A. I. R. 1932 Lah. 492=138 Ind. Cas. 198. It is unnecessary that the proceedings should be duplicated by the surety being first called on under s. 55 (4) and that subsequently fresh proceedings should be taken under s. 145. 33 Bom. L. R. 1595=135 Ind. Cas. 812=A. I. R. 1932 Bom. 77. An order under s. 55(4) rejecting an application for forfeiture of security bond is appealable. 34 Ind. Cas. 247=10 Bur. L. T. 15. But an order passed on application to cancel surety bond is not appealable. 55 A. 548=144 Ind. Cas. 731=A. I. R. 1933 All. 382. Where a person stands surety for a judgment-debtor under a money decree and the Court after giving notice to surety under s. 145 of the Code, orders the security to be realised under s. 55 (4) the surety can appeal against the order. 33 Bom. L. R. 1593. A surety is not liable when application of insolvency by the judgment-debtor is dismissed for want of particulars required under s. 13 of the Provincial Insolvency Act. 33 Bom. L. R. 820=A. I. R. (1931) Bom. 444. It is contrary to public policy to allow a surety to recover any sum forfeited either from the actual person for whom he stood surety or from any person who induced him to stand surety. 32 Bom. L. R. 739.

**56. [S. 245A].** Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the prohibition of arrest or detention of women in execution civil prison of a woman in execution of a decree of decree for money. for the payment of money.

**57. [S. 338.]** The "Provincial Government"\* may fix scales graduated according to rank, race and nationality, of Subsistence allowance. monthly allowances payable for the subsistence of judgment-debtors.

**58. [Ss. 341, 342.]** (1) Every person detained in the civil prison in Detention and release. execution of a decree shall be so detained,—

(a) where the decree is for the payment of a sum of money exceeding fifty rupees, for a period of six months, and

(b) in any other case for a period of six weeks :

Provided that he shall be released from such detention before the expiration of the said period of six months or six weeks, as the case may be,—

(i) on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison, or

(ii) on the decree against him being otherwise fully satisfied, or

(iii) on the request of the person on whose application he has been so detained, or

(iv) on the omission by the person, on whose application he has been so detained to pay subsistence allowance :

Provided, also, that he shall not be released from such detention under clause (ii) or clause (iii), without the order of the Court.

(2) A judgment debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but he shall not be liable to be re-arrested under the decree in execution of which he was detained in the civil prison.

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\* The words "Provincial Government" have been substituted by G. I. Order. In British Burma for "Provincial Government" read "Governor" *vide* G. B. Order, 1937.

**Notes.**—Words 'such detention' in proviso (1) and 'detention' under this section in proviso (2) mean detention in civil prison. A. I. R. 1937 Lah. 253.

**59. [S. 653.]** (1) At any time after a warrant for the arrest of a judgment-debtor has been issued, the Court may Release on ground of illness. cancel it on the ground of his serious illness.

(2) Where a judgment-debtor has been arrested, the Court may release him if, in its opinion, he is not in a fit state of health to be detained in the civil prison.

(3) Where a judgment-debtor has been committed to the civil prison, he may be released therefrom—

(a) by the "Provincial Government,"\* on the ground of the existence of any infectious or contagious disease, or

(b) by the committing Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(4) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

**Scope.**—The Court has no authority to fix any term of imprisonment under this section when committing a debtor to jail. 5 C. W. N. 145. A judgment-debtor arrested and released immediately without being imprisoned may be re-arrested. U. B. R. (1897-1900) Vol. II, p. 281. The provisions of s. 59 are self contained and are not controlled by the provisions of s. 55 (3) and (4) and are based on purely humanitarian grounds. If a judgment-debtor is suffering from serious illness the Court of justice would be well advised in ordering his release so as to escape the moral responsibility if anything happens to him in the event of his being sent to jail. A. I. R. 1934 Lah. 807=36 P. L. R. 72=152 Ind. Cas. 427. The fact that a judgment-debtor arrested in execution of a decree was released owing to non-payment of subsistence money by the decree-holder is no bar to his being arrested against in execution of the same decree. 26 A. 317; see also A. I. R. 1929 Lah. 361. A payment of subsistence money is not valid unless it reaches the officer in time. 22 Ind. Cas. 25. Cost of clothing is not subsistence allowance. 17 Ind. Cas. 911=9 Bur. L. T. 159=6 L. B. R. 61. Where a judgment-debtor is released while being taken to civil jail, he cannot be deemed to be released from detention under s. 58 as to exempt him from re-arrest. A. I. R. 1929 Lah. 361=118 Ind. Cas. 531.

#### ATTACHMENT.

**60. [S. 266.]** (1) The following property is liable to attachment and sale in execution of a decree, namely, lands, houses or other buildings, goods, money, bank-notes, cheques, bills of exchange, hundis, promissory-notes, Government securities, bonds or other securities for money, debts, shares in a corporation and, save as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own benefit, whether the same be held in the name of the judgment-debtor or by another person in trust for him or on his behalf :

Provided that the following particulars shall not be liable to such attachment or sale, namely :—

(a) the necessary wearing apparel, cooking vessels, beds and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman ;

(b) tools of artisans, and where the judgment-debtor is an agriculturist,

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\* The words "Provincial Government" have been substituted by G. I. Order. In British Burma for "Provincial Government" read "Governor" *vide* G. B. Order, 1937.

his implements of husbandry and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section ;

(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him ;

(d) books of account ;

(e) a mere right to sue for damages ;

(f) any right of personal service ;

(g) stipends and gratuities allowed to "pensioners of the Crown"\* or payable out of any service family pension fund notified in the "official Gazette"† by the "Central Government or the Provincial Government"‡ in this behalf, and political pensions ;

‡(h) the wages of labourers and domestic servants, whether payable in money or in kind ; and salary, to the extent of the first hundred rupees and one half the remainder of such salary ;

(i) the salary of any public officer or of any servant of a railway company or local authority to the extent of the first hundred rupees and one half the remainder of such salary ;

Provided that, where the whole or any part or the portion of such salary liable to attachment has been under attachment, whether continuously or intermittently for a total period of twenty-four months, such portion shall be exempt from attachment until the expiry of a further period of twelve months and, where such attachment has been made in execution of one and the same decree, shall be finally exempt from attachment in execution of that decree ;"

(j) the pay and allowances of persons to whom the "Indian Army Act, 1911, or the Burma Army Act"\* apply "or of persons other than commissioned officers to whom the Naval Discipline Act as modified by the Indian Navy (Discipline) Act 1934 applies :":‡

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, "1925",‡ for the time being applies in so far as they are declared by the said Act not to be liable to attachment ;

‡(l) any allowance forming part of the emoluments of any public officer or of any servant of a railway company or local authority, which the Central Government,|| may by notification in the "official Gazette"¶ declare to be exempt from attachment, and any subsistence grant or allowance made to any such officer or servant while under suspension ;"

(m) an expectancy of succession by survivorship or other merely contingent or possible right or interest ;

(n) a right to future maintenance ;

(o) any allowance declared by "any Indian law" † to be exempt from liability to attachment or sale in execution of a decree ; and,

(p) where the judgment-debtor is a person liable for the payment of land-revenue, any movable property which, under any law for the time being

\* Substituted by G. I. Order and G. B. Order.

† Substituted by G. I. Order.

‡ Substituted by Act IX of 1937.

§ Inserted by Act 35 of 1934.

|| Substituted by G. I. Order. In Burma read "Governor".

¶ Substituted by G. I. Order of 1937. In Burma read "Gazette."



applicable to him, is exempt from sale for the recovery of an arrear of such revenue.

*"Explanation 1.*—The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attachment or sale whether before or after they are actually payable; "and in the case of salary other than salary of a public officer or a servant of railway company or local authority the attachable portion thereof is exempt from attachment until it is actually payable;"\*

*"Explanation 2.*—In clauses (h) and (i) 'salary' means the total monthly emoluments, excluding any allowance declared exempt from attachment under the provisions of clause (l), derived by a person from his employment whether on duty or on leave."

(2) Nothing in this section shall be deemed—

to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoyment) from attachment or sale in execution of decrees for rent of any such house, building, site or land.

**Local Amendments in British Burma.**—In clause (g) of sub-section (1) for "official Gazette" substitute "Gazette" and for "Central Government or Provincial Government" substitute "Governor" in clause (e) for "Central Government" read "Governor" and in clause (o) for "Indian law" substitute "any enactment in force in British Burma."—*Vide* Government of Burma (Adaptation of Laws) Order, 1937.

**Scope.**—Exception under this section can be claimed only by the judgment-debtor. After waiver by him his son cannot claim the privilege. 145 Ind. Cas. 169 = A. I. R. 1933 Lah. 251 = 6 I. R. Lah. 67. Section 60 (1) is mandatory and objection can be entertained, though raised at a late state of execution proceedings. A. I. R. 1930 Nag. 11 = 119 Ind. Cas. 677. Non-transferable occupancy neither can be attached and sold in execution of a decree nor can it vest in a receiver. A. I. R. 1930 Sind 75 = 121 Ind. Cas. 876. When property is offered as security the proprietary interest of the surety is not automatically extinguished, merely a first charge is created on the security which will have to be available in the first instance for the purpose for which it has been offered and such security is not exempted from attachment under s. 60. A. I. R. 1930 All. 225 = (1930) A. L. J. 402 = 125 Ind. Cas. 477. Future, fluctuating and uncertain profits accruing from immovable property not belonging to judgment-debtor cannot be attached. A. I. R. 1929 Cal. 352 = 33 C. W. N. 282 = 121 Ind. Cas. 751. Section 60 is a prohibition against forcible attachment or sale. A. L. R. 1935 Lah. 210 = A. I. R. 1935 Lah. 164. Arrears of maintenance payable under order of criminal Court cannot be attached if the right to receive maintenance is only a personal right created by the order. The true test is whether a merely personal right is created by the order for maintenance or not. A. I. R. 1935 Cal. 578 = 39 C. W. N. 281 = 62 C. 404. Unpaid balance of mortgage money payable to third person is debt. A. I. R. 1935 Lah. 141. A preliminary decree for accounts is a saleable property. 159 Ind. Cas. 695 = 40 C. W. N. 145 = A. I. R. 1935 Cal. 751. A promissory-note in the name of third person is attachable under sub-section (1). 58 M. 693 = 153 Ind. Cas. 944 = 1935 M. W. N. 1 = A. I. R. 1935 Mad. 181 = 41 L. W. 15 = 68 M. L. J. 81 (F. B.). The right of a widow to live in a portion of the family house which she has obtained by a decree against the creditor purchaser of the house is a right restricted in its enjoyment personally to her. The right is inalienable under s. 6 (d) T. P. Act and read with s. 60, C. P. Code, such an interest cannot be subject of attachment in execution. A. I. R. 1935 Mad. 848 = 69 M. L. J. 317 = 1935 M. W. N. 728 = 4 L. W. 763 = 157 Ind. Cas. 853; see also 31 M. 500. Where a woman obtains a decree for maintenance on a suit filed in *forma pauperis* and future maintenance is made a charge on certain property, the proceeds on sale of such property on execution are not attachable by Government for Court-fee. A. I. R. 1935 Sind 21 = 154 Ind. Cas. 580. But maintenance decree is attachable in so far as it relates to arrears of maintenance. 148 Ind. Cas. 196 = A. I. R. 1934 Nag. 83. *Khadim's* share in offerings of shrine is attachable. A. I. R. 1934 Lah. 57 = 36 P. L. R. 446 = 15 Lah. 136. Right of a occupier in State land is not attachable. A. I. R. 1934 Rang. 263 = 149 Ind. Cas. 815. Exemption

\* Added by Act IX of 1937.

† The words within quotations have been inserted by Act IX of 1937.

under s. 60 cannot be claimed after sale. A. I. R. 1930 Lah. 106=121 Ind. Cas. 303. Executions under mortgage decrees are not governed by s. 60. A. I. R. 1929 Rang. 27=115 Ind. Cas. 651. The decree-holder may have acted in perfectly good faith and innocently in attaching wrong property but is nevertheless liable if damages have been caused by his mistake. A. I. R. 1925 Nag. 390=8 N. L. J. 170=94 Ind. Cas. 573; A. I. R. 1929 Lah. 200=112 Ind. Cas. 848. Insolvent's money deposited by him as security for costs of appeal to His Majesty can be attached, but order of attachment must be made subject to the result of appeal. A. I. R. 1929 Pat. 6=9 P. L. T. 969=8 Pat. 478=114 Ind. Cas. 465. A right to apply for attachment is a processual right and a privilege within the discretion of Court. A. I. R. 1928 Mad. 1173=55 M. L. J. 382=28 L. W. 314=113 Ind. Cas. 416. Groves situate on ex-proprietary holding cannot be attached and sold in execution of a decree. A. I. R. 1937 All. 779=161 Ind. Cas. 526. Omission to follow correct procedure under the appropriate order and rule is merely an irregularity, not rendering sale a nullity. A. I. R. 1927 All. 76=49 A. 292=25 A. L. J. 173=99 Ind. Cas. 443. If there is a present gift with a postponed payment, a vested interest is created. A. I. R. 1926 Mad. 371=20 M. L. J. 79=92 Ind. Cas. 1021. Estate in the hands of the mother of deceased proprietor who derives her title by virtue of her marriage is liable to attachment for payment of debts incurred by previous male holder. A. I. R. 1926 Lah. 7=26 P. L. R. 735=90 Ind. Cas. 1052.

**Saleable property.**—The equity of redemption is a substantial right capable of being attached and sold. A. I. R. 1923 Rang. 119=70 Ind. Cas. 530. It is clear that the Court can only sell in execution property which the judgment-debtor can lawfully alienate. 70 Ind. Cas. 466=45 M. 620=42 M. L. J. 477. Interest of a Buddhist couple in marriage property is not saleable property within s. 60 as it is indeterminate and variable according to contingencies. A. I. R. 1927 Rang. 274=5 Rang. 478=104 Ind. Cas. 516; see also 33 Ind. Cas. 118=9 Bur. L. T. 74. Property assigned to female members of *semindar's* household for enjoyment in common being life-estate, cannot be attached in execution against her personally as right of any member ceases on her death. 33 Ind. Cas. 83. Future perquisite on account of offering or *bhog* to the deity being an uncertain and indefinite income cannot be attached. 1 P. L. T. 75=55 Ind. Cas. 175. A right to get reconveyance and possession of property worth fifteen lakhs for payment of six lakhs is property of a very valuable kind which is attachable and saleable. A. I. R. 1921 Mad. 498=(1921) M. W. N. 519. *Asthan* property is not attachable and saleable in execution of personal decrees against *Mohant*. A. I. R. 1931 Oudh 119=8 O. L. J. 210=61 Ind. Cas. 757. Right to hold property as security for dower's debt and to continue in possession thereof until dower's debt is satisfied is transferable property. A. I. R. 1923 Pat. 33=2 Pat. 84=4 P. L. T. 272=70 Ind. Cas. 312. Right of occupier of State land to occupy such land is saleable interest. A. I. R. 1937 Rang. 74. Words "belonging to judgment-debtor" do not mean "belonging to judgment-debtor alone". Share of debts due to judgment-debtor along with another is attachable and not exempt under this section. A. I. R. 1937 Cal. 199. Objection must be raised before actual sale. 30 N. L. R. 135=148 Ind. Cas. 200=A. I. R. 1934 Nag. 82. A mere right to give a lease is not property which can be transferred. A. I. R. 1936 Pesh. 90.

**Disposing power.**—This section only authorises the attachment of property over which the judgment-debtor has a disposing power which can be exercised for his own benefit. 15 C. 329=15 I. A. 1 (P. C.); 10 Pat. 582=132 Ind. Cas. 868=12 Pat. L. T. 50=A. I. R. 1931 Pat. 364. Sons of assured deceased can not prevent attachment of money payable under policy. A. I. R. 1928 Cal. 518=55 C. 1315=47 C. L. J. 587=32 C. W. N. 634=114 Ind. Cas. 658; see also 37 B. 471. Where Hindu widow is restricted by deed of compromise from having any disposing power the property so got, cannot be attached. A. I. R. 1923 Bom. 276=25 Bom. L. R. 293=47 B. 597=73 Ind. Cas. 196. The judgment-debtor retains an interest in the properties even after they are sold in execution till the sale is confirmed and the same can be attached. 131 Ind. Cas. 14=34 L. W. 531=A. I. R. 1931 Mad. 511. The Nawab of Moorsshedabad has got disposing power over the rents and profits of his property. 58 I. A. 215=132 Ind. Cas. 727=35 C. W. N. 791=A. I. R. 1931 P. C. 160=61 M. L. J. 208=53 C. L. J. 493=1931 A. L. J. 495 (P. C.). Power to dispose partner's interest in a partnership may be attached and sold in execution. A. I. R. 1929 Mad. 641=52 M. 563=29 L. W. 823=57 M. L. J. 264=116 Ind. Cas. 343. If there is present gift with a postponed payment a vested interest is created. 92 Ind. Cas. 1021=A. I. R. 1926 Mad. 371=20 M. L. J. 79. Where the *Khadim's* share in

the offerings of a shrine are by custom allowed to be sold the right to such a share can be attached and sold. A. I. R. 1934 Lah. 57.

**Debts.**—Debts means actually existing debt. 27 C. 38=4 C. W. N. 87; 9 C. W. N. 703. Rent in respect of future period is not debt. A. I. R. 1928 All. 193=50 A. 507=26 A. L. J. 253=108 Ind. Cas. 229. Sum standing to the credit of deceased in the Benefit Fund is not a debt liable to attachment. A. L. R. 1933 Rang. 48=A. I. R. 1933 Rang. 23=142 Ind. Cas. 360. Attaching creditor can attach any debt due though not immediately payable. 56 Ind. Cas. 948=12 Bur. L. T. 247. Debt that has not yet fallen due cannot be attached. A. I. R. 1925 Rang. 318=89 Ind. Cas. 794. Existing debt when payment is deferred is attachable while where both the debt and its payment is in future, such debt is unattachable. A. I. R. 1925 Cal. 561=78 Ind. Cas. 881. The word 'debts' does not merely mean entire debts but includes share of debts. A. I. R. 1937 Cal. 199.

**Proviso.**—Proviso to s. 60 (1) is mandatory and the Courts have no jurisdiction to attach and sell any of the properties mentioned therein. A. I. R. 1935 Lah. 942.

**Clause (a).**—Necessary wearing apparel is not liable to attachment. 9 B. H. C. R. 272. A *mangala sutra* of a Hindu lady is such an apparel. 9 B. 106. Cooking vessels come under clauses (a) and (b). A. I. R. 1932 All. 344=54 A. 399=136 Ind. Cas. 280.

**Clause (b).**—A sewing machine is a tool. 65 Ind. Cas. 416. Artisan is one engaged in a mechanical employment. Musicians and washermen are not artisans. 5. L. W. 596=38 Ind. Cas. 415=(1917) M. W. N. 420; 38 Ind. Cas. 414=(1916) 2 U. B. R. 133. The word "artisans" includes one who practices or cultivates an art. 54. A. 399=A. I. R. 1932 All. 344=136 Ind. Cas. 280. Agriculturists include not only tenants or proprietors cultivating land but also persons engaged in cultivation of land. 41 B. 475=19 Bom. L. R. 281. 39 Ind. Cas. 639. Cattle necessary for agricultural purpose cannot be attached. 13 S. L. R. 201; 61 Ind. Cas. 777. When judgment-debtor is in a position to replace them they can be attached. 25 Ind. Cas. 117. Where a judgment-debtor's only source of living is not by cultivation of land he is not an agriculturist. 63 Ind. Cas. 681; see also 130 Ind. Cas. 81=26 N. L. R. 295; A. I. R. 1931 All. 20=14 R. D. 716; A. I. R. 1928 All. 211=116 Ind. Cas. 20; A. I. R. 1927 All. 601=106 Ind. Cas. 49; 106 Ind. Cas. 45=A. I. R. 1928 Lah. 132; A. I. R. 1928 Nag. 23=105 Ind. Cas. 129. A person tilling his land for years does not lose his status of agriculturist merely because he has temporarily let out the land. A. I. R. 1930 Lah. 191=30 P. L. R. 649=119 Ind. Cas. 225. The term "artisan" does not include surgeon or doctor. 144 Ind. Cas. 848=34 P. L. R. 809=A. I. R. 1933 Lah. 936. *Charak* an iron pot used for the purpose of preparing *gur* from sugarcane is an implement of husbandry. 81 I. C. 67. A sweetmeat vendor is an artisan. A. I. R. 1935 All. 848=1935 A. L. J. 1011.

**Clause (c).**—The fact that a person cultivates his own land and thereby maintain himself and his family will not necessarily make him any the less an agriculturist. 132 Ind. Cas. 809=A. I. R. 1931 All. 20. The term "agriculturist" is used in s. 60 (c) to denote a person making his living by tilling the soil. In other words one whose sole means of livelihood is gained by cultivating the land and does not necessarily mean a person who works with his own hands. The property of an agriculturist to be exempt under clause (c) must be shown to have been occupied by him as such for purposes of agriculture *i. e.*, in order to enable the owner or occupier to cultivate the land. 8 O. W. N. 1353; see also 26 N. L. R. 295=A. I. R. (1931) N. 8=130 Ind. Cas. 81; A. I. R. 1933 Rang. 227 (F. B.)=145 Ind. Cas. 326=11 Rang. 372; A. I. R. 1933 Lah. 1010; 141 Ind. Cas. 824=29 N. L. R. 106=A. I. R. 1933 Nag. 80. An "agriculturist" includes a person who gives a substantial portion of his livelihood, not necessarily the whole of it by agriculture. 17 N. L. J. 271; see also 157 Ind. Cas. 986=1935 A. L. J. 507=A. I. R. 1935 All. 448; A. I. R. 1936 Lah. 532=161 Ind. Cas. 16. The cultivation of land by hired labourers by a person who has a different occupation cannot constitute that person an agriculturist. A. I. R. 1935 All. 242=1935 A. L. J. 306=153 Ind. Cas. 511=1935 A. W. R. 47; see also 164 Ind. Cas. 690=38 P. L. R. 333=A. I. R. 1936 Lah. 737; A. I. R. 1936 Rang. 215=162 Ind. Cas. 694=8 R. R. 579; A. I. R. 1935 Pesh. 151=163 Ind. Cas. 621. S. 60 (c) is intended to protect agriculturists who are the owners of the houses and in occupation thereof as such owners. 1935 O. W. N. 793=156 Ind. Cas. 759; see also A. I. R. 1935 Lah. 894; A. I. R. 1935 Pat. 496=158 Ind. Cas. 59; A. I. R. 1936 Lah.

895. House in occupation of agriculturist is exempted from attachment even if not used for agricultural purposes. A. L. R. 1333 All. 740=2 A. W. R. 580; see also 147 Ind. Cas. 676=35 P. L. R. 185; 35 P. L. R. 509=A. I. R. 680; A. R. 1934 Lah. 614=35 P. L. R. 520. A judgment-debtor may be an agriculturist although the cultivation of land is not his sole means of livelihood *i. e.*, even if he obtains some income from sources others than agriculture. 26 N. L. R. 295=A. I. R. 1931 Nag. 8=130 Ind. Cas. 81. In order to exempt a house of an agriculturist from attachment it must be proved that it is being used or occupied *bona fide* for purpose of agriculture. 12 Lah. 367=130 Ind. Cas. 419=31 P. L. R. 842=A. I. R. 1930 Lah. 1034. The burden of proving essential facts lies on the debtor. *Ibid.* The intention of s. 60 in the proviso in question is that an agriculturist should not be deprived of his means of livelihood by passing his house and other buildings taken from him. 1932 A. L. J. 675=A. I. R. 1932 A. 508=138 Ind. Cas. 685=A. L. R. 1932 All. 883. Where the judgment-debtor belonged to an agriculturist caste and it is not proved that he had any other occupation, it is presumed that he is an agriculturist and occupies the building in that capacity. 1932 A. L. J. 499=138 Ind. Cas. 67=A. I. R. 1932 All. 499=A. L. R. 1932 All. 865. It is doubtful whether the word "agriculturist" as used in s. 60 (c) denotes a person making his living by tilling the soil and whether a judgment-debtor who is a Government servant cannot be said to have his sole means of livelihood by cultivating the land. 9 O. W. N. 1144=16 R. D. 589. The mere fact that these persons have obtained permission to build houses on a portion of the land which was formerly their occupancy tenancy does not necessarily imply that they have themselves ceased to be agriculturists or that they no longer occupy the house in the capacity of agriculturists. 1932 A. L. J. 499=138 Ind. Cas. A. 361=A. L. R. 1932, 865. Where house to be attached is occupied by sons of deceased debtors as agriculturists it need not be proved that their deceased father also occupied as agriculturist. A. I. R. 1928 All. 211=116 Ind. Cas. 20. Objector having properties more than sufficient for his agricultural requirements cannot claim exemption in respect of all. A. I. R. 1929 Lah. 181=30 P. L. R. 29=10 Lah. L. J. 543=115 Ind. Cas. 478. The word "occupation" does not necessarily mean "residence" only. A. I. R. 1927 All. 244=99 Ind. Cas. 376. It is only house occupied by agriculturist as such that is exempted. A. I. R. 1927 Lah. 66=98 Ind. Cas. 857; see also A. I. R. 1927 Lah. 230=92 Ind. Cas. 759. "Occupied by" means "lived in by" or "used for agricultural purposes by." A. I. R. 1926 Lah. 230=92 Ind. Cas. 759. The word agriculturist must be strictly construed. A large landed proprietor *c. g.* owning 300 acres of land, even though his sole income is from land, is not an agriculturist. 92 Ind. Cas. 398=A. I. R. 1926 Mad. 950=49 M. 227=50 M. L. J. 90=92 Ind. Cas. 396. Agriculturist does not cease to be so merely because he becomes *Akali*. A. I. R. 1925 Lah. 331=7 Lah. L. J. 95=29 P. L. R. 463=88 Ind. Cas. 543. Burden of proving exemption lies on person objecting to attachment. A. I. R. 1925 All. 432=87 Ind. Cas. 564; A. I. R. 1930 Lah. 1034=31 P. L. R. 842=130 Ind. Cas. 419. Agriculturist whose house is exempt from attachment is one who tills field and gets livelihood mainly from cultivation. 20 C. W. N. 874=35 Ind. Cas. 343; 14 A. L. J. 240=33 Ind. Cas. 727; 39 A. 120=14 A. L. J. 1031=38 Ind. Cas. 171. House of an agriculturist appurtenant to his holding not liable to sale in execution of decree obtained upon mortgage of the house. 51 Ind. Cas. 553; see also 15 N. L. R. 83=51 Ind. Cas. 129; 45 Ind. Cas. 546. Vacant site used for storing manure with no structure over is not included in "houses and other buildings". 4 P. W. R. 1917=21 P. L. R. 1917=39 Ind. Cas. 375. House of insolvent whose chief source of income at the time of his application was *zemindari* is not property exempt from attachment. 40 Ind. Cas. 544. Agriculturist judgment-debtor may agree to sell his house by using his privilege under s. 60 (c). A. I. R. 1927 Pat. 233=6 Pat. 254=8 P. L. T. 563=102 Ind. Cas. 616; see also A. I. R. 1931 All. 20=(1930) A. L. J. 1599=52 A. 1027. In considering means of livelihood the question of burden of proof cannot be ignored. A. I. R. 1931 All. 20=I. R. 11 A. 340 Rev. An agriculturist's house occupied by him in the village as also his hut in the field are exempt from attachment. A. I. R. 1930 Rang. 129=7 Rang. 766=121 Ind. Cas. 777. A female occupancy tenant not cultivating field herself can be agriculturist, and her house is exempt from attachment. A. I. R. 1927 Nag. 374=10 N. L. J. 159=102 Ind. Cas. 712. If even without objection Court otherwise becomes cognisant of the fact that the property attached was the house of an agriculturist it would be his duty to withdraw the attachment. A. I. R. 1930 All. 727=(1930) A. L. J. 1244=127 Ind. Cas. 447. Where there is no proof of a house being used for purposes of agriculture, it is not exempted from attachment. A. L. R. 1934 Lah. 76. Objection under

clause (1) (c) after sale but before confirmation cannot be entertained. A. I. R. 1937 Lah. 309; see also 58 B. 569=36 Bom. L. R. 681=A. I. R. 1934 Bom. 348. In order to exemption of house from attachment, *bonafide* occupation for agricultural purposes must be proved. A. I. R. 1937 Lah. 200. An objection before two days of the sale should not be entertained. 38 P. L. R. 689. Where an agriculturist has got two houses and one is sufficient for occupation by him *bonafide* for purposes of agriculture, the other house can be attached. A. I. R. 1934 Lah. 168=A. L. R. 1934 Lah. 177.

**Clause (d).**—Books of account are exempt from attachment. 3 B. H. C. R. 43. But Court can require the judgment-debtor to produce his books in Court. 3 N. W. P. H. C. R. 334. *Jatubahi* of a *Gayawal* is not liable to attachment. A. I. R. 1922 Pat. 556=1 Pat. 619=3 P. L. T. 603=68 Ind. Cas. 944.

**Clause (e).**—A right to bring suit is exempt from attachment. 3 W. R. Mis 18; 14 W. R. 152; 6 N. W. P. H. C. 95; 78 Ind. Cas. 409; 76 Ind. Cas. 657; (1918) M. W. N. 887. The right to claim compensation being a mere right to sue cannot be attached. 157 Ind. Cas. 587=31 N. L. R. 235=A. I. R. 1935 Nag. 135. A mere right to sue cannot be attached. A. I. R. 1936 Nag. 218.

**Clause (f).**—The rights of personal service within the meaning of proviso (f) is neither heritable, nor partible nor transferable. 160 Ind. Cas. 355=17 Pat. L. T. 77=A. I. R. 1936 Pat. 10. *Birt of Mahabrahman* being right to personal service cannot be sold in execution of money decree. 41 A. 656=17 A. L. J. 842=51 Ind. Cas. 539. *Birt jijnani* is a right to personal service, although Hindu law regards this right as immovable property. 43 Ind. Cas. 650. Offerings at temple being personal property cannot be attached in execution. 126 P. L. R. 1917=159 P. W. R. 1917=42 Ind. Cas. 390. Though the right of *Gangaputra* to receive offerings is right of personal service and cannot be attached his right of occupation of particular spot on bank together with physical articles is liable to attachment. A. I. R. 1929 Oudh 444=6 O. W. N. 780=120 Ind. Cas. 822. *Pal* or turn of worship of Goddess Kali at *Kalighat* is alienable and attachable in execution. A. I. R. 1933 Cal. 757; see also A. I. R. 1935 Pat. 131=154 Ind. Cas. 944; see also 58A. 457. The interest of an *utpat* or priest's share in the net balance of the offerings to the deity is attachable. A. I. R. 1927 Bom. 143=29 Bom. L. R. 102=100 Ind. Cas. 1006.

**Clause (g).**—Gratuity to railway servant is not attachable. 11 Pat. 584=140 Ind. Cas. 561=A. I. R. 1932 Pat. 311; see also 5 M. 272; 6 A. 173. Pension implies periodical payments of money by Government to the pensioner. 26 A. 617; 24 Ind. Cas. 805; 8 C. W. N. 665; 58 I. A. 215=A. I. R. (1931) P. C. 160=1931 A. L. J. 495=35 C. W. N. 791=53 C. L. J. 493=61 M. L. J. 208=132 Ind. Cas. 727 (P. C.). There is no presumption that *jagir* is political pension. Judgment-debtor must prove that it is so. 111 Ind. Cas. 838; see also A. I. R. 1929 Nag. 232=116 Ind. Cas. 661. Compensation by the Government for forest dues in respect of *jagir* land taken over by the Government for forest purposes is not exempt from attachment. A. I. R. 1930 Bom. 134=121 Ind. Cas. 664. Where the grant to K was of land rather than of revenue charged on land it is not a political pension. 22 C. W. N. 577=47 Ind. Cas. 632 (P. C.); affirming 36 A. 311=25 Ind. Cas. 120. Money payable to retired employee is attachable. A. I. R. 1922 Cal. 196. A pension is not ordinarily attachable, decree-holder must prove that a particular pension is attachable. A. I. R. 1922 All. 429=44 A. 697=20 A. L. J. 679=68 Ind. Cas. 854. Gratuity granted to the heirs of the deceased employees by a railway administration is not assets of the employee in the hands of his heirs. A. I. R. 1923 Oudh 21=26 O. C. 53=9 O. L. J. 401=69 Ind. Cas. 893. Gratuity payable by a University to its servants not being in the nature of Government pension is not exempt from attachment. A. I. R. 1924 Lah. 688=75 Ind. Cas. 945. Where trial Court directs sale of pension by decree, execution Court cannot re-open the question of saleability; A. I. R. 1925 All. 652=47 A. 900=23 A. L. J. 841=89 Ind. Cas. 364. For finding out the meaning of pensions as used in s. 60 (g) reference to Pensions Act is not proper. A. I. R. 1937 Lah. 178. Where Government granted income of certain water metes as *jagir*, the income from lease is not liable to be attached. A. I. R. 1937 Lah. 211. A political pension is a fixed periodical allowance or stipend granted, not in respect of any right, privilege, perquisite or office, but on account of services or particular merits or as compensation to de throne Princes, their families and dependants. *Jagirs* known as *Ala Jagirs* in the *Ambala* district are accordingly within the meaning of s. 60 (1) and as

such are exempt from attachment. A. I. R. 1934 Lah. 881=36 P. L. R. 105=A. L. R. 1934 Lah. 824. The Code makes all political pensions exempt in whatever form they are granted by the Government. 38 P. L. R. 531. Moneys subscribed by members to mutual benefit fund and payable under rules to nominee or legal heirs are not attachable. 70 M. L. J. 581=43 L. W. 527=1936 M. W. N. 333.

**Clauses (h) and (i).**—These two clauses were substituted by Act IX of 1937 in order to give effect to the recommendation of the Royal commission on labour. The following *Statement of Objects and Reasons* were appended to L. A. Bill 11 of 1935 which after some modifications was placed on the statute Book as Act IX of 1937. The framer of the Bill observes : "The Royal Commission on labour drew attention to the indebtedness prevailing among certain classes of workers, and expressed the view that this was due mainly for the credit enjoyed by them and the facilities afforded to creditors by the law relating to the attachment of salaries. With a view to reducing credit, the Commission recommended that wages and salaries of workmen receiving less than Rs. 300 a month should be entirely exempted from attachment. Enquiries made by Government of India in consultation with Local Government, afford justification for action on the lines suggested by the Commission and in particulars reveal a serving State of indebtedness among certain classes of Government employees. The Government of India therefore propose to amend section 60 of the Civil Procedure Code to provide—

(1) the salaries, not exceeding Rs. 100 a month, of all workers should be totally exempt from attachment ;

(2) that the pay of servants of Government Railway Companies and local authorities getting more than Rs. 100 a month should be exempt to the extent of the first Rs. 100 and one half of the remainder, and

(3) that which the attachable portion of the pay of servants of Government, Railway Companies and local authorities should remain as at present liable to continuous attachment the period of attachment should be restricted as follows viz, that after a debtor's pay has been attached for a total period of two years (in one or more periods) no further attachment should be possible in favour of the same decree or in favour of any other decrees until twelve months have elapsed.

"The Bill seeks to give effect to these proposals. It also takes away the privileged position of Co-operative Societies under the proviso to sub-clause (iii) under clause (i) of the proviso to sub-section (1) of section 60 of the Code as in the opinion of the Government of India it is unnecessary to continue that privilege.

"Under (existing) sub-clause (i) of the proviso to sub-section (1) of section 60 of the Code of Civil Procedure, 1908, leave allowances if less than salary are exempt from attachment, but under sub-clause (i) leave allowances, if equal to salary on duty, are liable to attachment. Since the introduction of time-scales of pay in the services, this has created an anomalous position for if an officer drawing pay once time-scale proceeds on leave before enacting the maximum of the scale, the whole of his leave allowance, being less than his salary on duty, is exempt from attachment, while if he goes on leave after drawing the maximum pay of the scale for over a year, the whole of his leave allowance, being equal to his salary on duty would be liable to attachment. It is accordingly proposed to place leave allowances and salary on duty in exactly the same position as regards attachment. At the same time the Bill gives to the Governor-General in Council power to exempt certain allowances from attachment, the object being to enable him to exempt certain compensatory allowances granted for specific purpose."

**Clause (j).**—*Vide* A. I. R. 1933 All. 153=146 Ind. Cas. 494 ; A. I. R. 1926 All. 122=48 A. 73=23 A. L. J. 929. Civil Courts cannot interfere with the order made by Commander-in-Chief under s. 165 of the Army Act. 43 B. 368=21 Bom. L. R. 137=50 Ind. Cas. 427. An Army Assistant Surgeon's pay is not attachable. 48 A. 122=A. I. R. 1926 A. 122. The pay of a Staff-Sergeant is not attachable. A. I. R. 1934 Bom. 31 ; A. I. R. 1933 Bom. 185.

**Clause (k).**—Compulsory deposit made in the General Provident Fund is not liable to attachment even after the retirement or death of the contributor from service. A. I. R. 1929 All. 417=(1929) A. L. J. 670=51 A. 845=117 Ind. Cas. 622 ; see also 11 Rang. 116=142 Ind. Cas. 360=A. I. R. 1933 Rang. 23 (F. B.) ; 33 Bom. L. R. 720=134 Ind. Cas. 558=A. I. R. 1931 B. 300 ; 35 C. 641=12 C. W. N. 633 ; 29 B. 259 ; 45 A. 554=74 Ind. Cas. 746 ; 46 C. 962=54 Ind. Cas. 439 ; 44 B. 673=56 Ind. Cas. 450 ; 80 Ind. Cas. 424=3 Pat. 74=A. I. R. 1924 Pat. 524 ; 27 C. W. N. 472=50 C. 347 ; 45 A. 554=21 A. L. J. 454=74 Ind. Cas. 746 ; 150 Ind. Cas. 213=36 P. L. R. 145=A. I. R. 1934 Lah. 153. So long as it remains in the hands of the com-

pany it is exempt from attachment. But after payment it can be attached. 29 B. 250 ; 50 C. 347 ; A. I. R. 1927 Oudh 22=13 O. L. J. 425=1 Luck. 313=29 O. C. 278=92 Ind. Cas. 673. Compulsory deposit in Railway Provident Fund cannot be attached. A. I. R. 1923 C. 585=50 C. 347=27 C. W. N. 472=77 Ind. Cas. 1025. As long as a compulsory deposit is in the hands of the Government or the institution which keeps and manages the fund, it is exempt from attachment under any decree, and neither does it vest in the Official Assignee nor in the receiver appointed, under Chapter 20, C. P. Code. But after the amount standing in the credit of subscriber is paid to him and comes into his hands it ceases to retain its character of a compulsory deposit and it becomes his property and is liable therefore to be attached in execution of a decree against him. A. I. R. 1935 Bom. 396=37 Bom. L. R. 494. Under this clause, the amount standing to the credit of the employee of the Imperial Bank of India in the Provident Fund established by that Bank for the benefit of its employees is exempt from attachment. A. I. R. 1936 Lah. 694=165 Ind. Cas. 767.

**Clause (m).**—The residuary legatee becomes proprietor only on completion of administration and ascertaining and making over residues to him. A. I. R. 1931 Pat. 76=130 Ind. Cas. 163. Interest of residuary legatee being vested interest is generally transferable and can be attached and sold in the execution of decree against the residuary legatee. A. I. R. 1931 Pat. 76=130 Ind. Cas. 163. Interest of heir in the hands of administrator is attachable. A. I. R. 1929 Lah. 600=117 Ind. Cas. 76. An interest which is contingent and not vested remainder is not attachable. 30 S. L. R. 50=163 Ind. Cas. 206=A. I. R. 1936 Sind 65. But a vested remainder which depends upon a contingency is attachable. A. I. R. 1936 Cal. 802.

**Clause (n)**—A right to receive future maintenance cannot be attached. 14 L. R. 371 (Rev.)=17 R. D. 505 ; see also 16 C. L. J. 354=17 C. W. N. 662 ; 6 W. R. Mis. 64 ; 27 C. 38 ; 9 C. W. N. 703 ; 40 M. 302 ; 38 C. 13 ; 57 B. 507=146 Ind. Cas. 340=35 Bom. L. R. 615=A. I. R. 1933 Bom. 350. A *jagir* for maintenance is unattachable but a Receiver can be appointed to manage the *jagir* for the decree-holder. A. I. R. 1933 Nag. 266 ; see also A. I. R. 1936 Lah. 830=165 Ind. Cas. 519 (right of residence). A mere right of maintenance cannot be attached and sold. 40 M. 302=30 M. L. J. 361=34 Ind. Cas. 381 ; see also 21 O. C. 329=6 O. L. J. 137=49 Ind. Cas. 511. Heritable annuity conferred by Will is liable to attachment as it is essentially different from right of maintenance. A. I. R. 1921 Oudh 164=24 O. C. 250=63 Ind. Cas. 851. Although right of maintenance is not attachable, Receiver can be appointed for realising the rents and profits of the property paying out of the same a sufficient sum for maintenance of judgment-debtor, and his family and applying the balance, if any, to liquidation of debt. A. I. R. 1925 P. C. 176=3 Pat. L. R. 142=47 A. 385=52 I. A. 262=49 M. L. J. 244=(1525) M. W. N. 630=30 C. W. N. 818=41 C. L. J. 383=23 A. L. J. 634=27 Bom. L. R. 849=87 Ind. Cas. 295 (P. C.). The expression "right to receive future maintenance" means the right of one person to receive from another board, lodging, clothing and other necessities of life. 158 Ind. Cas. 170=1935 M. W. N. 776=42 L. W. 345=A. I. R. 1935 Mad. 815=69 M. L. J. 264 ; see also 158 Ind. Cas. 710=1935 O. W. N. 1134 ; 31 N. L. R. 239=156 Ind. Cas. 65=A. I. R. 1935 Nag. 133 ; 38 P. L. R. 702=A. I. R. 1936 Lah. 944 ; A. I. R. 1936 Lah. 55=17 Lah. 378=163 Ind. Cas. 103. An annuity payable under a Will is not "a right to future maintenance" as contemplated by s. 60 (i) (n) of the Code and as such is not exempt from attachment. 159 Ind. Cas. 644=37 P. L. R. 261=A. I. R. 1935 Lah. 811.

**Clause (p).**—Section 60 (p) applies to movable property only. A. I. R. 1935 Pesh. 113.

**61. [New.]** The "Provincial Government"\*†, may by general or special order published in the "official Gazette,"‡ declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear

\*For "Local Government" the words "Provincial Government" have been substituted by G. I. Order of 1937. But in Burma read "Governor" for the words "Local Government."

† The words "with the previous sanction of the Governor-General in Council" were omitted by s. 2 and Sch. I, Part I of the Devolution Act, 1920 (38 of 1920).

‡ For "local official Gazette" the words "official Gazette" have been substituted by G. I. Order of 1937 in British India. But in Burma read "Gazette" for the words "official Gazette."

to the "Provincial Government"\* to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment debtor and his family, shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree.

**62. [S. 271.]** (1) No person executing any process under this Code directing or authorizing seizure of movable property shall enter any dwelling-house after sunset and before sunrise.

Seizure of property in dwelling-houses.

(2) No outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a room in a dwelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the process shall give notice to such woman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

**Scope.**—A shop or a godown is not a dwelling-house. 3 B. 99

**Clause (3).**—145 Ind. Cas. 259=34 Cr. L. J. 563.

**63. [S. 285.]** (1) Where property not in the custody of any Court is under attachment in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim thereto and any objection to the attachment thereof shall be the Court of highest grade, or where there is no difference in grade between such Courts, the Court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a Court executing one of such decrees.

**Scope.**—This section applies to immovable property. 7 M. 47; but see 7 C. 410=9 C. L. R. 361. Although the decree-holder claiming rateable distribution should ordinarily, as prescribed by s. 63 have applied for execution to the Court by which the assets are held s. 63 recognising an exception, lays down when and to what extent this rule may be departed from. Even if the decrees are passed by the same Court, still s. 63 applies. The object of s. 63 is to deal with the several attachments, no matter whether the decrees passed are by the same Court, or by different Courts. By which Court the decrees have been passed is an immaterial detail, the emphasis is upon the word 'attachment' and not upon the word 'decrees.' A. I. R. 1936 Mad. 797=1936 M. W. N. 655=71 M. L. J. 328=59 M. 1028=44 L. W. 358. Section 63 contemplates the case where attachments of the same property have been made by different Courts at the instance of different decree-holders of the common judgment-debtor and provides for the distribution among them of the proceeds of the attached property by one of such Courts only. The principle underlying it is the principle of avoiding multiplicity of proceedings the principle of fair distribution, and not the principle of exclusion. The distribution is to be made by the superior Court and if all the Courts be of the same grade, the distribution is to be made by the Court which first attached the property. For this purpose it is the duty of the Court of inferior grade or the Court of the same grade which had attached last of all to send the sale proceeds to the superior Court, or if all the Courts be of the same grade to the Court which first attached the property, and the proceeds so received shall be deemed to have been received on behalf of all the Courts in which there

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\* For "Local Government" the words "Provincial Government" have been substituted by G. I. Order of 1937. But in Burma read "Governor" for the words "Local Government."



have been attachments in execution of money decrees prior to the actual receipt of assets. The decree-holders in all such Courts will be entitled to rateable distribution under s. 73. 40 C. W. N. 1307=A. I. R. 1936 Cal. 723 ; see also 59 Mad. 1028=44 L. W. 358=1936 M. W. N. 655=A. I. R. 1936 Mad. 797=71 M. L. J. 328 ; 1935 M. W. N. 1300=69 M. L. J. 900 ; 37 Bom. L. R. 78=A. I. R. 1935 Bom. 176=59 B. 310=159 Ind. Cas. 505 ; A. I. R. 1935 Mad. 938=1935 M. W. N. 1046=42 L. W. 783. A Small Cause Court which has a higher pecuniary jurisdiction than the Additional Small Cause Court in the same area is a Court of higher grade within the meaning of this section. A. I. R. 1936 Nag. 270. Attachments by the High Court and the Court of Small Cause stand in the same footing. The Small Causes Court decree need not be transferred to the High Court where the execution proceeding is pending. Section 73 must be read subject to s. 63. A. I. R. 1934 Cal. 559=61 C. 240=152 Ind. Cas. 69=A. I. R. 1934 Cal. 559. When property is attached by more Courts than one, each of them has jurisdiction to sell it and this section merely declares by which of such Courts that jurisdiction should be exercised. 22 B. 88. Property attached by two Courts one of a superior, and another of inferior grade cannot be sold by the Court of lower grade. 27 A. 56=A. W. N. 1904, 160 ; 26 A. 538. Attachment and sale by inferior Court of immovable property, subsequent to attachment in execution of decree of superior Court is not necessarily illegal and without jurisdiction. (1917) M. W. N. 505=33 M. L. J. 217=22 M. L. T. 119=41 Ind. Cas. 612 ; 32 Ind. Cas. 927 ; 32 Ind. Cas. 41 ; 38 C. L. J. 266=A. I. R. 1924 Cal. 168=75 Ind. Cas. 325. After attachment of property by First Class Subordinate Judge there was attachment and sale by Second Class Subordinate Judge. First Class Subordinate Judge is entitled to call for sale proceeds to his Court for rateable distribution. A. I. R. 1925 Bom. 420=49 B. 655=27 Bom. L. R. 917=89 Ind. Cas. 980 ; see also 98 Ind. Cas. 628=A. I. R. 1927 Mad. 67=51 M. L. J. 661 ; A. I. R. 1924 Mad. 889=47 M. L. J. 720=20 L. W. 864=84 Ind. Cas. 265. Holders of decrees of inferior Court, whose execution had been stopped by the superior Court under s. 63, are entitled to rateable distribution without any further application. A. I. R. 1925 Cal. 966=29 C. W. N. 575=87 Ind. Cas. 783 ; A. I. R. 1928 Rang. 157=6 R. 131=110 Ind. Cas. 744 ; see also 46 C. 64=27 C. L. J. 145. Object of this section is to prevent confusion in the execution of decree. A. I. R. 1921 Pat. 140=2 P. L. T. 19=6 Pat. L. J. 332=62 Ind. Cas. 33. Property attached in execution of prior decree of different Court cannot be sold by Court executing a subsequent decree. Sub-section (2) profits such sale when it has taken place in ignorance of prior rights. A. I. R. 1921 Pat. 140=2 P. L. T. 719=6 Pat. L. J. 332. Section 63 applies only as between Civil Courts or where it extended to Revenue Courts as between Revenue Courts. A. I. R. 1921 All. 142=43 A. 612=19 A. L. J. 643=63 Ind. Cas. 909. Where attachment by inferior Court is prior to that of superior Court, no application to superior Court, claiming rateable distribution is necessary ; but where inferior Courts' attachment is subsequent rateable distribution cannot be claimed without application. 25 C. W. N. 740=A. I. R. 1921 Cal. 87=63 Ind. Cas. 11 ; see also 64 Ind. Cas. 493=A. I. R. 1922 Mad. 3=15 L. W. 245=41 M. L. J. 378 ; A. I. R. 1921 Pat. 140=6 Pat. L. J. 332=2 P. L. T. 719 ; A. L. R. 1933 All. 795=A. I. R. 1933 A. 563=1933 A. L. J. 921. Court of superior grade has jurisdiction to receive the amount and determine all claims thereto. A. L. R. 1933 M. 569=A. I. R. 1933 M. 342=65 M. L. J. 34. Sections 63 and 73 must be read together. Words "any claim" in s. 63 include claim for rateable distribution under s. 73. A. I. R. 1937 Nag. 80 ; see also 40 C. W. N. 1307=A. I. R. 1936 Cal. 723.

**Sub-section (2).—Sale of property by Court attaching it subsequent to attachment by one Court though in contravention of s. 63 (1) is validated by sub-section (2) of s. 63.** A. I. R. 1937 Cal. 55 ; see also A. I. R. 1936 Mad. 797=71 M. L. J. 328=59 M. 1028 ; A. I. R. 1935 Oudh 154=11 O. W. N. 1618=153 Ind. Cas. 853. A. I. R. 1934 Pat. 511=152 Ind. Cas. 902.

**64. [S. 276.]** Where an attachment has been made, any private transfer

Private alienation of property after attachment to be void.

or delivery of the property attached or of any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

*Explanation.*—For the purposes of this section, claims enforceable under an attachment include claims for the rateable distribution of assets.

*Scope.*—Section 64 relates to private alienation of property after it has been attached by order of a Court. A. I. R. 1930 Lah. 858=128 Ind. Cas. 304. It has no application to a case in which the alienation has been made after the issue of *ad interim* injunction restraining alienation of house. A. I. R. 1930 Lah. 858=128 Ind. Cas. 304. Attachment begins to be binding from the date when all processes of attachment necessary under the law to effect valid attachment have been served, and not from the date of order of attachment. A. I. R. 1931 Pat. 58=9 Pat. 860=12 P. L. T. 398=129 Ind. Cas. 142; see also 145 Ind. Cas. 813=A. I. R. 1933 Rang. 267; 193 A. L. J. 1501; A. I. R. 1933. Rang. 198=146 Ind. Cas. 693=6 I. R. (Rang.) 119; A. I. R. 1934 Pat. 619. Attachment only prevents private alienations. It does not confer any title upon attaching creditor in the property in question and he is only entitled to be classed with other creditors A. I. R. 1929 Cal. 524=57 C. 122=123. Ind. Cas. 737; see also A. I. R. 1929 B. 395=53 B. 851=31 Bom. L. R. 1111=123 Ind. Cas. 510; A. I. R. 1930 Bom. 16=31 Bom. L. R. 1209=122 Ind. Cas. 836; A. I. R. 1923 Lah. 261=3 Lah. 414=69 Ind. Cas. 720; A. I. R. 1921 Oudh 170=8 O. L. J. 358=16 Ind. Cas. 642; A. I. R. 1921 Mad. 30=44 M. 232=40 M. L. J. 65=62 Ind. Cas. 121.

For the purpose of this section attachment takes effect not from the date on which it is ordered but when it is made under Order 21, rule 54. 32 Ind. Cas. 276; 53 Ind. Cas. 207=42 M. 844 (F. B.); (1931) M. W. N. 259=A. I. R. (1931) Mad. 570; see also A. L. R. 1934 All. 12.

Attachment before judgment is not a process in execution of a decree. Attachment in s. 64 covers attachment before judgment. A. I. R. 1912 Nag. 238=68 Ind. Cas. 188; see also A. I. R. 1929 Cal. 494=33 C. W. N. 805=57 C. 274=122 Ind. Cas. 637; 113 Ind. Cas. 353=A. I. R. 1928 B. 444=30 Bom. L. R. 1136. An attachment is not effectual till the prohibitory order is posted in the Court house. 59 C. 1176=36 C. W. N. 733=A. L. R. 1933 Cal. 33; A. L. R. 1934 All. 12=1934 A. L. J. 1501.

The attachment under s. 64 must be made in the manner and published as prescribed in Order 21, rule 54. 39 Ind. Cas. 857; 36 Ind. Cas. 732=3 O. L. J. 422; see also A. I. R. 1922 Nag. 238=68 Ind. Cas. 188; 12 P. L. T. 398=A. I. R. (1931) P. 58=129 Ind. Cas. 142=9 P. 860.

Section 64 protects a creditor only from those transactions which are subsequent to attachment. 21 C. W. N. 158=34 Ind. Cas. 953=23 C. L. J. 115. A property was attached by a decree-holder but the assets were not brought to the Court. Pending this attachment, the property was transferred. Subsequently another decree-holder attached the same property and the transfer being held valid, he contended that he could enforce his claim under the attachment by the other decree-holder: *Held* that he was not entitled to do so as the attaching creditor under the prior attachment never got the assets into the executing Court and further the present attaching creditor under his attachment never applied for rateable distribution. A. I. R. 1937 Nag. 1. Under s. 64, C. P. Code an applicant for rateable distribution is placed on the same footing as the attaching decree-holder. 150 Ind. Cas. 770=A. I. R. 1934 All. 896. Under s. 64 of the present Civil Procedure Code, it has to be shown that the transfer was contrary to the attachment, which is the same thing as saying that it must be prejudicial to the interests of the attaching creditor or the auction-purchaser. 152 Ind. Cas. 757=A. I. R. 1934 All. 902. One of the objects of s. 64 is to prevent an alienation which might defeat the claim of the attaching creditor. A. I. R. 1934 All. 1057. This section which declares private alienation of property after attachment to be void, does not cover the enforced execution of a conveyance in obedience to a decree of Court. A. I. R. 1936 Nag. 163. Agreement entered into before attachment is not affected. *Ibid*; see also A. I. R. 1936 Nag. 209; 19 N. L. J. 94; A. I. R. 1935 All. 391=1935 P. L. J. 749=154 Ind. Cas. 437; 158 Ind. Cas. 940=1935 M. W. N. 942=42 L. W. 544=A. I. R. 1935 Mad. 872=69 M. L. J. 678=8 R. M. 386.

An alienation which is void by reason of its being made contrary to an attachment cannot revive or be validated by reason of the attachment ceasing as a result of the execution being struck off. 39 C. W. N. 733. If there is a valid attachment of debt, the satisfaction of the decree in which the debt might have been merged would be void under s. 64 against all claims and objections under the attachment. A. I. R. 1934 Pat. 619=152 Ind. Cas. 795. A private transfer of property under attachment is not absolutely void but is only voidable. 63 Ind. Cas. 108; see also A. I. R. 1925 Mad. 338=47 M. L. J. 913=85.

Ind. Cas. 349. Mortgage during attachment is not binding on auction purchaser. A. I. R. 1922 All. 443=44 A. 714=20 A. L. J. 722=68 Ind. Cas. 790. Prior transfer is not affected by attachment before judgment. A. I. R. 1928 Bom. 545=30 Bom. L. R. 1488=115 Ind. Cas. 414; A. I. R. 1921 Cal. 801=33 C. L. J. 7=62 Ind. Cas. 167. Section 64 is intended for the benefit of the decree-holder. He can however agree to forego the benefit. A. I. R. 1923 Mad. 230=16 L. W. 988=44 M. L. J. 80=72 Ind. Cas. 839. Prohibitory order restraining payee of a promissory-note from receiving money under it, has the effect of an attachment. A. I. R. 1923 Mad. 317=44 M. L. J. 206=(1923) M. W. N. 91=72 Ind. Cas. 189.

Agreement to sale entered into before attachment does not create any interest or charge on the property and so it cannot prevail against attachment. A. I. R. 1929 Cal. 494=33 C. W. N. 805=57 C. 274=122 Ind. Cas. 637. The moment attachment comes to an end by reason of satisfaction of the decree, all claims under the attachment ceases to be enforceable. A. I. R. 1928 Bom. 545=30 Bom. L. R. 1488=115 Ind. Cas. 414; see also 118 Ind. Cas. 615=A. I. R. 1929 Rang. 229=7 Rang. 201. Attachment under s. 64 is that under which execution sale is held and not attachment of creditor who is paid off. A. I. R. 1928 Bom. 545=30 Bom. L. R. 1488=115 Ind. Cas. 414. Attachment does not continue after dismissal of execution application. A. I. R. 1922 Nag. 81=66 Ind. Cas. 850. Where claim suit is decreed and attachment is raised, but the decree is reversed on appeal, the attachment revives and renders transfer during interval invalid. A. I. R. 1922 Nag. 138=4 N. L. J. 213=65 Ind. Cas. 220.

Assignment of a debt or fund, equitable or legal, involves a transfer of an interest in that debt or fund. A. I. R. 1929 Rang. 229=7 Rang. 201=118 Ind. Cas. 615. Property under attachment before judgment was transferred by private sale. Subsequently the attaching creditor was paid off and the suit was dismissed. In the circumstances the transfer is not contrary to attachment. A. I. R. 1928 Bom. 545=30 Bom. L. R. 1488=115 Ind. Cas. 414. It is only those persons who have claims enforceable under attachment that can take objection that the transfer was void. A. I. R. 1929 Pat. 1=7 Pat. 726=9 P. L. T. 822=113 Ind. Cas. 673. A person who has merely obtained an attachment before judgment cannot put up a claim for rateable distribution. A. I. R. 1928 Bom. 545=30 Bom. L. R. 1488=115 Ind. Cas. 414. No title passes by virtue of attachment. A. I. R. 1929 Lah. 90=10 Lah. 491=30 P. L. R. 6=113 Ind. Cas. 907.

Where attachment is wrongly released, subsequent attachment will relate back to the time when attachment was first made. A. I. R. 1924 Cal. 744=51 C. 548=39 C. L. J. 418=83 Ind. Cas. 233; but see A. I. R. 1929 Rang. 229=7 Rang. 201=118 Ind. Cas. 715; 62 Ind. Cas. 121=40 M. L. J. 65=44 M. 232=A. I. R. 1921 Mad. 30. Decree embodying *bona fide* transfer is not private transfer. 68 Ind. Cas. 673=41 M. L. J. 557=45 M. 103. A purchaser under a private sale void under s. 64 has no lien of his purchase money on the property. 34 Ind. Cas. 34.

Attachment to money-decree is not governed by s. 64 but by Order XXI, rule 53. A. I. R. 1929 Pat. 1=7 Pat. 726=9 P. L. T. 822=113 Ind. Cas. 673. Vesting order by which the rights of insolvent are vested in the Official Assignee has no analogy with attachment of property by Court. A. I. R. 1928 Mad. 735=51 M. 417=(1928) M. W. N. 294=28 L. W. 109=55 M. L. J. 175 (F. B.)=112 Ind. Cas. 541. Mortgage executed to pay of prior mortgage debt is binding on purchaser under decree. A. I. R. 1928 Mad. 703=28 L. W. 215=55 M. L. J. 369=111 Ind. Cas. 266. Mortgage executed by Court pursuant to decree for specific performance of agreement to execute a mortgage is not a private purchase, and is valid as against an attachment of the same property effected after the decree for specific performance but before the execution of the mortgage by Court. 34 Bom. L. R. 117=139 Ind. Cas. 610=A. I. R. 1932 Bom. 301=A. L. R. 1932 Bom. 165; see also 63 M. L. J. 664=1932 A. L. J. 909=1932 M. W. N. 1063=56 C. L. J. 324=36 C. W. N. 1129=A. I. R. 1932 P. C. 235 (P. C.); 35 Bom. L. R. 1=56 C. L. J. 324 (P. C.).

Where the amount due under the writ of execution is paid and the attachment comes to an end, there are no further claims enforceable under the attachment in respect of which the alienation can be said to be void, and *ex port facto* the alienation is rehabilitated in law. 10 R. 199=138 Ind. Cas. 201=A. I. R. 1932 Rang. 103=A. L. R. 1932 Rang. 234; but see A. I. R. 1933 Nag. 82=A. I. R. 1933 Nag. 349. Though a plaintiff has obtained his decree there is nothing to prevent the judgment-debtor disposing of his property before it has been attached in execution of the decree. A. I. R. 1932 Sind 164=26 S. L. R. 158=A. L. R. 1932 Sind 192. A

transferee of property pending its attachment in execution of a decree is entitled to apply to set aside the sale held pursuant to the attachment on the ground of material irregularity or fraud. 63 M. L. J. 945=36 L. W. 781=140 Ind. Cas. 600.

In case of attachment before judgment, actual attachment and not order for attachment is the starting point for avoidance of transfer. A. L. R. 1934 All. 12=1933 A. L. J. 1501. Attachment before judgment does not create a charge in favour of the attaching creditor. A. I. R. 1933 All. 953. A claim to be effective as questioning the private alienation, must be one enforceable under the attachment within the meaning of s. 64, C. P. Code, the attachment therein referred to being the attachment under which the execution sale is made and no other. A. L. R. 1933 Nag. 239=A. I. R. 1933 Nag. 230=144 Ind. Cas. 681=1. R. 6 N. 5. The operation of a registered deed from the date of execution is not in any way affected by attachment of property between date of execution and registration. A. L. R. 1933 Cal. 33=59 C. 1176=36 C. W. N. 733=A. I. R. 1933 Cal. 212=142 Ind. Cas. 452.

There is a distinction between an attachment made before judgment and one made after decree. If after attachment a decree is passed it is not necessary for the plaintiff to re-attach this property in execution, but he can immediately apply for sale. Transfers by the defendant after the attachment will be void against the plaintiff's claims enforceable under the attachment. If the suit is dismissed by the Court, or if any decree is passed in plaintiff's favour is reversed on appeal or annulled on review the attachment does not create a charge in the plaintiff's favour and when it ceases the plaintiff loses all his rights under it. Transfers made after dismissal of suit or reversal of decree for the plaintiff on appeal are not void. A. L. R. 1934 All. 12.

*Explanation*—If a party comes and says that he is entitled to rateable distribution under s. 73, before he can ask the Court to apply the provisions of the Explanation to s. 64 to his case, he has to prove that there are assets which have come into the hands of the Court. It is necessary that the decree-holder who seeks to enforce his decree should also get an attachment at his own instance. A. I. R. 1934 All. 1069. The combined effect of s. 64, C. P. Code and the explanation which has been added thereto is to extend the protection of that section to the claimants for rateable distribution against private alienations of property after attachment, just as much as to the decree-holder at whose instance the attachment is made. 1936 O. W. N. 861=164 Ind. Cas. 1037. A claim for rateable distribution of assets which is a claim enforceable under the attachment under the Explanation to s. 64 C. P. Code, must be taken to mean a claim enforceable under s. 73 C. P. Code *i. e.*, it must satisfy the conditions laid down by s. 73, C. P. Code. 39 C. W. N. 1076; see also A. I. R. 1934 All. 1057; but see 13 Pat. 446=A. I. R. 1934 Pat. 685.

### SALE.

**65. [S. 316.]** Where immovable property is sold in execution of a decree and such sale has become absolute, the

Purchaser's title. property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

*Scope.*—Under s. 65 property vests in the purchaser from the date of its sale and if afterwards he passes to another person an agreement to convey it, the latter suit to enforce the agreement does not fall under s. 66. A. I. R. 1930 Bom. 81=31 Bom. L. R. 1271=124 Ind. Cas. 117. Between the Court sale and its confirmation, the purchaser has in equity a good title while the judgment-debtor has the bare right to have the sale set aside and therefore on the sale being set aside the former can recover from the latter money spent by him on the property after the sale. A. I. R. 1928 Pat. 552=9 P. L. T. 795. A purchaser at a Court sale can have the sale set aside only if the judgment-debtor had no saleable interest at all in the property sold, otherwise he gets whatever right title and interest of the judgment-debtor there may be in the property, with all risks and defects therein. A. I. R. 1930 Lah. 937=12 Lah. L. J. 203=130 Ind. Cas. 513; see also 123 Ind. Cas. 24=A. I. R. 1930 Mad. 12=(1929) M. W. N. 811. Purchaser at auction sale of land already leased is entitled to rent due from the lessee. A. I. R. 1928 Rang. 67=5 Rang. 803=109 Ind. Cas. 151. At Court auction the purchaser is placed exactly into the shoes of the judgment-debtor as regards the land sold, and the Court is not responsible for breach of warranty. A. I. R. 1928 Rang. 67=5 Rang. 803=109 Ind. Cas. 151; see also A. I. R. 1921 Pat. 409=2. P. L. T. 240=61 Ind. Cas. 922; 45 Ind. Cas. 248=5 O. L. J. 31.

Property sold vests from the date of sale in the purchaser who is entitled to profits and responsible for loss from that date. A. I. R. 1926 Nag. 17=88 Ind. Cas. 693 ; A. I. R. 1923 Pat. 355=4 P. L. T. 318=1 Pat. L. R. 267=73 Ind. Cas. 451 ; see also 1936 R. D. 49. *Prima facie* and in the absence of anything else, where land is sold the structures or buildings thereon do not pass. A. I. R. 1926 Cal. 27=52 C. 862=90 Ind. Cas. 901. Purchaser's rights at revenue and voluntary sales are distinct. A. I. R. 1926 Cal. 97=52 C. 862=90 Ind. Cas. 901. Decree-holder's failure to fulfil the conditions on which he was permitted to bid does not invalidate the sale in favour of highest bidder. A. I. R. 1926 Pat. 335=(1926) Pat. 138=95 Ind. Cas. 441. Auction-purchaser in execution of simple money decree against Hindu widow obtains only widow's interest. A. I. R. 1926 All. 715=48 A. 637=24 A. L. J. 873. Issue of sale certificate is not necessary for title to vest which it does on confirmation, from date of sale. 95 Ind. Cas. 965. Execution sale expressly subject to and admitting existence of a mortgage cannot operate against mortgage. A. I. R. 1926 Nag. 446=95 Ind. Cas. 563. The auction-purchaser's title is good against a mortgagee under an invalid mortgage who can get equitable relief only by way of repayment of his mortgage-amount. A. I. R. 1927 Rang. 332=6 Bur. L. J. 230=106 Ind. Cas. 861. A gift authorizing the donee to take possession by auction-purchaser made before confirmation of sale passes title though the donor is not actually in possession. A. I. R. 1927 Oudh 261=2 Luck 496=102 Ind. Cas. 72. Purchaser in execution of mortgage-decree can claim a right in the charge in favour of the mortgagor, if that was all the right, title and interest of the judgement-debtor. A. I. R. 1927 Cal. 359=45 C. L. J. 151. Where property over which maintenance charge in pauper suit is decreed directing realization of Government costs from arrears of maintenance, is sold through Court for those costs, the sale is one of equity of redemption subject to the charge of maintenance. A. I. R. 1926 Cal. 859=94 Ind. Cas. 391. Under the provisions of s. 65 the title to the mortgaged property vests in the purchaser from the time when the property is sold in execution of the decree on the mortgage. A. L. R. 1933 Oudh 619. The title of the auction-purchaser is derived from the sale and not from the sale certificate. It accrues on the sale becoming absolute but takes effect from the date of sale itself. The sale certificate is merely evidence of title of the auction-purchaser and not the title-deed in the sense that the title is conveyed or created by it. The word "sale certificate" itself denotes that it is only a certificate by the Court that the auction-purchaser had purchased the property. 136 Ind. Cas. 49=A. I. R. 1932 Pat. 80 ; 9 O. W. N. 948=140 Ind. Cas. 560=16 R. D. 567.

66. [S. 317.] (1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.

**Scope.**—Section 66 raises an irrebuttable presumption in favour of the auction-purchaser but there is nothing to prevent the latter from creating a trust in favour of the person who supplied the purchase money. Such a course is not possible after the passing of the Trust Act, which requires a registered instrument for creation of trust. But twelve years' enjoyment by the beneficiary will in general confer a prescriptive right even in the absence of a registered instrument. A. I. R. 1934 All. 990. Section is intended to discourage *benami* purchasers at execution sales, held by the Court by penalising the person who purchases *benami* in the name of another. 61 C. 440=150 Ind. Cas. 1051=38 C. W. N. 494=A. I. R. 1934 Cal. 567. The penalty applies equally to any one claiming through him. *Ibid.* This section applies where claim is made against the representative in interest of the auction-purchasers. 4 A. W. R. 974 ; see also A. I. R. 1934 Cal. 322=61 C. 371=150 Ind. Cas. 77 ; A. I. R. 1936 All. 750=1936 P. L. J. 1169=165 Ind. Cas. 703. This section is not retrospective. 40 C. W. N. 470. A suit for recovery of money advanced to *benami* auction-purchaser is not barred by this section. A. I. R. 1936

Pat. 429=17 Pat. L. T. 591=162 Ind. Cas. 553. Under this section, the suit of a plaintiff who bases it on the ground that he was the real purchaser of a Court sale and that the certified purchaser was not really so, must fail. But if the real owner is in possession of the property and the certified purchaser want to take advantage of his name being in the sale certificate and brings the suit on that basis, the real owner can successively defend it on the ground of his being the real purchaser. A. I. R. 1933 Pat. 230=12 P. 616=14 P. L. T. 208=A. I. R. 1933 Pat. 264 ; see also 118 Ind. Cas. 713 ; 108 Ind. Cas. 130=A. I. R. 1928 All. 619=50 A. 512=26 A. L. J. 245=108 Ind. Cas. 130 ; 30 C. W. N. 160=53 C. 297=A. I. R. 1926 Cal. 542 ; A. I. R. 1925 Nag. 41=82 Ind. Cas. 541 ; 27 C. W. N. 208=37 C. L. J. 413=A. I. R. 1923 Cal. 302=75 Ind. Cas. 196 ; 45 M. 856=A. I. R. 1922 Mad. 481=43 M. L. J. 363=73 Ind. Cas. 478 ; 47 A. 711=19 A. L. J. 787=63 Ind. Cas. 676 ; 43 A. 416=19 A. L. J. 227=62 Ind. Cas. 725 ; 62 Ind. Cas. 720=A. I. R. 1921 Pat. 39=(1921) Pat. 21 ; 58 Ind. Cas. 745=24 C. W. N. 659 The rule in this section has no retrospective operation A. I. R. 1923 Cal. 228=36 C. L. J. 356=27 C. W. N. 305=70 Ind. Cas. 556 ; but see 43 A. 416=19 A. L. J. 227=62 Ind. Cas. 725. Section 66 has to be strictly construed. 33 Bom. L. R. 1296=A. I. R. 1931 Bom. 578. Where after the Court sale a transfer of title has taken place in favour of the plaintiff and the plaintiff is already on the position of owner, a suit by such plaintiff is not barred and the case goes out of the four corners of s. 66. 32 P. L. R. 295. An objection under s. 65 goes to the root of the case and does not depend upon disputed facts and may be allowed to be raised at any stage and the Court is bound to give effect to the plea. 35 C. W. N. 940. Purchase by one joint decree-holder out of joint fund enures for benefit of all the joint owners. A. I. R. 1933 All. 854. A suit bound on dispossession after an adverse possession of 12 years is clearly not a suit profited by s. 66 and does not become so by proof of *benami* on an alternative cause of action. A. I. R. 1929 P. C. 228=33 C. W. N. 1061=50 C. L. J. 357=56 I. A. 330=31 Bom. L. R. 1393=120 Ind. Cas. 651. The plea of prohibition under s. 66 can be put forward and give effect to at any stage of the suit even in appeal for the first time. 3 O. L. J. 508=37 Ind. Cas. 111.

In a suit by an heir of the certified purchaser to eject the defendant it is open to defendant to set up his own title to show that the certified purchaser was a *benamidar* for him. 31 Ind. Cas. 58=11 N. L. R. 130 A suit for confirmation of possession of immovable property against a private transferee of the certified purchaser as *benamidar* of the plaintiff is not barred. 32 Ind. Cas. 963. Suit against auction-purchaser by a person alleging that it was so purchased in trust for him is not barred. 3 L. W. 233=(1916) 1 M. W. N. 184=33 Ind. Cas. 1000. The words "certified purchaser" in s. 66 include persons claiming under Court purchaser. 22 O. C. 222=6 O. L. J. 563=53 Ind. Cas. 961. A suit for declaration that the purchase by certified purchaser is *benami* for plaintiff is barred by this section. 2 O. L. J. 584=32 Ind. Cas. 365 ; see also 32 Ind. Cas. 434=(1916) 1 M. W. N. 220=3 L. W. 86. Where certified *benami* purchaser sues for ejectment, this section has no application. 4 L. W. 609=31 M. L. J. 877=37 Ind. Cas. 497. Section 66 does not apply to a suit between members of a joint family *inter se*. It is otherwise in case of separated members. 3 O. L. J. 508=37 Ind. Cas. 111 ; 118 Ind. Cas. 713. Manager of joint Hindu family purchasing property at Court sale in name of his son-in-law, but with the family funds, bars claims of members of joint-family to the property as being joint family acquisitions. 4 A. 159=21 C. W. N. 1065=26 C. L. J. 267=44 I. A. 201 P. C.=40 Ind. Cas. 988. Suit by a judgment-debtor against an auction-purchaser to enforce an agreement to re-convey the properties to him entered into before the sale is barred by s. 66. 50 Ind. Cas. 546. A suit by the principal against the agent for recovery of properties purchased by the agent in his own name but with the principal's money and for the principal's benefit in a Court auction though with the knowledge of the principal, is maintainable. (1919) M. W. N. 695=9 L. W. 276=49 Ind. Cas. 734. Agreement to buy property jointly in name of one but out of joint funds can be enforced specifically if payment made out of joint fund. 24 C. W. N. 27=54 Ind. Cas. 726. Section 66 applies to successor in title of the certified purchaser. 16 N. L. R. 87=55 Ind. Cas. 499 ; A. I. R. 1928 Cal. 448=55 C. 1070=32 C. W. N. 759. An agreement to convey subsequent to purchase is not affected by section 66 and is specifically enforceable. A. I. R. 1920 P. C. 30=43 M. 643=47 I. A. 108=18 A. L. J. 584=24 C. W. N. 699=56 Ind. Cas. 395 ; see also 42 M. 615=37 M. L. J. 98=51 Ind. Cas. 111 ; 136 Ind. Cas. 538=A. I. R. 1932 Cal. 170. This section applies to *benami* purchase at Court sale of even fraction of property. 57 Ind.

Cas. 684. This section does not apply to a sale by a Receiver. A. I. R. 1926 All. 124=48 A. 207=24 A. L. J. 26=90 Ind. Cas. 116. This section in no way affects the title of persons interested beneficially in the purchases otherwise than by way of *benami*. A. I. R. 1924 Oudh 218=10 O. L. J. 481=78 Ind. Cas. 393. Section 66 does not exclude evidence as to the auction-purchaser being a *benami* for another wherever such evidence is relevant. A. I. R. 1925 Oudh 20=11 O. L. J. 466=84 Ind. Cas. 98. If two persons enter into a joint venture to buy a property at a Court sale, the funds being provided jointly but the sale certificate is issued in the name of one of them a suit by the other claiming half of the property is not barred under s. 66. A. I. R. 1926 Bom. 525=50 B. 600=28 Bom. L. R. 947=97 Ind. Cas. 688. Objection under this section can be taken at any stage and the Court is bound to give effect to the plea. 136 Ind. Cas. 538=A. I. R. 1932 Cal. 170. Claim is barred under this section, although it relates to share in property sold. A. I. R. 1937 All. 176. Section 66 (1) is no bar to suit to rectify sale-deed when these was a *benami* purchase at Court sale and there was subsequent contract by *benamidar* to sell house to person for whom he had purchased *benami*. A. I. R. 1937 Mad. 362; see also A. I. R. 1934 All. 990; 62 C. L. J. 88.

Sub-section (2).—Ostensible purchaser cannot plead his own fraud as defence to suit for possession by *benami* purchaser. A. I. R. 1925 Mad. 1016=22 L. W. 313=91 Ind. Cas. 776; see also 4 B. L. R. App 32.

\*67. [S. 327.] (1) The "Provincial Government," †† may, by notification in the "official Gazette," † make rules for any local area imposing conditions in respect of the sale of any class of interests in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the "Provincial Government," † to make it impossible to fix their value.

§ [ (2) When on the date on which this Code came into operation in any local area, any special rules as to sale of land in execution of decrees were in force therein, the "Provincial Government"† may, by notification in the "official Gazette," † declare such rules to be in force, or may ‖ by a like notification, modify the same.

Every notification issued in the exercise of the powers conferred by this sub-section shall set out the rules so continued or modified.]

Scope.—Publication of sale at the Collector's office is necessary both in the case of *ryotwari* land and enfranchised *shorttem* village. A. I. R. 1924 Mad. 217=46 M. 736=45 M. L. J. 263=75 Ind. Cas. 369.

#### DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECREES AGAINST IMMOVABLE PROPERTY.

68. [S. 320, 1st para.] The "Provincial Government,"† may ‡ declare, by notification in the "official Gazette," † that in any local area the execution of decrees in cases in which a Court has ordered any immovable property to be sold, or the execution of any

\* Section 67 was re-numbered 67 (1) by s. 3 of the Code of Civil Procedure (Amendment) Act, 1914 (1 of 1914)

† For the words "Local Government" the words "Provincial Government" and for the words "local official Gazette" the words "official Gazette" have been substituted in British India by G. I. Order of 1937, but in British Burma those two words have been substituted by "Governor" and "Gazette" respectively by G. B. Order of 1937; therefore for those two substituted words read "Governor" and "Gazette" respectively in British Burma.

‡ The words "with the previous sanction of the Governor-General in Council" were omitted by s. 2 and Sch. I, Part I, of the Devolution Act, 1920 (38 of 1920).

§ Sub-section (2) was added to sec. 67 by s. 3 of the Code of Civil Procedure (Amendment) Act, 1914 (1 of 1914).

‖ The words "with the previous sanction of the Governor-General in Council" were omitted by s. 2 and Sch. I, Part I, of the Devolution Act, 1920 (38 of 1920).

‡ Certain words after this repealed by Act 38 of 1920 have been omitted.

particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immovable property, shall be transferred to the Collector.

**Scope.**—The Local Government has no power under this section to transfer to the Collector an execution case pending in a Civil Court in which the Court has already sold the property but the sale has not been confirmed. The power is confined only to those cases in which the property has not been sold but only an order for sale has been passed. A. I. R. 1934 Oudh 143. After transfer under s. 68 the Civil Court cannot interfere with the orders passed by the Collector or rectify mistakes committed by him. A. I. R. 1928 All. 558=50 A. 827=26 A. L. J. 769=115 Ind. Cas. 125; 109 Ind. Cas. 381=A. I. R. 1928 Nag. 207; 46 A. 562=83 Ind. Cas. 765. Simple money decree cannot be transferred to the Collector if no immovable property is directed to be sold. A. I. R. 1926 Oudh 318=92 Ind. Cas. 906; see also A. I. R. 1926 All. 339=48 A. 392=24 A. L. J. 397=93 Ind. Cas. 1020. It is only when the property attached is capable of being sold and is a revenue paying estate that the Civil Court can transfer the decree to the Collector with a clear direction to sell the property. 31 N. L. R. 239=A. I. R. 1935 Nag. 133. If it is declared by notification that a decree for sale of a particular kind of property should be transferred to the Collector for execution, a sale of the property, if made by a Civil Court, is void as such a notification ousts the jurisdiction of the Court so far as regards the execution of the decree. A. I. R. 1934 All. 314. All that the executing Court has to see is whether it is a case in which a decree-holder asks for the sale of the agricultural property, and if that is the case, the decree has to be transferred to the Collector for execution as soon as the Court orders that the property should be sold. A. I. R. 1934 All. 253. Under the provision of s. 68, the Local Government has no power to transfer to the Collector an execution case pending in a Civil Court in which that Court has already sold the property but the sale has not been confirmed. A. I. R. 1934 Oudh 143=148 Ind. Cas. 464. A suit to set aside sale by a person against whom order of confirmation of sale is made by the Collector is not maintainable. A. I. R. 1923 All. 186=21 A. L. J. 186=21 A. L. J. 53=45 A. 203=79 Ind. Cas. 82. Section 68 has no application in the Punjab. A. I. R. 1928 Lah. 475. Temporary alienation of the land of an agricultural tribe in satisfaction of a money decree is permissible. 4 A. L. J. 476=74 Ind. Cas. 194. After transfer of decree for execution to the Collector issue of an injunction to the Court which passed the decree originally is obviously futile. A. I. R. 1929 Oudh 235=6 O. W. N. 226=4 Luck. 635=117 Ind. Cas. 471. Where a decree is sent under s. 68 to the Collector for execution, the Collector does not become the Court executing the decree and the Court which sent the decree to the Collector remains the Court executing the decree for the purpose of substitution of legal representative. (1931) A. L. J. 166=A. I. R. (1931) All. 320=133 Ind. Cas. 609; see also 60 B. 688=162 Ind. Cas. 806=38 Bom. L. R. 276=A. I. R. 1936 Bom. 189; A. I. R. 1936 Oudh 280=1936 O. W. N. 489=162 Ind. Cas. 362. Collector alone has jurisdiction to hold sale even though the order for sale was passed prior to notification by Government that execution of decrees by sale of agricultural land should be transferred to Collector, notification being a matter of procedure affects also pending proceedings. A. L. R. 1933 Oudh 135=A. I. R. 1933 Oudh 275=10 O. W. N. 517=145 Ind. Cas. 363=8 Lah. 504. Where property to be sold in execution is ancestral, the Collector and Collector alone could sell in Allahabad. The sale of such property by the Civil Court Amin is entirely without jurisdiction. A. I. R. 1933 All. 192. The Collector executing a decree, which a Civil Court transferred to him under s. 68 is not a Court. 60 B. 729=38 Bom. L. R. 505=A. I. R. 1936 Bom. 277; see also 19 N. L. J. 175; A. I. R. 1935 Bom. 158=59 B. 345=37 Bom. L. R. 93.

**69. [New.]** The provisions set forth in the Third Schedule shall apply to all cases in which the execution of a decree has been transferred under the last preceding section.

**Scope.**—Where decree is transferred for execution under s. 68 Collector may execute it under para 1 or para 2 of Schedule III. 61 Ind. Cas. 579. The Civil Court has no jurisdiction to interfere with an order passed by the Collector under Schedule III of C. P. Code in respect of decrees, transferred to the Collector for execution under s. 68 of the C. P. Code. A. L. R. 1933 Bom. 403=35 Bom. L. R. 761=A. I. R. 1932 Bom. 369.



**70. [S. 320, 3rd and 4th paras.]** (1) The "Provincial Government"\* may make rules consistent with the aforesaid provisions—  
Rules of procedure,

(a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for re-transmitting the decree from the Collector to the Court ;

(b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to the Collector ;

(c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue-authorities as nearly as may be as the orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree had not been transferred to the Collector.

(2) A power conferred by rules made under sub-section (1) upon the Collector or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, shall not be exercisable by the Court or by any Court in exercise of any appellate or revisional jurisdiction which it has with respect to decrees or orders of the Court.

**Scope.**—Though a Civil Court cannot interfere in matters declared to be in the Collector's jurisdiction under s. 68 it is not deprived of its ordinary jurisdiction in regard to other matters because the decree has been sent to the Collector. 46 Ind. Cas. 885. A Collector acting under s. 70 can pass order under s. 476, Cr. P. Code 14 A. L. J. 1077=18 Cr. L. J. 307. A Collector has no jurisdiction to set aside the sale after he has confirmed it and re-transmitted the decree to the Civil Court and a civil suit will lie challenging such order. A. I. R. 1926 All. 575=48 A. 568=21 A. L. J. 687=95 Ind. Cas. 578. The Collector can make any correction in the sale certificate to make it conform with the proclamation of sale after confirmation of sale. A. I. R. 1926 All. 575=48 A. 568=24 A. L. J. 687=95 Ind. Cas. 578 ; see also 158 Ind. Cas. 753=1935 A. L. J. 919=A. I. R. 1935 All. 868. Suit to declare sale held by Collector under s. 68, null and void is not maintainable as Civil Courts has no authority in the matter of execution by Collector. A. I. R. 1926 Oudh 612=1 Luck, 558=13 O. L. J. 897=3 O. W. N. 739=97 Ind. Cas. 1036. Chief Court of Oudh has neither appealable nor revisional jurisdiction over orders passed by the Collector in discharge of his powers under s. 68. A. I. R. 1926 Oudh 288=92 Ind. Cas. 549. If the Local Government make rules which giving finality to an order of Revenue Court and the Revenue Court confirms the sale of an ancestral property sold in the execution of decree a suit to set aside the sale is not maintainable. 18 A. L. J. 124=2 U. P. L. R. (H. C.) 35=54 Ind. Cas. 801.

**71. [S. 320, 5th para.]** In executing a decree transferred to the Collector under section 68 the Collector and his subordinates shall be deemed to be acting judicially.  
Collector deemed to be acting judicially.

**72. [S. 326.] (1)** Where in any local area in which no declaration under section 68 is in force the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a  
Where Court may authorize Collector to stay public sale of land.

\* The words "Provincial Government" have been substituted in British India for "Local Government" by G. I. Order. But in Burma read "Governor" for "Local Government"—*vide* G. B. Order, 1937.

temporary alienation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

(a) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable.

**Scope.**—All objections relating to the proceedings before Collector must be disposed of by him. A. I. R. 1928 Lah. 475=110 Ind. Cas. 173; see also 1 Lah. 192=2 Lah. L. J. 333 (F. B.)=58 Ind. Cas. 603. In case of sale of revenue paying land in execution of decree, sanction of revenue authorities is not necessary. 69 P. L. R. 1918=143 P. W. R. 1918=46 Ind. Cas. 864; 66 Ind. Cas. 893=A. I. R. 1921 Lah. 223. Where Collector reports his inability to execute a decree sent to him for execution the Court should file the execution petition but proceed with execution in accordance with law. A. I. R. 1926 Lah. 682=95 Ind. Cas. 199. The Collector has under s. 72 jurisdiction to make a proposal for temporary alienation of land of a judgment-debtor who is member of agricultural tribe notwithstanding the provisions of s. 16 (1) of the Punjab Alienation of Land Act. 1 P. R. 1916 (Rev.)=51 Ind. Cas. 399. Section 72 must be read as alternative to s. 68 and so read it only indicates the source of the authority of the Collector to exercise powers under Sch. 3 in local areas where the Local Government has not issued a notification under s. 68. The Civil Court has under s. 72 power to authorise the Collector exactly as the Local Government has it under s. 68. Civil Court cannot under s. 72 exercise the powers of the Collector under Schedule 3 due to the express provisions of s. 72 (2) and 70 (2). A. I. R. 1937 Nag. 41. The intervention of the Collector contemplated by s. 72, is a preliminary requisite to the application of that section. Section 72 however can only be applied in cases where the land is saleable. Where the land is protected from sale by a special enactment, s. 72 can have no application. A. I. R. 1936 Pesh. 90=161 Ind. Cas. 628. The Collector has no authority to suggest satisfaction of the decree in part by transfer of certain debts from the judgment-debtors to the decree-holders, or that mortgagee's rights should similarly be transferred to the decree-holder. A. I. R. 1936 Pesh. 14=160 Ind. Cas. 571. Under s. 72, C. P. Code the Collector is empowered to represent to the Court that the public sale of land in other cases is objectionable and that a temporary alienation of land would satisfy the decree. A. I. R. 1935 Pesh. 113. When the executing Court did not give consideration to the question whether the Collector's proposal ought to be confirmed in the circumstances, but proceed to adopt it as a matter of course, the Court failed to exercise judicially the discretion which is vested in it under s. 72, C. P. Code. It amounted to a material irregularity in the exercise of its jurisdiction and revision was competent. A. I. R. 1935 Lah. 964.

#### DISTRIBUTION OF ASSETS.

**73 [S. 295.]** (1) Where assets are held by a Court and more persons

Proceeds of execution sale to be rateably distributed among decree-holders.

than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons :

Provided as follows :—

(a) where any property is sold subject to a mortgage or charge, the mortgagee or incumbrancer shall not be entitled to share in any surplus arising from such sale ;

(b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold ;

(c) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—  
first, in defraying the expenses of the sale ;

secondly, in discharging the amount due under the decree ;  
 thirdly, in discharging the interest and principal monies due on subsequent incumbrances (if any) ; and  
 fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

(3) Nothing in this section affects any right of "the Crown".\*

**Scoope.**—For purposes of rateable distribution of assets under this section, the assets must be deemed to have been received by the Court on the date when they were received by the Collector. A. I. R. 1937 Nag. 16. The principle of s. 73 is that as long as the assets are still held by a Court there should be rateable distribution. 151 Ind. Cas. 266=A. I. R. 1934 All. 652. Section 73 does not say that before the receipt of such assets an application must be made to the Court. The first step necessary in these cases is that there must be assets held by the Court. The next step is that there must be a decree-holder who has a decree for the payment of money passed against the same judgment-debtor. The decree-holder must not have obtained satisfaction and he must have made an application to the Court for the execution of his decree before the receipt of the aforesaid assets. 54 A. 516=1932 A. L. J. 359=138 Ind. Cas. 106=A. I. R. 1932 All. 411=A. L. R. 1932 All. 546; but see A. I. R. 1937 Nag. 16. "Assets held by" Court is an expression which is wide enough to cover such money as comes into the custody of the Court otherwise than by coercive process. 28 N. L. R. 179=A. I. R. 1932 Nag. 156=140 Ind. Cas. 293=A. L. R. 1932 Nag. 217; 54 A. 516=1932 A. L. J. 359=138 Ind. Cas. 106=A. I. R. 1932 A. 411; see also A. I. R. 1931 Pat. 405; A. I. R. 1930 Cal. 623=57 C. 736; A. I. R. 1930 Sind. 300=128 Ind. Cas. 686; A. I. R. 1927 Bom. 405=29 Bom. L. R. 689=105 Ind. Cas. 184; A. I. R. 1927 B. 405; A. I. R. 1926 Nag. 380=35 Ind. Cas. 205; 46 M. 506 (F. B.)=72 Ind. Cas. 820; A. I. R. 1925 Nag. 157=81 Ind. Cas. 7 (contra); A. I. R. 1923 Mad. 505 (F. B.)=46 M. 506=44 M. L. J. 413=32 M. L. T. 198=72 Ind. Cas. 820; A. I. R. 1921 Cal. 749=35 C. L. J. 327=70 Ind. Cas. 541; 26 C. W. N. 169=70 Ind. Cas. 539; 14 L. W. 582=70 Ind. Cas. 20. The word "assets" is not confined only to those realised by sale or otherwise in execution of a decree. A. I. R. 1937 Nag. 80. The dismissal of an execution petition, after the application for rateable distribution is made prior to receipt of assets, does not affect the right of applicant to share in distribution. A. I. R. 1937 Pat. 92. The operation of section 73 of the Civil Procedure Code is attracted when several holders of decrees against a person attach a decree obtained by such person before the money due under the attached decree is deposited in Court. 40 C. W. N. 1249. A decree passed against certain persons as heirs of another person and a decree passed against the same persons in their individual capacity are decrees passed against the same judgment-debtors within the meaning of section 73 of the C. P. Code and rateable distribution can be claimed by the holder of one such decree in an execution case by the other. 40 C. W. N. 570=63 C. 923=162 Ind. Cas. 702=A. I. R. 1936 Cal. 210; see also 159 Ind. Cas. 501=1935 M. W. N. 960=69 M. L. J. 711 (F. B.)=42 L. W. 835. But where a decree was obtained by one against party R whilst the decree obtained by the other party was against the sons of R: *Held* that the two decrees were not passed against the same judgment-debtor. 159 Ind. Cas. 575=40 C. W. N. 26=A. I. R. 1935 Cal. 738; see also A. I. R. 1935 Mad. 399=1935 M. W. N. 294. Under s. 73 the Court acts in an administrative capacity. It is not therefore competent to inquire into the validity of a decree. A. I. R. 1934 Pat. 545=152 Ind. Cas. 482. Money not belonging to the judgment-debtor or paid under misapprehension is not assets. 13 Pat. 446=A. I. R. 1934 Pat. 685. A mortgage decree which contains a direction that if the mortgage debt be not satisfied by the sale of the mortgaged property, the decree-holder will be

\* In British India the words "the Government" have been substituted by the words "the Crown" by G. I. Order; but in British Burma read the words "the Government" for the words "the Crown".

entitled to realise the balance by a personal decree is a decree for payment of money under this section. 60 C. L. J. 22=38 C. W. N. 850=A. I. R. 1934 Cal. 769. Where the money is already under attachment no fresh attachment is necessary when the application for execution and rateable distribution is transferred to another Court. 147 Ind. Cas. 1071=11 O. W. N. 161=A. I. R. 1934 Oudh 110. An application for rateable distribution is maintainable in the original Court when the petition for execution is transferred from that Court. 35 P. L. R. 305=A. I. R. 1934 Lah. 113. A decree for the payment of *mesne* profits, which are not yet ascertained is "decree for payment of money". 40 L. W. 291=151 Ind. Cas. 609=A. I. R. 1934 Mad. 604=67 M. L. J. 303=1934 M. W. N. 886. A person in whose favour an order for refund of purchase money has been passed is not entitled to put in his application for rateable distribution. 17 N. L. J. 146. Assets do not include money paid by judgment-debtor on arrest to get released and is not subject to rateable distribution. 19 Bom. L. R. 274=39 Ind. Cas. 623; 21 Bom. L. R. 975=53 Ind. Cas. 599. Assets held by Court includes money paid under Order 21, rule 89. A. L. R. 1933 Pat. 249=12 P. 772=14 P. L. T. 357=145 Ind. Cas. 390=A. I. R. 1933 Pat. 303; A. L. R. 1933 Nag. 388=A. I. R. 1933 Nag. 345; see also A. L. R. 1933 Nag. 82=A. I. R. 1933 Nag. 349. As regards meaning of receipts of assets, *vide* A. I. R. 1936 Pesh. 164; A. I. R. 1936 Mad. 437=70 M. L. J. 683=163 Ind. Cas. 209. The purpose of section 73 is that there should be an equitable distribution of assets between those judgment-debtors who have been diligent enough to obtain decrees and put in execution applications before the time such assets have been received and while considering the application the Court should rather look to the substance than to the form of the application. A. I. R. 1928 Mad. 703=52 M. 760=37 M. L. J. 97=118 Ind. Cas. 72; see also A. I. R. 1929 Lah. 645=118 Ind. Cas. 908; A. I. R. 1931 All. 92=(1930) A. L. J. 1552=113 Ind. Cas. 244; A. I. R. 1926 Cal. 249=90 Ind. Cas. 527. Application for rateable distribution cannot be refused merely because it is made after realization of assets, if execution has been applied for before realization of assets. A. I. R. 1925 Mad. 587=48 M. L. J. 459=21 L. W. 518=87 Ind. Cas. 390. Where money is deposited by sureties for release of an attachment before judgment, rateable distribution of such money can be made under s. 73. 70 Ind. Cas. 539=A. I. R. 1922 Cal. 19=26 C. W. N. 169. Where the mortgagee holds a money decree against the judgment-debtor apart from the mortgage, he can get relief under s. 73. A. I. R. 1924 Pat. 434=74 Ind. Cas. 140; see also A. I. R. 1936 Pesh. 52. Though one may effect attachment before judgment yet decree must be passed before realisation of money in order to entitle one to share in rateable distribution. A. I. R. 1924 Lah. 70=40 P. L. R. 1922=69 Ind. Cas. 718; see also A. I. R. 1922 Mad. 236=15 L. W. 831=68 Ind. Cas. 714; A. I. R. 1921 Mad. 481=14 L. W. 582=70 Ind. Cas. 20; A. I. R. 1921 Oudh 176=8 O. L. J. 358=66 Ind. Cas. 642; A. I. R. 1921 Nag. 5=17 N. L. R. 143=64 Ind. Cas. 53. For rateable distribution, application must be made to the Court, which holds the assets before the receipt of such assets. A. I. R. 1921 Cal. 801=33 C. L. J. 7=62 Ind. Cas. 167; 62 Ind. Cas. 857 (Cal.); A. I. R. 1921 Pat. 401=1921 Pat. 204=5 Pat. L. J. 415=57 Ind. Cas. 421; 3 P. W. R. 1920=11 P. L. R. 1920=54 Ind. Cas. 41; 42 Ind. Cas. 897=(1917) M. W. N. 859.

An application for execution includes a prayer for rateable distribution and there is no need of separate application under s. 73. A. I. R. 1931 All. 92=(1930) A. L. J. 1552=131 Ind. Cas. 244; A. I. R. 1933 All. 337=1933 A. L. J. 336=145 Ind. Cas. 577; A. I. R. 1934 All. 1057. In order to entitle a person to a rateable distribution, the two decrees must have passed against same judgment-debtor, and a judgment-debtor's legal representative is not same as judgment-debtor in personal capacity. A. I. R. 1930 Cal. 454=34 C. W. N. 294=130 Ind. Cas. 227. Provisions of Order XXI rule 72 must be taken subject to provisions of s. 73. A. I. R. 1931 Mad. 103=(1930) M. W. N. 568=130 Ind. Cas. 458; see also A. I. R. 1931 Bom. 252=33 Bom. L. R. 503; A. I. R. 1930 Cal. 761=52 C. L. J. 19=129 Ind. Cas. 776. Decree raised against same judgment-debtor and another or others is covered by the section. A. I. R. 1930 Sind 300=128 Ind. Cas. 686. Court has no jurisdiction to order for rateable distribution when another Court has attached the moneys in deposit. 37 C. W. N. 821=1933 Cal. 792. Where there are decrees of several Courts against the same judgment-debtor and assets have been realised by the highest Court decree-holders of the inferior Court is entitled to rateable distribution without transferring the decree to or applying for execution in higher Court. A. L. R. 1933 All. 795; see also A.

L. R. 1933 Mad. 569—A. I. R. 1933 Mad. 342—144 Ind. Cas. 252—37 L. W. 366—65 M. L. J. 34—1933 M. W. N. 660; see also 63 Ind. Cas. 11.

Application for rateable distribution before appropriation of money towards decree is competent. A. I. R. 1930 Mad. 4. This section has no application where money is paid by one judgment-debtor to a decree-holder who has no claim against him. 145 Ind. Cas. 362—14 Pat. L. T. 287—A. I. R. 1933 Pat. 277. This section is applicable where the Collector realises amount by sale of property or the decree-holder is declared to be the purchaser and the purchase money is to be set off against the decretal amount. 1933 A. L. J. 1102—A. I. R. 1933 All. 666. The Court should be deemed to be holding the assets of the judgment-debtor where the purchase money is set-off against the decretal amount. *Ibid*; see also A. L. R. 1933 Mad. 1003—A. I. R. 1933 M. 804—145 Ind. Cas. 975—38 L. W. 579—65 M. L. J. 569—1933 M. W. N. 579; 1933 A. L. J. 1102—A. I. R. 1933 All. 666; A. I. R. 1933 Mad. 804. The custody Court which is not attaching Court has no power to order rateable distribution. 37 C. W. N. 820—A. I. R. 1933 Cal. 814. Any amount received from judgment-debtor under pressure of the sale is “assets” under this section. A. I. R. 1933 Nag. 347; 12 Pat. 772—145 Ind. Cas. 390—14 Pat. L. T. 357—A. I. R. 1933 Pat. 303. Where a decree-holder is allowed to set off the purchase money against his decree instead of paying the money into Court, the noticed receipt of the purchase money by the Court amounts to holding of the assets within the meaning of the section. 33 Bom. L. R. 503—A. I. R. 1931 Bom. 252—132 Ind. Cas. 737; see also 12 Pat. L. T. 639—A. I. R. 1931 Pat. 405—134 Ind. Cas. 616; 12 P. L. T. 477—A. I. R. (1931) P. 359—133 Ind. Cas. 166. A decree obtained against a Hindu father and a decree against the father and his sons are decrees against the same judgment-debtor. 165 Ind. Cas. 664—1936 M. W. N. 1142—44 L. W. 615—A. I. R. 1936 Mad. 948—71 M. L. J. 541; see also 160 Ind. Cas. 559—43 L. W. 624—1936 M. W. N. 343—A. I. R. 1936 Mad. 123. Section 73 does not take into account at all whether payment orders have been passed for the different decree-holders who have decrees against the same judgment-debtor. All that the section considers necessary are that assets should be held by a Court and that more persons than one have made applications to the Court for the execution of decrees. A. I. R. 1934 All. 652—151 Ind. Cas. 266—3 A. W. R. 606. Where the parties are not entitled to claim rateable distribution under s. 73, Civil Procedure Code, by reason of the fact that none has applied for execution before the date of receipt of assets, to the Court having the custody of the assets, but all the same have made attachment does not create any lien in favour of any of them, and the Court holding the assets can divide the same amongst all of them *pro rata*. A. I. R. 1935 Cal. 390. Under this section all the judgment-debtors need not be identical. 156 Ind. Cas. 631—A. I. R. 1935 Mad. 399—1935 M. W. N. 294. The word “application” in s. 73 cannot be unqualified. It must mean an application made in accordance with law, not barred by limitation, not yet satisfied, and capable of being satisfied and it must also mean an application still subsisting and pending, and not already disposed of whether on the merits or by default. A. I. R. 1935 Rang. 135—13 Rang. 514—158 Ind. Cas. 515. S. 146 cannot enlarge the scope of s. 73 as it is expressly made subject to other provisions of the Code. 159 Ind. Cas. 575—40 C. W. N. 26—A. I. R. 1935 Cal. 738. A Court charged with distribution of assets under s. 73, C. P. Code has no power to inquire into the validity or *bona fides* of a decree on the strength of which rateable distribution is claimed. 62 C. 715—39 C. W. N. 490—61 C. L. J. 165—A. I. R. 1935 Cal. 290 (F. B.).

Where a property is already in attachment, a person need not apply for a fresh attachment in order to have the benefit of this section. 53 A. 125—1930 A. L. J. 1552—131 Ind. Cas. 244—A. I. R. 1931 All. 92. Where the same property of the same judgment-debtor is attached in execution of decrees of different Court, the decree-holder in the inferior Court is entitled to rateable distribution when he applies for it before the sale takes place, and it is not necessary for that purpose that his decree should be transferred to the superior Court for execution. A. I. R. 1931 Rang. 111—132 Ind. Cas. 832; see also 133 Ind. Cas. 426—1931 A. L. J. 880. If a property is sold in execution of decree subject to mortgage and the mortgagee is satisfied out of sale proceeds first and surplus paid to attaching decree-holder, who is left short of his decretal amount, he can sue for recovery of his balance on basis of money had and received. A. I. R. 1931 Rang. 56—8 Rang. 485—128 Ind. Cas. 834. Decree debt and mortgage debt are not two and distinct debts. Where decree-holder and mortgagee is the same

person, provisos (a) and (b) are not applicable. A. I. R. 1930 Mad. 138-122 Ind. Cas. 336.

A mere application for rateable distribution is not valid application for execution and in order to obtain rateable distribution under s. 72 the decree-holder must make an application for execution praying for execution of his decree in one of the ways mentioned in Order XXI, rule 11 before receipt of assets by Court. A. I. R. 1929 Nag. 148-25 N. L. R. 94-12 N. L. J. 64=116 Ind. Cas. 655. Mere attachment before judgment without decree and application for execution of the decree cannot entitle plaintiff for rateable distribution. A. I. R. 1928 Bom. 545-30 Bom. L. R. 1448-115 Ind. Cas. 414. An actual transfer of the decree to the Court granting rateable distribution is not necessary provided application for rateable distribution is supplemented with transfer certificate subsequently received. A. I. R. 1928 Nag. 332=110 Ind. Cas. 524; see also 110 Ind. Cas. 744=1928 Rang. 157; A. I. R. 1928 Mad. 496-27 L. W. 423=55 M. L. J. 120=109 Ind. Cas. 404; A. I. R. 1928 Rang. 96=5 Rang. 757=107 Ind. Cas. 169.

Section 73 requires that an application for execution should be made before the assets have been received and that the decree-holder at the time the assets are distributed has not obtained satisfaction. The word 'made' in section 73 does not imply that the application should be pending and it is only used with reference to a certain definite stage of the proceedings. A. L. R. 1933 Pesh. 2.

No rateable distribution can be ordered where no longer regular application for execution has been made, and prayer is only for rateable distribution. A. I. R. 1925 Nag. 382=87 Ind. Cas. 1025. Order under s. 73 cannot be made in anticipation. A. I. R. 1925 Cal. 102=28 C. W. N. 988=84 Ind. Cas. 747.

The mere deposit of the earnest money is not assets realised by the sale. A. I. R. 1925 Cal. 956=29 C. W. N. 575=87 Ind. Cas. 783. 25 per cent. deposit made by auction-purchaser under Order XXI, rule 84 becomes assets under s. 73 on default in payment of full amount. A. I. R. 1926 Mad. 872=49 M. 570=97 Ind. Cas. 86. Compensation money awarded under the Land Acquisition Act is 'assets' held by the Court after date of receipt of final award. A. I. R. 1926 Mad. 307=49 M. 38=97 Ind. Cas. 496. Money paid by a judgment-debtor under Order XXI, rule 43 is assets held by the Court. A. I. R. 1926 Bom. 242=28 Bom. L. R. 237=93 Ind. Cas. 852.

**Proviso (c).**—In proviso (c), C. P. Code the words 'a decree ordering its sale' (the sale of immovable property), for the discharge of the incumbrance thereon are quite general and apply both where the charge exists independent of and prior to the decree and where it is created by the decree itself. Therefore a charge created in respect of the judgment-debtor's property by virtue of a decree obtained by unpaid vendor is not included from the operation of the proviso. A. I. R. 1935 Mad. 713.

**Sub-section (2).**—In a case of contests as to the disposal of the surplus of assets not determined in suit or in execution proceedings, conflicting claims can only be determined by separate suit. A. I. R. 1927 All. 467=49 A. 636=25 A. L. J. 390=101 Ind. Cas. 505; A. I. R. 1926 Pat. 497=5 Pat. 445=93 Ind. Cas. 759. The Court distributing assets cannot go behind the decree. The remedy of the opponent raising the plea of fraud lies under s. 73 (2). A. I. R. 1922 Bom. 31=46 Bom. 635=24 Bom. L. R. 1=65 Ind. Cas. 600; A. I. R. 1924 Nag. 39=19 N. L. R. 172=75 Ind. Cas. 749=A. I. R. 1924 Mad. 97=32 M. L. T. 155; 43 M. 381=38 M. L. J. 108=27 M. L. T. 66=11 L. W. 81=55 Ind. Cas. 452; 39 A. 322=15 A. L. J. 295=39 Ind. Cas. 532. Unless it is ascertained or definitely alleged on substantial grounds that the assets realised or to be realised in execution of decrees of rival decree-holders would be insufficient to discharge in full the claims of all the decree-holders under s. 73 of C. P. Code, no decree-holder has a right to maintain a suit to have the decree of his rival declared void on the ground that it was fraudulently obtained and to ask the Court to grant an injunction permanently restraining the defendant from executing his decree against the common judgment-debtor or his property. 145 Ind. Cas. 206=A. I. R. 1933 Nag. 214. This sub-section is applicable where assets liable to be distributed under s. 73 are paid to persons not entitled to receive the same. 145 Ind. Cas. 362=14 Pat. L. T. 287=A. I. R. 1933 Pat. 277. A Court cannot enquire into the validity of the decree sought to be executed under s. 73. A. I. R. 1927 Mad. 944=39 M. L. T. 609=104 Ind. Cas. 735.

An order that a certain decree-holder is not entitled to make an application for rateable distribution is final and is not appealable. A. I. R. 1936 All. 626=1936 A. L. J. 559=162 Ind. Cas. 349.

**Sub-section (3).—**Where rights of the two attaching creditors and of the Government were brought into existence at one and the same time, and by the same decree, and the assets were realised or rather come into the hands of the Court before any of the judgment creditors applied for execution and were still held by the Courts and though the two creditors had obtained attachments before the Crown had obtained one, but no payment had been made to the creditors: *Held* that where the right of the Crown and that of the subject met at one and the same time, that of the Crown was in general preferred and that applying the principle, the claim of the Crown should *prima facie* be preferred to the other claim. A. L. R. 1933 Sind 357=A. I. R. 1933 Sind 368; see also 59 M. 872=162 Ind. Cas. 862=1936 Mad. 603=70 M. L. J. 601. Sub-section (3) does not confer any jurisdiction on the executing Court to entertain a claim on behalf of the Government in the absence of any decree in support of it. The sub-section only saves the rights of the Government, independent of the section, such as they might be, and merely appears to have reference to have the right of priority which can ordinarily be claimed in respect of debts due to the Crown. A. I. R. 1935 Lah. 319=156 Ind. Cas. 826.

**Appeal.**—An order under s. 73 is an order in execution proceedings and not a decree and is not appealable. A. I. R. 1929 Rang. 198=120 Ind. Cas. 693; see also 19 C. W. N. 1502=42 C. 1; 55 B. 473=A. I. R. 1931 Bom. 350; 42 M. L. J. 473=67 Ind. Cas. 546; A. I. R. 1929 Lah. 645; A. I. R. 1931 Bom. 252=33 Bom. L. R. 503; A. L. R. 1933 Sind 181=A. I. R. 1933 Sind 329=27 S. L. R. 190; A. I. R. 1921 Pat. 401=5 Pat. L. J. 415=57 Ind. Cas. 421; A. I. R. 1927 Lah. 100=98 Ind. Cas. 884; 42 M. L. J. 473=67 Ind. Cas. 546; 134 Ind. Cas. 195.

In order to be appealable the order under s. 73 must decide a question arising between the decree-holder on the one hand and the judgment-debtors on the other. A. I. R. 1924 Cal. 801=51 C. 761=28 C. W. N. 704=39 C. L. J. 439; A. I. R. 1931 Bom. 350=55 B. 473; A. I. R. 1931 Bom. 252=33 Bom. L. R. 503. Where the Order is under s. 73 between rival decree-holders and the judgment-debtor is not interested in it, the order does not fall under s. 47 and is not appealable. A. I. R. 1937 Rang 134. An order refusing to execute an order allowing an application for rateable distribution is appealable. 12 P. L. T. 477=A. I. R. 1931 Pat. 359=133 Ind. Cas. 166.

**Revision.**—An obviously wrong order under s. 73 is revisable. A. I. R. 1927 Mad. 1030=106 Ind. Cas. 208; 87 Ind. Cas. 390=A. I. R. 1925 Mad. 587=48 M. L. J. 459=21 L. W. 518=87 Ind. Cas. 390; 36 C. 130; A. I. R. 1926 Nag. 380; A. I. R. 1926 Mad. 179; 32 M. 334; 15 C. W. N. 872; 78 Ind. Cas. 731=28 C. W. N. 704; 26 C. W. N. 169; 51 C. 761; A. I. R. 1929 Rang. 123. High Court does not interfere in revision with orders disallowing or allowing claim for rateable distribution except in very exceptional circumstances. 60 Ind. Cas. 371. An order under this section is not open to revision where the party has another remedy by way of suit. 27 S. L. R. 190=A. I. R. 1933 Sind 329; but see A. I. R. 1928 Mad. 362=54 M. L. J. 278. The Lahore High Court does not allow revision of an order under this section. 134 Ind. Cas. 195. Court will only interfere in revision against orders under s. 73 if there is any obvious mistake and the result of regular suit is certain. A. I. R. 1927 Mad. 244=39 M. L. T. 609=104 Ind. Cas. 725. Taking a wrong view of s. 73 is an application for rateable distribution is not decting to exercise jurisdiction. Hence no revision is competent from the order. A. I. R. 1935 Pat. 201=156 Ind. Cas. 409.

#### RESISTANCE TO EXECUTION.

**74. [S. 330.]** Where the Court is satisfied that the holder of a decree

for the possession of immovable property or  
Resistance to execution. that the purchaser of immovable property sold  
in execution of a decree has been resisted or obstructed in obtaining possession of the property by the judgment-debtor or some person on his behalf and that such resistance or obstruction was without any just cause, the Court may, at the instance of the decree-holder or purchaser, order the judgment-debtor or such other person to be detained in the civil prison for a term which may extend to thirty days and may further direct that the decree-holder or purchaser be put into possession of the property.

**Scope.**—The word “possession” includes constructive possession. 25 B. 478 ; 33 C. 487=3 C. L. J. 293. Resistance or obstruction to execution by the judgment-debtor or by some body at his instigation is dealt with by this section. 16 M. 127 ; 25 B. 478 ; 2 C. W. N. 311. As regards what amounts to resistance, *vide* 15 B. 564 ; 6 Bom. L. R. 254.

### PART III.

#### INCIDENTAL PROCEEDINGS.

##### COMMISSIONS.

Power of Court to issue Com-  
missions. 75. [New.] Subject to such conditions and limitations as may be prescribed, the Court may issue a Commission—

- (a) to examine any person ;
- (b) to make a local investigation ;
- (c) to examine or adjust accounts ; or
- (d) to make a partition.

**Scope.**—Section 75 defines the circumstances under which a Commission may be issued and does not authorize a Court to delegate to the Commissioner the trial of any material issue which it is bound to try. A. I. R. 1926 Lah. 47=3 Lah. 209=68 Ind. Cas. 802 ; see also 17 C. W. N. 369=15 C. L. J. 17. The powers under s. 75 can only be exercised where a suit has been pending and not otherwise. This section must be qualified by the rules in the First Schedule, subject to such further rules as may be found in the High Court Rules. A. I. R. 1922 Bom. 444=24 Bom. L. R. 853=47 B. 250=75 Ind. Cas. 221. Judge cannot make over the whole case to the Commissioners and delegate his functions in the matter of taking evidence and determining issues to them. A. I. R. 1926 Lah. 145=89 Ind. Cas. 333 ; see also A. I. R. 1926 Cal. 57=89 Ind. Cas. 24. Whether one of the parties is personally engaged in agricultural labour cannot be referred to the Commissioner. A. I. R. 1928 Bom. 145=30 Bom. L. R. 131=109 Ind. Cas. 133. Civil Procedure Code does not contemplate the issue of succession of Commissions covering the same ground. A. I. R. 1929 Mad. 661=118 Ind. Cas. 296. Trial of material issue cannot be delegated to Commissioner where a Commissioner is referred to make local investigation and report if land was reformed or accretion complies with order and gives finding (parties not objecting) and Court adopts finding : *Held*, that the mere fact that no objection was taken to the finding was not sufficient for the Court to adopt it. A. I. R. 1930 Cal. 764=53 C. L. J. 299=129 Ind. Cas. 416. Issue of Commission is discretionary with the Court. In case of wrongful exercise of discretion, it cannot be questioned in the second appeal for the first time. A. I. R. 1933 Pat. 277. In the case of appointment of successive Commissioners it is the duty of the Court to consider the objections to a Commissioner's report and to accept or reject it before it appoints a fresh Commissioner. A. L. R. 1933 A. 475=A. I. R. 1933 A. 65=139 Ind. Cas. 708. An appellate Court is competent to issue a Commission for local investigation. 135 Ind. Cas. 243=A. I. R. 1932 All. 270. A Commission cannot be issued to hear a person sing and then to report her talents. 1932 A. L. J. 117=A. I. R. 1932 All. 264.

76. [S. 386.] (1) A Commission for the examination of any person may be issued to any Court (not being a High Commission to another Court. Court) situate in a Province other than the Province in which the Court of issue is situate and having jurisdiction in the place in which the person to be examined resides.

(2) Every Court receiving a Commission for the examination of any person under sub-section (1) shall examine him or cause him to be examined pursuant thereto, and the Commission, when it has been duly executed, shall be returned together with the evidence taken under it to the Court from which it was issued, unless the order for issuing the Commission has otherwise directed, in which case the Commission shall be returned in terms of such order.

**Amendments in Burma.**—In British Burma s. 76 has been omitted *vide* G. B. Order of 1937.



77. [New.] In lieu of issuing a Commission the Court may issue a letter of request to examine a witness residing at any place not within British India.

78. [S. 391.] "Subject to such a conditions and limitations as may be prescribed"\* the provisions as to the execution and return of Commissions for the examination of witnesses shall apply to Commissions issued by "or at the instance of."\*

(a) Courts situate beyond the limits of British India and established or continued by the authority of His Majesty or of "the Central Government or of the Crown Represevative",† or

(b) Courts situate in any part of the British Empire other than British India, or

(c) Courts of any foreign country‡

**Amendments in Burma.**—For the words "British India" in clauses (a) and (b) read "British Burma" in Burma.

## PART IV.

### SUITS IN PARTICULAR CASES.

#### SUITS BY OR AGAINST THE "CROWN"§ OR PUBLIC OFFICERS IN THEIR OFFICIAL CAPACITY.

|| 79. [New.] Subject to the provisions of section 179 and 185 of the Government of India Act, 1935, in a suit by or against the Crown the authority to be named as plaintiff or defendant, as the case may be, shall be—

(a) in the case of a suit by or against the Central Government, the Governor-General in Council before the establishment of the Federation of India, and thereafter, the Federation ;

(b) in the case of a suit by or against a Provincial Government, the Province ; and

(c) in the case of a suit by or against the Crown Representative, the Secretary of State.

*The following section 79 has been substituted in British Burma by Government of Burma (Adaptation of Law) Order, 1937 :—*

79. [New.] Subject to the provisions of sections 73 and 133 of the Government of Burma Act of 1935 and section 179 of the Government of India Act, 1935, in a suit by or against the Government of Burma, the authority to be named as plaintiff or defendant as the case may be, shall be the Government of Burma.

**Scope.**—Contracts to be binding upon the Secretary of State, must be made in strict conformity with the provisions laid down in the statute. If they are not so made, they are not valid as against him. A. I. R. 1928 Cal. 74=54 C. 969=107 Ind. Cas. 360. The head of a Government department cannot be made liable for wrongful acts

\* The words within quotations have been inserted by Act X of 1932.

† The words within quotations have been substituted by G. I. Order of 1937. But in Burma for the words within quotations read "Governor" vide G. B. Order of 1937.

‡ Certain words after this repealed by Act X of 1932 have been omitted.

§ Substituted by G. I. Order of 1937. But in Burma read "Government."

|| Section 79 has been substituted for the old section 79 by G. I. Order, 1937. In Burma a new section has also been substituted by G. B. Act of 1937.

of official in the department, unless it can be shown that the act complained of was substantially the act of the head of the department himself. A. I. R. 1927 Bom. 521 = 28 Bom. L. R. 1071 = 51 B. 749 = 104 Ind. Cas. 685. For personal liability a public servant should not be sued in his official name. A. I. R. 1927 Bom. 521 = 29 Bom. L. R. 1071 = 51 B. 749. A suit against a State Railway should not be brought against the manager, but should be brought against the Government. A. I. R. 1924 Bom. 306 = 48 B. 297 = 26 Bom. L. R. 71 ; A. I. R. 1931 P. 393 ; A. I. R. 1933 Pat. 543 ; 10 Pat. 466. Where Government acquires land for the District Board and the District Board appeals against the decision allowing compensation to the owners of the plot : *Held* the appeals by the District Board were incompetent as the appeal should have been filed by the Secretary of State for India in Council. A. I. R. 1929 Lah. 10 = 9 Lah. 667 = 10 Lah. L. J. 330 = 29 P. L. R. 268 = 111 Ind. Cas. 477.

**80. [S. 424.]** No suit shall be instituted against "the Crown"\* or against a public officer in respect of any act purporting to be done by such public officer in his official

capacity, until the expiration of two months next after notice in writing has been, "delivered to or left at the office of—

(a) in the case of a suit against the Central Government, a Secretary to that Government ;

(b) in the case of a suit against the Crown Representative, the Political Secretary ;

(c) in the case of a suit against a Provincial Government, a Secretary to that Government or the Collector of the District, and

(d) in the case of a suit against the Secretary of State, a Secretary to the Central Government, the Political Secretary and a Secretary to the Provincial Government of the Province where the suit is instituted,"\* and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims ; and the plaint shall contain a statement that such notice has been so delivered or left.

*This section as amended in British Bnrma is as follows :—*

**80. [S. 424.]** No suit shall be instituted against the Crown, or against a public officer in respect of any act purporting to be done by such public officer in his official

capacity, until the expiration of two months next after notice in writing has been "delivered to or left at the office of—

(a) in the case of a suit which is or might have been brought against the Secretary of State, a Secretary to the Central Government of India and a Secretary to the Government ;

(b) in the case of a suit against the Railway Board, the Chief Commissioner of Railways ;

(c) in the case of any other suit against the Government, a Secretary to the Government or the Collector of the District, and

(d) in the case of a suit against a public officer, the officer against whom the suit brought, stating the cause of action, etc."

**English decision.**—In *Rebati Mohan Das v. Jatindra Nath Ghosh*, A. I. R. 1934 P. C. 96 = 61 I. A. 171 = 61 C. 470 = 36 Bom. L. R. 544 = 1934 A. L. J. 406 = 1934 M. W. N. 381 = 148 Ind. Cas. 482 = 38 C. W. N. 517 = 11 O. W. N. 463 = 59 C. L. J. 252 = 66 M. L. J. 506 (P. C.). *Sir. George Lowndes* said : "Nor do they think that anything would be gained by a reference to the numerous English cases which were there cited. They were decided under the various acts passed in this country for the protection of public authorities, which were not in *pari materia* within the section of the Indian Code."

**Object and scope.**—The object of notice required by this section is to inform the Crown or the public officers concerned generally of the nature of the suit, which is intended to be field against them. The notice must not be too strictly or too

\* The words within quotation have been substituted by G. I. Order of 1937.

narrowly construed. It must not be construed as if it were pleadings and it need not set out all the details and facts of the case, which the plaintiff intends to prove. It must be considered sufficient if it substantially fulfils its object of informing the parties concerned generally of the nature of the suit intended to be filed. 5 Bom. L. R. 30=27 B. 189; 24 M. 279; 13 C. L. R. 195. The object of this section is to afford opportunity to the Crown or public servant, time and opportunity to reconsider his legal position and to investigate the truth of the alleged cause of action and of making amends or of settling claims if he thinks fit without litigation. 40 B. 392=18 Bom. L. R. 243=34 Ind. Cas. 535; 34 C. 257=5 C. L. J. 148; 25 C. 214; 24 M. 279; 35 C. W. N. 161=58 C. 850=A. I. R. 1931 Cal. 503; (1912) M. W. N. 786; 33 P. L. R. 508=137 Ind. Cas. 266=A. I. R. 1932 Lah. 374=A. L. R. 1932 L. 790. Very little distinction is made by the section between suits against the Crown and as against public officers. Only this distinction is left between the two classes of suits that, whereas in the absence of a notice under s. 80 the Crown cannot be made a defendant in a suit, no matter what its character may be, a public officer may without such a notice be a defendant in a suit, in which no act of his is in question but he is made a party for some reason or other. The restrictive words in the section were unnecessary and would be inappropriate in the case of Secretary of State for India in Council, firstly, because the Secretary of State for India in Council, is a statutory body which has no capacity but an official one; and secondly, because he is often responsible for the acts of other public bodies and officers. 59 C. 961=55 C. L. J. 8=138 Ind. Cas. 4=A. I. R. 1932 Cal. 275=A. L. R. 1932 Cal. 1037. Although the cause of action in s. 80 should not be taken in a narrow sense, yet the section requires the cause of action to be stated with some precision. A. I. R. 1928 Cal. 74=54 C. 969=107 Ind. Cas. 360. Where defendant's interests devolve upon Government during suit, no notice as prescribed by s. 80 need be given. The matter is governed by Order 22, rule 10. A. I. R. 1926 All. 585=24 A. L. J. 726=96 Ind. Cas. 351. Where suit is alleged to be barred under a special law of limitation, the party is not entitled to deduct the period of two months for service of notice under s. 80. A. I. R. 1921 Cal. 56=34 C. L. J. 287; 46 Ind. Cas. 899; but see sub-section (2) of section 15 of the Limitation Act and 38 Ind. Cas. 600=52 P. R. 1917; 22 O. C. 342=54 Ind. Cas. 535; A. I. R. 1928 All. 625; A. I. R. 1928 All. 348; A. I. R. 1930 All. 742. Where plots mentioned in the notice comprised all the plots mentioned in the plaint the variance between the notice and the plaint will not justify dismissal of the suit. 20 C. W. N. 636=32 Ind. Cas. 752. A notice under s. 80 is defective if the case is set up in the plaint is different from the case stated in the notice. A suit instituted upon such a notice cannot be maintained. 32 Ind. Cas. 235. Objection as to want of notice under this section may be waived. 38 L. W. 891. A suit brought pursuant to an undertaking given under s. 14, Bombay Land Revenue Act within 30 days from the Collectors' decision is not a suit which falls within s. 80, C. P. Code; it is a suit on account of land revenue brought under special provisions of the Special Act, and the general provisions of s. 80 do not apply to such a suit. A. I. R. 1934 Bom. 162=36 Bom. L. R. 297.

**Notice.**—The notice prescribed by s. 80 is essential in all suits against the Crown or against a public officer with regard to any act purported to be done by the said public officer in his official capacity. 39 M. L. J. 151=28 M. L. T. 163=12 L. W. 193=(1920) M. W. N. 495=58 Ind. Cas. 885; see also 12 M. L. T. 224; 18 C. W. N. 1340=27 Ind. Cas. 232; 15 Pat. 353=161 Ind. Cas. 690=17 Pat. L. T. 152=A. I. R. 1936 Pat. 339; A. I. R. 1935 Cal. 726. Such notice is required even in case of an injunction and of likely irreparable injury or in case of a threat to do a future injury provided the threat is conveyed through an act, such as speech, writing, etc. 39 M. L. J. 151=(1920) M. W. N. 445=58 Ind. Cas. 885; 5 Bom. L. R. 431; but see 28 A. 600=(1906) A. W. N. 107=3 A. L. J. 341. A public officer is entitled to notice under this section before suit, though acting *malafide* in the discharge of his duties. The word "purporting" covers a profession by acts, by words or by appearance of what is true as well as of what is untrue. 7 L. W. 586=34 M. L. J. 494=23 M. L. T. 357=41 M. 792=46 Ind. Cas. 86. The language of the section is imperative. 25 A. 187=1503 A. W. N. 13; 35 C. W. N. 161. Section 80 is to be strictly complied with and is applicable to all forms of action and all kinds of relief. A. I. R. 1927 P. C. 176=51 B. 725=54 I. A. 338=25 A. L. J. 641=29 Bom. L. R. 1227=46 C. L. J. 76=53 M. L. J. 81=32 C. W. N. 61=104 Ind. Cas. 257. The notice under s. 80 must be considered sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed. A. I. R. 1926 Mad. 408=23 L. W. 464=91 Ind. Cas. 368; A. I. R. 1933 M. 105; A. I. R. 1929 Sind

61=125 Ind. Cas. 193 ; A. I. R. 1934 Pat. 346=150 Ind. Cas. 1131. A notice when it is without description and statement of place of residence is not valid. A. I. R. 1931 Cal. 61=57 C. 1127=130 Ind. Cas. 903. Person or persons giving notice should be the same by whom the suit is actually filed. A. I. R. 1931 Mad. 175=59 M. L. J. 923=54 M. 416=129 Ind. Cas. 456 ; 32 Bom. L. R. 604=A. I. R. 1929 Bom. 367. In determining whether a particular document satisfied the requisites of a valid notice under s. 80, the Court is not bound to abandon all common sense but must look at the document and understand it in a fair and reasonable sense in the way in which the writer meant and the addressee understood it. A. L. R. 1933 Mad. 693=A. I. R. 1933 Mad. 105=36 L. W. 694=1932 M. W. N. 1240=140 Ind. Cas. 458. Where the plaintiff is 'private party' it is reasonable that his name, his description and place of residence should be known and stated. 36 L. W. 691=140 Ind. Cas. 458=1932 M. W. N. 1240. The plea of want of notice under this section must be taken at the earliest possible opportunity and must be specifically pleaded. Where such a plea is taken by the defendant at a very late stage the defendant must be deemed to have waived the privilege of notice. A. I. R. 1931 Cal. 175=53 C. L. J. 31=130 Ind. Cas. 894 ; A. I. R. 1933 Mad. 917 ; A. I. R. 1934 Pat. 354=150 Ind. Cas. 590. Exceptions or qualifications to the explicit terms of s. 80 cannot be made on account of consideration of hardship and absence of prejudice or detriment to the interests of the Government. A. I. R. 1931 Mad. 175=32 L. W. 810=52 M. L. J. 923=54 M. 416=129 Ind. Cas. 416. In case of failure of service of notice, the proper procedure is to reject the suit and not to dismiss the suit after going into the question. 35 C. W. N. 161. Notice by a pleader on behalf of his client under s. 80 is not a private letter. A. I. R. 1928 Bom. 338=30 Bom. L. R. 934=113 Ind. Cas. 519. A notice under this section can be waived. 146 Ind. Cas. 699=38 L. W. 891=A. I. R. 1933 Mad. 917 ; 34 C. 257 ; 48 C. 503. Two months' notice is condition precedent in a suit against Official Assignee. A. L. R. 1933 Sind 216=A. I. R. 1933 Sind 4=140 Ind. Cas. 265. A third party is not competent to raise a question of want of notice under s. 80. 136 Ind. Cas. 445=13 Pat. L. T. 169. Service of an application for leave to sue is no substitute for service of notice under s. 80. 35 C. W. N. 161. The words of s. 80 as to how notice is to be served are mandatory and not controlled by Order 48, rule 2, C. P. Code. 35 C. W. N. 161. This section contemplates a notice of action in the English sense, since it requires a statement of the name, description and place of residence of the plaintiff. The rule is not to be relaxed simply because the defendant could have had little or no difficulty in finding out these matters for himself by other means. A. I. R. 1931 Cal. 61=57 C. 1127. A public officer against whom a suit is filed in respect of an act done by him in his official capacity is entitled to notice under section 80, even though he has acted *malafide*. A. I. R. 1934 Pat. 14. In case of withdrawal of suit instituted after proper notice with liberty to institute fresh suit a second notice is not required for instituting a fresh suit. 36 Bom. L. R. 1105. A notice need not be practically a copy of the plaint. It should be such as would give substantial information of the basis of the claim and the relief which the plaintiff seeks. A. I. R. 1934 Pat. 701. A notice which states that the cause of action and reliefs are described in the amended copy of plaint which forms part of notice, though defective in form, is substantial compliance of s. 80. 151 Ind. Cas. 1076=38 C. W. N. 409=59 C. L. J. 295=A. I. R. 1934 Cal. 187. Section 80 is express, explicit, mandatory and admits of no implications or exceptions. Where there are two plaintiffs notice by one is not sufficient notice within the meaning of this section. 159 Ind. Cas. 33=A. I. R. 1935 Sind 206 ; see also A. I. R. 1935 Mad. 389=41 L. W. 591=1935 M. W. N. 293=156 Ind. Cas. 333 ; A. I. R. 1935 Bom. 229=37 Bom. L. R. 341=156 Ind. Cas. 591. A notice under this section is necessary in a case where the suit is originally instituted against a person to whom notice under the section is necessary and a person to whom notice should ordinarily be given is subsequently added as defendant by reason of the estate of the earlier defendant subsequently going under his protection. 25 S. L. R. 200=A. I. R. (1931) Sind 158=133 Ind. Cas. 74. The notice is invalid where the cause of action has not arisen at the time of notice. A. I. R. 1928 Cal. 74=54 C. 969=107=Ind. Cas. 360.

**Notice in suits for injunction.**—This section is applicable to all forms of action to all kinds of relief without exception. A. I. R. 1927 Bom. 649=29 Bom. L. R. 1427=105 Ind. Cas. 756 ; 32 C. W. N. 61 (P. C.)=51 B. 725. A suit in which *inter alia* an injunction is prayed is still a suit. The section applies to a suit for injunction even where the delay of two months contemplated by the section is likely to result in immediate injury to the plaintiff. A. I. R. 1928 Sind 76=22 S. L. R.

63 ; A. I. R. 1927 Mad. 166=50 M. 239 ; 41 M. 792 ; 50 C. 992 ; 58 C. 1288 ; 14 Lah. 330=34 P. L. R. 975=A. I. R. 1933 Lah. 202 ; A. L. R. 1933 Sind 216=A. I. R. 1933 Sind 4=140 Ind. Cas. 265 ; A. I. R. 1931 Lah. 703=132 Ind. Cas. 1.

**Secretary of State for India.**—Necessity for notice under s. 80 exists in a suit against the Secretary of State as representing the State owned Railway. A. I. R. 1931 Nag. 56=13 N. L. J. 104=123 Ind. Cas. 902. In the case of a State Railway it is open to a party to give a combined notice which would satisfy all the requirements of s. 77, Railway Act, and s. 80, C. P. Code. Otherwise he must give separate notices under the respective sections. A. I. R. 1928 Mad. 599=(1928) M. W. N. 218=109 Ind. Cas. 406 ; see also A. I. R. 1930 All. 476=(1930) A. L. J. 1125 ; A. I. R. 1928 Bom. 421=52 B. 548=30 Bom. L. R. 970=113 Ind. Cas. 511 ; A. I. R. 1928 Mad. 599=(1928) M. W. N. 218=109 Ind. Cas. 406 ; A. I. R. 1931 P. 393 ; A. I. R. 1931 Pat. 145=10 P. 153 ; 14 Lah. 330=34 P. L. R. 975=A. I. R. 1933 Lah. 203 ; A. L. R. 1933 A. 510=A. I. R. 1933 A. 53=1932 A. L. J. 1033. The Secretary of State for India in Council can be sued as a corporation sole. A. L. R. 1933 Lah. 890=34 P. L. R. 975=A. I. R. 1933 Lah. 203.

Where in a plaint the cause of action was initially stated to arise on a certain date and subsequently the plaintiff applied for amendment of the plaint and introduced another date as the date on which the cause of action arose : *Held* that the notice given before the accrual of the cause of action subsequently mentioned, was in no way defective or irregular because the defendant (Secretary of State in Council) in the written statement gave the same date as was mentioned by the plaintiff in the amended plaint as being the date on which the cause of action arose. A. L. R. 1933 B. 329=35 Bom. L. R. 583=A. I. R. 1933 Bom. 314=145 Ind. Cas. 408.

**Public officer in his official capacity.**—Neglect to recover rent by an official Receiver becomes an act purporting to be under official capacity. A. I. R. 1931 Cal. 61=57 C. 1127=130 Ind. Cas. 903 ; see also A. I. R. 1934 P. C. 96=61 I. A. 171=61 C. 470=36 Bom. L. R. 544 (P. C.). A suit against an official Receiver or Receiver appointed by Court cannot be sustained without the requisite notice under this section. 34 C. W. N. 671=A. I. R. 1930 Cal. 737=128 Ind. Cas. 108 ; see also A. I. R. 1930 Lah. 708=125 Ind. Cas. 625 ; 31 P. L. R. 865=12 Lah. 260=132 Ind. Cas. 4 ; A. I. R. 1933 M. 105=1932 M. W. N. 1240 ; A. I. R. 1927 Mad. 166=50 M. 239 ; A. I. R. 1925 All. 241=47 A. 291=22 A. L. J. 1116=84 Ind. Cas. 739 ; 77 Ind. Cas. 57=A. I. R. 1924 All. 40=21 A. L. J. 737=46 A. 16=77 Ind. Cas. 57. The words "in respect of any act purporting to be done" cover only a past act and do not include a future act. A. I. R. 1927 Mad. 166=50 M. 239=51 M. L. J. 671=24 L. W. 730=99 Ind. Cas. 284 ; see also A. I. R. 1924 Bom. 1=26 Bom. L. R. 1=48 B. 87 ; 21 Bom. L. R. 980=53 Ind. Cas. 627 ; A. I. R. 1930 Bom. 11=31 Bom. L. R. 1109=122 Ind. Cas. 857 ; 1932 M. W. N. 299=34 L. W. 993 ; A. I. R. 1932 All. 657. The act purports to be done in his official capacity if the act was one such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as a public officer and desired other persons to consider that he was acting. The motives with which the act was done do not enter into the question at all. A. L. R. 1930 All. 704=(1930) A. L. J. 1080=124 Ind. Cas. 705. An Official Assignee purporting to act legally though his act not strictly legal is acting as an Official Assignee and in a suit against him for damages notice under s. 80 is necessary. A. I. R. 1930 Mad. 458=59 M. L. J. 501=124 Ind. Cas. 144 ; A. I. R. 1923 Bom. 392=25 Bom. L. R. 378=73 Ind. Cas. 240. An official Liquidator is a public officer. A. L. R. 1934 Oudh 267=A. I. R. 1934 Oudh 158=11 O. W. N. 398 ; see also 30 N. L. R. 240=148 Ind. Cas. 714=17 N. L. J. 47=A. I. R. 1934 Nag. 201. A claim bond upon a breach of a contract by a public officer may, in appropriate cases, entitle him to notice of suit under s. 80, C. P. Code. 61 I. A. 171=61 C. 470=38 C. W. N. 517 (P. C.). A Deputy Magistrate who has been appointed as the retiring officer of the Municipality for the purpose of election cannot be said to be a public officer at that time. 152 Ind. Cas. 817=1935 A. L. J. 139=A. I. R. 1935 All. 106. A Municipal Council not being an officer of the Government within the meaning of s. 80 a suit instituted against the Municipality is not bad for two months' notice. A. I. R. 1930 Mad. 844=59 M. L. J. 690=(1930) M. W. N. 821=32 L. W. 791=128 Ind. Cas. 161.

Where a Police officer has acted in his official capacity in charging a person a notice under s. 80 is necessary for malicious prosecution. A. I. R. 1930 All. 742=(1930) A. L. J. 1443=132 Ind. Cas. 17. But in suit for damage for assault and battery

by Police officer while investigating cognizable offence a Police officer is not entitled to notice either under s. 80 (4) of Bombay Police Act or C. P. Code, s. 80. A. I. R. 1928 Bom. 352=30 Bom. L. R. 1018=52 B. 832=114 Ind. Cas. 246. Where a suit for damages for wrongful arrest against a public officer is filed he is entitled to notice of suit under s. 80, even if in the discharge of his duty he acted *mala fide*. But no notice is necessary for the recovery of money extorted from the plaintiff by the officer as a consideration for his release. A. I. R. 1924 Cal. 145=50 C. 992=28 C. L. J. 104=28 C. W. N. 10=75 Ind. Cas. 173 ; see also 80 Ind. Cas. 72=46 A. 884=22 A. L. J. 812 ; 13 A. L. J. 788 ; 79 Ind. Cas. 818=A. I. R. 1923 Rang. 250. Where manager of an encumbered estate is a formal party, no notice under this section is necessary. A. L. R. 1933 Sind 202=A. I. R. 1933 Sind 1=142 Ind. Cas. 501. It is enough that the act is done and that it is purported to have been done in an official capacity ; and it is not necessary to go further and inquire whether it was done in execution or intended execution of any statute or public duty or authority. The non-performance or the breach of a contract is equally an act as a tort is within the meaning of this section. 59 C. 961=55 C. L. J. 8=A. I. R. 1932 Cal. 275. Village Sanitation *Panchayat* is not a public officer within the meaning of s. 80 and a suit is tenable even in the absence of notice. A. I. R. 1929 Nag. 70=114 Ind. Cas. 288. A Government school master although his services are lent to public body, is a public officer and a notice under s. 80 is necessary in this case. A. I. R. 1028 Nag. 33=104 Ind. Cas. 762. Where the Official Receiver is sued for establishing and realizing a charge over movable and immovable property of a debtor and where plaintiff does not allege any act or omission on the part of the Receiver, no notice under s. 80 is necessary. A. I. R. 1927 All. 132=48 A. 821=24 A. L. J. 1067. A suit for accounts against a common manager appointed under s. 95 of the B.T. Act can not be instituted without service of the notice under s. 80 and without leave obtained from the Court appointing him. 24 C. W. N. 138=30 C. L. J. 279=53 Ind. Cas. 747. A suit against a Bench clerk for damages for the loss of a record in Court through his negligence cannot be brought without giving notice under s. 80. 11 Bur. L. T. 95=40 Ind. Cas. 677. It can not be said that a public officer acting *mala fide* does not purport to act as a public officer. To hold otherwise will imply the importation of words into the section which cannot be found there. A. I. R. 1934 Pat. 14. In a suit by a mortgagee under a mortgage upon an estate executed by the predecessor of its common manager appointed under s. 95 of the B. T. Act assuming him to be a public officer, notice under s. 80' C. P. Code is not necessary as such notice is enjoined only where the plaintiff complains of some "act purporting to have been done by him in his official capacity" and as the mortgage was not executed by the defendant, the present manager and imposed no personal liability, and the non-payment by him or the mere omission to pay either interest or principal cannot be deemed to be such an act. A. L. R. 1934 P. C. 100=11 O. W. N. 463=38 C. W. N. 517=39 L. W. 504.

Exemption from arrest and personal appearance.

81. [SS. 425, 428.] In a suit instituted against a public officer in respect of any act purporting to be done by him in his official capacity—

(a) the defendant shall not be liable to arrest nor his property to attachment otherwise than in execution of a decree, and,

(b) where the Court is satisfied that the defendant cannot absent himself from his duty without detriment to the public service, it shall exempt him from appearing in person.

82. [S. 429.] (1) Where the decree is against "the Crown"\* or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied ; and if the decree is not satisfied within the

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\* For the words "the Secretary of State for India in Council" the words "the Crown" have been substituted in British India by G. I. Order of 1937 ; but in British Burma for the same words the words "the Secretary of State, the Government or the Railway Board" have been substituted by G. B. Order of 1937.

time so specified, the Court shall report the case for the orders of the "Provincial Government."\*

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

**SUITS BY ALIENS AND BY OR AGAINST "FOREIGN RULERS AND RULERS OF INDIAN STATES".†**

**83. [S. 430.]** (1) Alien enemies residing in British India with the permission of the "Central Government"‡ and alien friends, may sue in the Courts of British India, as if they were subjects of His Majesty.

(2) No alien enemy residing in British India without such permission, or residing in a foreign country, shall sue in any of such Courts.

*Explanation.*—Every person residing in a foreign country the Government of which is at war with the United Kingdom of Great Britain and Ireland, and carrying on business in that country without a license in that behalf under the hand of one of His Majesty's Secretaries of State or of a Secretary to the Government of India, shall, for the purpose of sub-section (2), be deemed to be an alien enemy residing in a foreign country.

*Amendments in British Burma.*—In sub-sections (1) and (2) for "British India" read "British Burma" and for "Central Government" in sub-section (1) read "Governor" and in the explanation to sub-section (1) omit "of India."

*Scope.*—An alien enemy licensed to trade in British India can sue in Indian Courts. 9 Bur. L. T. 51=31 Ind. Cas. 888; see also 8 S. L. R. 329; 39 A. 377. Where cause of action arose before or after war, an alien enemy can be sued in British Indian Courts. 40 C. 1140=20 C. W. N. 691=23 C. L. J. 493=35 Ind. Cas. 951. Under s. 83 an alien enemy residing in British India may sue in British Courts with the permission of the Governor-General in Council. 39 A. 377=39 Ind. Cas. 862. Not all contracts but only dealings of a commercial nature between hostile aliens are tainted with illegality. A contract whose tendency is to increase the enemy's resources is prohibited, but not an agreement for payment of money from funds accruing there. 31 M. L. J. 360=(1917) M. W. N. 73=37 Ind. Cas. 957. A British subject voluntarily residing or carrying on business in enemy country will be treated as an alien enemy. 55 Ind. Cas. 324=1 Lah. 276=2 Lah. L. J. 275.

**84. [S. 431.]** (1) A foreign State may sue in any Court of British India :

When foreign States may sue.

Provided that such State has been recognized by His Majesty or by the Governor General in Council :

Provided, also that the object of the suit is to enforce a private right vested in the head of such State or in any officer of such State in his public capacity.

(2) Every Court shall take judicial notice of the fact that a foreign State has or has not been recognized by His Majesty or by the Governor-General in Council.

*Amendment in Burma.*—In Burma for the words "British India" read "British Burma."—*Vide* G. B. Order of 1937.

*Scope.*—Any State which has preserved any decree of sovereignty must have at least three characteristics. First allegiance to the Ruler. Secondly the law enforced

\* Substituted by G. I. Order, 1937. But in Burma read "Governor".—*vide* G. B. Order of 1937.

† The words within quotations have been substituted for "Foreign and Native Rulers" in British India by G. I. Order. But the words "Foreign and Native Rulers" remain unaltered in British Burma.

‡ Substituted for the words "Governor-General in Council" by G. I. Order of 1937.

must be the Ruler's laws. And thirdly those laws must be enforced by his Courts. A. I. R. 1930 Mad. 1004=59 M. L. J. 548=32 M. L. W. 673=53 M. 968=128 Ind. Cas. 870. The "private rights" spoken of in this section do not mean individual rights, as opposed to those of the body politic or state; but those private rights of the State, which must be enforced in a Court of Justice, as distinguished from its political or territorial right, which must, from their very nature, be made the subject of arrangement between one State and another. They are rights, which may be enforced by a foreign State against private individuals, as distinguished from rights which one State in its political capacity may have against another State in its political capacity. 11 C. 17; see also *Emperor of Austria v. Day*, 2 Giff. 628; *United States of America v. Wagner*, L. R. 2 Ch. App. 582.

**85. [S. 432.]** (1) Persons specially appointed by order of the Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognised agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief.

"*Explanation*.—For the purposes of this subsection the expression 'the Government' means—

(a) in the case of Indian State, the Crown Representative, and

(b) in any other case, the Central Government."\*

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

**Amendment in British Burma.**—In British Burma for "British India" read "British Burma"—*Vide G. B. Order of 1937.*

**Scope.**—This section does not prevent the institution by an independent Prince, of a suit in a Court in British India, in his own name, and through a recognised agent other than one appointed under the section. 10 C. 136; 23 C. W. N. 287=80 Ind. Cas. 100; A. W. N. 1886, 133; 19 A. 510=A. W. N. 1897, 135.

**86. [S. 433.]** (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, "in the case of the Ruling Chief of an Indian State with the consent of the Crown Representative, certified by the signature of the political Secretary, and in any other case with the consent of the Central Government, certified by the signature of a Secretary to that Government,"† but not without such consent, be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued; but it shall not be given unless it appears to "the consenting authority"† that the Prince, Chief, ambassador or envoy—

(a) has instituted a suit in the Court against the person desiring to sue him, or

\* The explanation to sub-section (1) has been inserted by G. I. Order of 1937 and this explanation is not in force in British Burma.

† Substituted by G. I. Order of 1937.



(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, "except with such consent as is mentioned in sub-section (1)"\* certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

\*“(4) The Central Government or the Crown Representative, as the case may be, may, by notification in the *Gazette of India*, authorize a Provincial Government and any Secretary to that Government to exercise with respect to any Prince, Chief, ambassador or envoy named in the notification the functions assigned by the foregoing sub sections to the consenting authority and a certifying officer respectively.”

(5) A person may, as a tenant of immovable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold property

*The following section is in force in BRITISH BURMA in this form :—*

**86. [S. 433.]** (1) Any such Prince or Chief, and any ambassador or envoy of a foreign State, may, with the consent of the Governor, certified by the signature of a Secretary to the Government, but not without suit consent, be sued in any competent Court.

(2) Such consent may be given with respect to a specified suit or to several specified suits, or with respect to all suits of any specified class or classes, and may specify, in the case of any suit or class of suits, the Court in which the Prince, Chief, ambassador or envoy may be sued : but it shall not be given unless it appears to the Governor that the Prince, Chief, ambassador or envoy—

(a) has instituted a suit in the Court against the person desiring to sue him, or

(b) by himself or another trades within the local limits of the jurisdiction of the Court, or

(c) is in possession of immovable property situate within those limits and is to be sued with reference to such property or for money charged thereon.

(3) No such Prince, Chief, ambassador or envoy shall be arrested under this Code, and, except with the consent of the Governor certified as aforesaid, no decree shall be executed against the property of any such Prince, Chief, ambassador or envoy.

(4) [Omitted].

(5) A person may, as a tenant of immovable property, sue, without such consent as is mentioned in this section, a Prince, Chief, ambassador or envoy from whom he holds or claims to hold the property.—*Vide G. B. Order of 1937.*

**Scope.**—The rule of International Law that a sovereign authority cannot be personally impleaded in any Court which is based on the principle of "absolute independence of the sovereign to recognize any superior authority" cannot be applied to Princes in India for the reason that they are subordinate to the authority of the British Crown. This rule of International Law has been modified by the provision of s. 86, C. P. Code. A. I. R. 1934 All. 740=1934 A. L. J. 1093. Under this section a suit against a Ruling Chief filed without the consent of the Governor-General in Council cannot be tried by a Civil Court. But this privilege may be waived by the defendant. 60 P. L. R. 1903=40 P. R. 1903 ; 2 C. L. J. 163 ; 9 C. 535=12 C. L. R. 465 ; 1 W. N. 1907, 95=4 A. L. J. 358=29 A. 379 ; 21 B. 351 ; 21 Bom. L. R. 376=51 Ind. Cas. 228 ; 46 Ind. Cas. 558 ; 58 Ind. Cas. 912 ; A. I. R. 1921 Pat. 23=6 P. L. J. 185=61 Ind. Cas. 989=2 P. L. T. 180 ; A. I. R. 1935 Oudh 164=11 O. W.

\* Substituted by G. I. Order of 1937.

N. 1426. This section does not apply to a defence put forth as set off. 62 Ind. Cas. 778. A suit against a Ruling Chief, in his capacity as a co-sharer in respect of the property in British India will be governed by this section. A. I. R. 1924 All. 422 = 46 A. 355 = 22 A. L. J. 317 = 78 Ind. Cas. 559. An agent of a foreign State is personally liable for contracts entered into on behalf of his principal where the contracts do not come under s. 86, and permission to sue need not be applied for and even if granted no suit will lie against the foreign State. A. I. R. 1928 Sind 189 = 113 Ind. Cas. 345. Section 86, Civil Procedure Code, does not apply to proceedings under s. 184, Companies Act, but it does apply to all the proceedings under ss. 186 and 187 of the Act. A. I. R. 1936 All. 826 = 1936 A. L. J. 1134 = 1936 A. W. R. 1059. Where a suit is instituted not against the Prince himself, but against a business concern run by the State or a Ruling Prince, it cannot be said that it is one against the Prince himself. A. I. R. 1934 All. 740 = 1934 A. L. J. 1093. Where he carries on a business (such as a running railway) under a particular name and style he can be sued in such name by virtue of Order 30, rule 10. *Ibid.*

**Sub sections (3) and (5)**—No consent is necessary where the Ruling Chief is a tenant of the plaintiff. The plaintiff is entitled to institute such a suit without consent under the provisions of s. 86 (5). Sub-section (5), s. 86 is entirely distinct from sub-section (3). The two sub-sections are really dealing with two quite distinct matters. In view of the plain terms of sub-section (3) the consent referred to is necessary. A. I. R. 1935 Cal. 664 = 39 C. W. N. 1206.

Style of Princes and Chiefs as parties to suits.

**87. [S. 434.]** A Sovereign Prince or Ruling Chief may sue, and shall be sued, in the name of his State :

Provided that in giving the consent referred to in the foregoing section ["the Central Government, the Crown Representative or the Provincial Government" \* as the case may be], may direct that any such Prince or Chief shall be sued in the name of an agent or in any other name.

**Amendment in British Burma.**—For the words "the Central Government, etc., as the case may be" given within square brackets read the words "the Governor"—*Vide* G. B. Order of 1937.

**Notes.**—7 B. H. C. R. 150.

#### INTERPLEADER.

**88. [S. 470.]** Where two or more persons claim adversely to one another the same debt, sum of money or other property, movable or immovable, from another person who claims no interest therein other than for charges or costs and who is ready to pay or deliver it to the rightful claimant, such other person may institute a suit of interpleader against all the claimants for the purpose of obtaining a decision as to the person to whom the payment or delivery shall be made and of obtaining indemnity for himself :

Provided that where any suit is pending in which the rights of all parties can properly be decided, no such suit of interpleader shall be instituted.

**Scope.**—An interpleader suit is a suit in which several claimants are to be deemed to be claiming adversely to each other. A. I. R. 1928 Oudh 155 = 108 Ind. Cas. 817. This section corresponds to rules, 1 and 2 of Rules of Supreme Court, 1883. Where A is under liability for any debt, money, goods, or chattels, claimed adversely by B or C or more, for which he is being sued or expects to be sued, he desires protection against a wrong payment or delivery. The liability to some one must be admitted, and there must be no interest in the subject-matter other than for charges or costs, and no collusion. There must be conflicting claims on which he cannot decide without risk. *Chitty's Yearly Practice*, p. 942. An interpleader is not an action either in the strict or any conventional sense of the word. *Per Lord Selborne in Hamlyn v. Bettely*, (1881) 6 Q. B. D. at p. 66. In an interpleader suit in

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\* The words within quotations have been substituted for the words "the Governor General in Council or the Local Government" by G. I. Order of 1937.

which each of the contesting defendants attacks the title of the other each is virtually in the position of a plaintiff. A. I. R. 1925 Mad. 497=48 M. 1=93 Ind. Cas. 705. Where the defendants do not claim adversely to one another the property in suit from the plaintiff and the plaintiff is not also ready to pay or deliver the property to one of them, the suit is not an interpleader suit. A. I. R. 1922 Cal. 138. If the plaintiff has in some way identified himself with one of the parties in the sense that it makes a difference to him which party succeeds he will be debarred from bringing such a suit although he will not be refused relief merely because he has a natural affinity for one side rather than the other. A. I. R. 1927 Rang. 91=4 Rang. 465=99 Ind. Cas. 985. Where a widow who adopts a son and another person who is adopted by a co-widow are arrayed in that suit on the same side as defendants, yet they must be deemed to be claiming adversely to each other. A. I. R. 1928 Oudh 155=108 Ind. Cas. 817. Where the plaintiff in an interpleader suit, paid money due by him into Court for payment to the person to whom the Court should decide that it was payable, *held* that was a valid discharge for him, and if the Court paid it to the wrong person, he was not responsible. 2 C. P. L. R. 9.

## PART V.

### SPECIAL PROCEEDINGS.

#### ARBITRATION.

89. [*New.*] (1) Save in so far as is otherwise provided by the Indian Arbitration Act, 1899,\* or by any other law for

the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the Second Schedule.

(2) The provisions of the Second Schedule shall not affect any arbitration pending at the commencement of this Code, but shall apply to any arbitration after that date under any agreement or reference made before the commencement of this Code.

**Scope of the section.**—Where parties to a suit engage in arbitration without an order of the Court, the award in that arbitration can be confirmed in the terms of the decree. A. I. R. 1931 Rang. 58=9 Rang. 39=131 Ind. Cas. 57. The words "any other law" in s. 89 mean any law other than the Arbitration Act and other than the provisions contained in Schedule II, C. P. Code. These words include the provisions of Order 23, rule 3 which is not one of the provisions of Schedule II. A. I. R. 1931 Oudh 127=8 O. W. N. 71=138 Ind. Cas. 443; see also A. I. R. 1930 Bom. 98=31 Bom. L. R. 1403=54 Bom. 197=124 Ind. Cas. 119; A. I. R. 1927 Bom. 565=51 B. 908=25 Bom. L. R. 1254=105 Ind. Cas. 516; A. I. R. 1925 Mad. 50=76 Ind. Cas. 502. The words "any other law" in s. 89 do not exclude the law as laid down in other parts of C. P. Code. A. I. R. 1928 Mad. 1025=51 M. 800=55 M. L. J. 429=113 Ind. Cas. 632. An award passed in suit which is pending without the intervention of the Court may be regarded as adjustment under Order XXIII, r. 3. A. I. R. 1927 Mad. 1126=53 M. L. J. 444=39 M. L. T. 593=26 L. W. 231=104 Ind. Cas. 674. "Any other law" in section 89 does not include Order XXIII, rule 3. A. I. R. 1921 Sind 65=16 S. L. R. 174=81 Ind. Cas. 653; *contra*; A. I. R. 1925 All. 503=47 A. 637=23 A. L. J. 561 (F. B.). Pending suit, private arbitration without the consent of the Court award cannot be enforced either under Order XXIII, rule 3, C. P. Code or under the provisions of the Indian Arbitration Act. Arbitrations in the course of litigation should conform to the strict conditions and stipulations of the Second Schedule and should be under the supervision of the Court. The Indian Arbitration Act does not apply to arbitration in the course of litigation. A. I. R. 1921 Cal. 404=49 C. 608=69 Ind. Cas. 808. The words "by any other law for the time being in force" contained in section 89 refer to some law extraneous to the Code of C. P. Code and do not cover Order XXIII, rule 3. A. I. R. 1921 Lah. 332=3 Lah. L. J. 162=67 Ind. Cas. 123; see also A. I. R. 1921 Cal. 238=25 C. W. N. 127=61 Ind. Cas. 919; A. I. R. 1931 Oudh 127; A. I. R. 1931 Rang. 58. The concluding provisions of s. 21 of the Specific Relief Act will be found to be inapplicable to all arbitration agreements and awards governed by

Schedule II, by reading s. 89 (1), C. P. Code with Schedule II, para. 22. 46 C. 1041 = 29 C. L. J. 399 = 23 C. W. N. 716 = 51 Ind. Cas. 80. Section 89 is intended to confer jurisdiction to link up the Schedule and the body of the Code. Change in the law is not intended unless stated in express terms or unless followed by necessary implication. A. I. R. 1927 Bom. 565 = 51 B. 908 = 29 Bom. L. R. 1254 = 105 Ind. Cas. 516. Section 89 Civil Procedure Code, covers all references to arbitration whether the reference is or is not made without the intervention of the Court, and whether an award does or does not follow and it says that they shall be governed by the provisions of Schedule II, Civil Procedure Code. The words in s. 89, Civil Procedure Code, "by any other law for the time being in force" must refer to some law extraneous to the C. P. Code and cannot be legitimately held to cover Order 23, rule 3. A. I. R. 1936 Lah. 374 = 160 Ind. Cas. 287 = 38 P. L. R. 102. In *Bhim raj v. Munia*, A. I. R. 1935 Pat. 243 = 16 Pat. L. T. 280 = 14 Pat. 799. *Sir Courtney Jerrell, C. J.* observed: "The words 'or by any other law for the time being in force' have been the subject of some discussion; but in my opinion, the words clearly must be read *ejus dem generis* with reference to a specific piece of legislature, the Arbitration Act, 1899, and it means that it contemplated that further legislature may take place or that there may be already in existence, specific legislature dealing with arbitration. It was not the intention of the legislature to override either the Arbitration Act or any other specific piece of legislature, but the intention was to state that all references to arbitration of whatever kind, if they are intended to be given a binding effect must be conducted and instituted according to the provisions of Schedule 2 of the Act." The proceedings under Order 23, rule 3 for the recording of a compromise between the parties is not an exception to s. 89 and that section does not take into contemplation that rule at all as being one of the proceedings by way of arbitration to which the section and the Schedule are not to apply. A. I. R. 1935 Pat. 243.

#### SPECIAL CASE.

90. [New.] Where any persons agree in writing to state a case for the opinion of the Court, then the Court shall try and determine the same in the manner prescribed.

Power to state case for opinion of Court.

**Scope.**—A Court should not interfere by giving a partial decision which it cannot make effective to end the dispute when legislature had provided special tribunal. A. I. R. 1930 Bom. 232 = 32 Bom. L. R. 416 = 54 B. 825 = 125 Ind. Cas. 897.

#### SUITS RELATING TO PUBLIC MATTERS.

91. [New.] (1) In the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.

Public nuisances.

(2) Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.

**Notes.**—*Vide* the Public Suits Validation Act (XI of 1932).

**Scope.**—This section does not create a right which did not exist before nor it deprives any body of a right derived from the general law of the land. It is not a prohibitive section which prevents a person from asserting a right except in a particular way. A. I. R. 1924 All. 599 = 46 A. 470 = 22 A. L. J. 729 = 85 Ind. Cas. 304. Section 91 does not contest or restrict the provisions of Order I, rule 8 and does not take away the plaintiff's right to sue which may exist independently of its provisions. A. I. R. 1925 Cal. 1233 = 88 Ind. Cas. 505. Section 91, sub-section (1) authorizes two or more persons to sue with the previous consent of the Advocate-General in respect of a public nuisance but it does not compel them to do so nor is there anything in s. 91 which confers a new right. If a right exists independently of that section that right is not taken away. A. I. R. 1931 All. 941 = 151 Ind. Cas. 263. The definition of "Public Nuisance" given in s. 268 of the Penal Code applies to the Code of Civil

Procedure 1935 O. W. N. 899=157 Ind. Cas. 638. A suit relating to an encroachment on a private easement is not barred by that section. 153 Ind. Cas. 704=A. I. R. 1935 All. 789. Private action not allowed for a public injury. Private nuisance is actionable by the person injured by it. The general obstruction of a public thoroughfare, unless authorized by law, custom or contract, is a public nuisance for which a private suit is not allowed but to obstruct, annoy or endanger a particular person or body of persons only in his or their use of a public thoroughfare may be a private nuisance, for which a private action may lie. Every class or community has a right to use the public streets for religious or musical processions subject to the law against nuisances and any wrongful attack on that right will give rise to a cause of action. 12 N. L. R. 130=136 Ind. Cas. 534; see also A. I. R. 1929 Bom. 94=53 B. 187=31 Bom. L. R. 97=117 Ind. Cas. 513; 48 Ind. Cas. 88 (Nag); see also 1935 O. W. N. 899=157 Ind. Cas. 638; A. I. R. 1935 Pesh. 190. A suit for a declaration of rights in respect of a village pathway that has been obstructed is not governed by s. 91. 46 Ind. Cas. 970; see also 73 Ind. Cas. 616=A. I. R. 1923 Lah. 540. Plaintiff relying on special damages in suit to establish public right, special damages must be specifically alleged. The mere general allegation is not sufficient. A. I. R. 1926 Cal. 549=91 Ind. Cas. 728; see also A. I. R. 1925 Bom. 367=27 Bom. L. R. 421=87 Ind. Cas. 934. Where the plea of want of sanction of the Advocate-General was not taken in the trial Court but was raised for the first time in the lower appellate Court and that Court refused to entertain it. The lower Court was perfectly within its rights in doing so. A. I. R. 1928 Nag. 39=105 Ind. Cas. 113.

**92. [S 539.]** (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where

Public Charities. the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General, or two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit, whether contentious or not, in the principal Civil Court of original jurisdiction or in any other Court empowered in that behalf by the "Provincial Government"\* within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate to obtain a decree—

(a) removing any trustee ;  
 (b) appointing a new trustee ;  
 (c) vesting any property in a trustee ;  
 (d) directing accounts and inquiries ;  
 (e) declaring what proportion of the trust-property or of the interest therein shall be allocated to any particular object of the trust ;  
 (f) authorizing the whole or any part of the trust-property to be let, sold, mortgaged or exchanged ;  
 (g) settling a scheme ;  
 (h) granting such further or other relief as the nature of the case may require.

(2) [Save as provided by the Religious Endowments Act, 1863,]† no suit claiming any of the reliefs specified in sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section.

**Amendments in British Burma.**—In sub-section (1) for the word "Provincial Government" read "Governor" and in sub-section (2) omit the words "save as provided by the Religious Endowments Act, 1863"—*vide* G. B. Order of 1937.

**N. B.**—*Vide* the Public Suits Validation Act (XI of 1932) ; see also A. L. R. 1933 Oudh 606.

**Scope of the Section.**—Where defendant is neither constructive trustee nor trustee *de son tort*, a suit under this section is not maintainable. A. I. R. 1923 All.

\* For the "Local Government" substitute the words "Provincial Government".—*Vide* G. I. Order. 1937.

† XX of 1863.

247=21 A. L. J. 310. This section is inapplicable to trusts not yet completed. Suit for administration of trusts of a Will containing disposition for charitable purposes is maintainable though it is not brought under s. 92. 70 Ind. Cas. 903=31 M. L. T. (H. C.) 63=16 L. W. 922. Two essential conditions are necessary in order that a suit should fall under s. 92 : either there must be an alleged breach of an express or constructive trust created for public purposes of a charitable or religious nature, or the direction of the Court is deemed necessary for the administration of the trust. In the event of any of these eventualities, if the suit asks for a decree claiming any of the reliefs mentioned in s. 92 (1) clauses (a) to (h), then the suit shall be instituted in respect of any such trust in conformity with the provisions of s. 92. The section is inapplicable to a suit in which there is no allegation in the plaint of an alleged breach of an express or constructive trust. 33 Bom. L. R. 1575=135 Ind. Cas. 806=A. I. R. 1932 Bom. 65 ; 63 M. L. J. 703=36 L. W. 633=140 Ind. Cas. 197=(1932) M. W. N. 1340 ; A. I. R. 1931 R. 323 ; A. I. R. 1932 Rang. 132=10 Rang. 342. The object of requiring sanction under s. 92 is to safeguard not only rights of public but also those of institutions and trustees. A. I. R. 1930 Mad. 120=58 M. L. J. 39=53 M. 223=30 L. W. 954=(1929) M. W. N. 911=124 Ind. Cas. 220 ; see also 37 Ind. Cas. 897. Section 92 does not affect, but merely prescribes modes of enforcing, substantive rights. A. I. R. 1928 All. 660=51 A. 30=26 A. L. J. 1016=111 Ind. Cas. 93. Section 92 does not bar suit by religious institution against trustees of different funds for recovering a portion of that fund. A. I. R. 1929 Bom. 153=31 Bom. L. R. 192=119 Ind. Cas. 775. Where a society to whom property is bequeathed desires to convert it into a money, proper cause is not under s. 307, Succession Act, but a suit under s. 92, C. P. Code. A. I. R. 1931 All. 212=(1931) A. L. J. 36=130 Ind. Cas. 498. A suit to establish the existence of the trust itself where the whole question involved is whether such a trust exists or not is not within the purview of section 92. A. I. R. 1926 Pat. 321=5 P. 539=7 P. L. T. 679=(1926) Pat. 145=94 Ind. Cas. 433. Suit for declaration that property is *wakf* is not covered by s. 92. 2 Lah. L. J. 457 ; A. I. R. 1930 Cal. 787=34 C. W. N. 1129=53 C. L. J. 91=58 C. 474=130 Ind. Cas. 369 ; but see A. I. R. 1925 All. 683 ; 47 A. 770=23 A. L. J. 601=89 Ind. Cas. 40.

There must be suit alleging breach of express or constructive trust for public purposes of a charitable or religious nature in order to bring suit under s. 92 and directions of Courts are necessary for administration of trust. A. I. R. 1931 Bom. 33=32 Bom. L. R. 1435=128 Ind. Cas. 891 ; 30 Bom. L. R. 774 (P. C.) ; 26 Bom. L. R. 950 ; A. I. R. 1927 All. 526=49 A. 191=25 A. L. J. 281=99 Ind. Cas. 568 ; 11 P. 288=12 P. L. T. 817=136 Ind. Cas. 417=A. I. R. 1932 Pat. 33=A. L. R. 1932 Pat. 373 ; 33 Bom. L. R. 1575 ; 32 B. L. R. 1435=A. I. R. 1931 B. 33. In the case of a trust of a public purposes of a charitable and religious nature, the primary duty of the Civil Court, is to consider the interest of the public, or that part of the public, for whose benefit the trust is executed and the Court is justified in deciding, in the exercise of its discretion, that the defendant *mutawalis* should be removed on account of their insolvency and mismanagement and keeping the charity in a deplorable condition. A. I. R. 1934 P. C. 53=11 O. W. N. 204=1934 A. L. J. 258=38 C. W. N. 452=66 M. L. J. 333=A. I. R. 1934 P. C. 53=36 Bom. L. R. 386=1934 M. W. N. 309=147 Ind. Cas. 882 (P. C.). In Mahamedan Law there cannot be any private mosque. When once a place is dedicated to be a mosque, it becomes public property ; it is property of God. Therefore where a person in charge of such a mosque claims the property as his private estate, he is reasonable under s. 92. A. I. R. 1934 Pe'h. 57. Section 92 is not confined to the case of admitted trusts. It can decide whether the suit property is *wakf*. 152 Ind. Cas. 50=A. I. R. 1934 Bom. 257.

The subject-matter of the trust was a sum of money which had, before the execution of the trust-deed, been deposited with a person in Madras. The person with whom the money had been deposited was, however, carrying on business in Calcutta at the time of the institution of a suit on the original side of the Calcutta High Court under s. 92, C. P. Code in respect of the trust : Held that the subject-matter of the trust was situate within the local limits of the Calcutta High Court within the meaning of s. 92, C. P. Code. 59 C. 357=137 Ind. Cas. 808=A. I. R. 1932 Cal. 445=A. L. R. 1932 Cal. 572.

The section was intended to apply only to questions relating to what may be called "the indoor management" of the trust, and issues relating to the right of strangers to the trust are outside the scope of a suit under this section. 10 Rang. 342=A. I. R. 1932 Rang. 132=140 Ind. Cas. 317 ; see also 55 M. 549=62 M. L. J.

180=1932 M. W. N. 9=35 L. W. 156=138 Ind. Cas. 74=A. I. R. 1932 Mad. 234=A. L. R. 1932 Mad. 767. Sanction is not necessary in a case in which the relief for the settlement of a scheme for management is based upon an agreement arrived at between the co-trustees or on the terms of a Will executed by the founder of the trust or any other descendant of his when he was the sole trustee. 63 M. L. J. 703=36 L. W. 633=1932 M. W. N. 1340=140 Ind. Cas. 197. Difficulty in granting some of the relief claimed in the absence of the consent in writing of the Advocate-General, does not disentitle the plaintiff to the other reliefs. A. I. R. 1933 Pat. 265=145 Ind. Cas. 294. It is not necessary that the suit under s. 6 of Act XIV of 1920 which may be instituted without the sanction of the Advocate-General, on the trustee's failure to comply with the Court's order to produce accounts should be presented only by the person who made the applications under ss. 3 and 4 of the Act. A. L. R. 1933 Mad. 1039=38 L. W. 730=65 M. L. J. 690=A. I. R. 1933 M. 854=1933 M. W. N. 1286. Where a suit under s. 92, C. P. Code, has been properly instituted and one of the plaintiffs dies, the suit can be continued by the survivor or survivors and even though there is only one survivor. A. L. R. 1934 All. 21=1933 A. L. J. 1393. Where no relief is claimed which falls under Cls. (a) to (h), a sanction under this section is not necessary. A. L. R. 1933 P. 265=A. I. R. 1933 Pat. 246=145 Ind. Cas. 294. Suit contemplated by the section is one of a representative character brought for the benefit of the public to enforce the public rights upon a cause of action alleging a breach of trust or necessity for direction for administration against a trustee for the particular relief claimed. The section does not apply to a case where the parties sue to enforce their personal rights. A. I. R. 1931 Nag. 198; see also A. I. R. (1931) Sind 87=131 Ind. Cas. 177. Question of the true nature of an endowment cannot be decided in a suit not constituted by s. 92. A. I. R. 1927 All. 526=49 A. 91=25 A. L. J. 381=99 Ind. Cas. 568. Appellate Court cannot give direction on matters left undecided by trial Court. A. I. R. 1930 Lah. 1056=12 Lab. L. J. 199=31 P. L. R. 1018. Suit against trespassers for recovery of trust properties does not fall under s. 92. Lah. 295=73 Ind. Cas. 645; A. I. R. 1928 All. 33=50 A. 165=25 A. L. J. 902=106 Ind. Cas. 389. Where trespasser claims trust property, suit for settling scheme and appointment of trustee lies against him. A. I. R. 1927 Mad. 710=53 M. L. J. 183=39 M. L. T. 66=102 Ind. Cas. 74; see also A. I. R. 1928 All. 33=50 A. 165=25 A. L. J. 902; A. I. R. 1925 All. 759=47 A. 867=23 A. L. J. 795=89 Ind. Cas. 639; 35 Ind. Cas. 593=10 S. L. R. 12. Provision of this section is mandatory. 49 Ind. Cas. 530; 41 A. 1=16 A. L. J. 841=48 Ind. Cas. 94.

This section has no application where worshippers at mosque sue to set aside alienation of *wakf* property by trustee. 51 Ind. Cas. 799; 47 Ind. Cas. 111=28 C. L. J. 4; 41 M. 124=33 M. L. J. 357=6 L. W. 666=22 M. L. T. 218=42 Ind. Cas. 366; 40 M. 212=31 M. L. J. 777=20 M. L. T. 490=5 L. W. 625=(1919) M. W. N. 400=38 Ind. Cas. 73; 23 C. W. N. 115=49 Ind. Cas. 355. It is only where the suit is for one or more of the reliefs in s. 92 (1) that it must be brought under that section. A suit by the worshippers of temple for declaration that certain land is temple land and for an injunction restraining defendant's alienation is not within s. 92. 42 Ind. Cas. 260. A suit praying for removal of trustee and for a declaration that alienation made by trustee is void comes under this section. A. I. R. 1925 All. 683=47 A. 770=23 A. L. J. 601=89 Ind. Cas. 40; see also A. I. R. 1925 Mad. 689=21 L. W. 525=88 Ind. Cas. 375.

A suit under this section is maintainable for removal of *de facto* trustee and for appointment of new trustee and for vesting trust property in him. 97 P. R. 1918=173 P. W. R. 1918=47 Ind. Cas. 683; see also 89 Ind. Cas. 40=23 A. L. J. 601=A. I. R. 1925 All. 683=47 A. 770. Court has power to appoint a *mutawali* in certain circumstances independent of this section. A. L. R. 1933 Lah. 570=34 P. L. R. 81=A. I. R. 1933 Lah. 127=141 Ind. Cas. 169. Head of *muti*, though not trustee, has similar obligations, and if public are interested in the performance of those obligations they can sue him under s. 92. A. I. R. 1927 Mad. 614=52 M. L. J. 415=25 L. W. 461=(1927) M. W. N. 233=50 M. 567=39 M. L. T. 37=101 Ind. Cas. 420. Where suit is not for vindication of public right but of a private right of being a co-trustee, s. 92 does not apply. 1927 Mad. 338=97 Ind. Cas. 480. Test, whether s. 92 applies or not is to see whether suit is for vindication of public rights or for vindication of private rights. A. I. R. 1927 Mad. 338=97 Ind. Cas. 480. Clauses (a) and (b) are distinct. A. I. R. 1930 Mad. 229=1929 M. W. N. 744=122 Ind. Cas. 455. Section 92 is mandatory. It is not necessary to obtain sanction under the

Religious Endowment Act, and without such sanction a removal could be ordered. (1916) 2 M. W. N. 351=4 L. W. 444=37 Ind. Cas. 688. Where individuals sue citizens for rights of worship or performing festivals, no sanction is necessary. 3 L. W. 512=35 Ind. Cas. 88. Suit for declaration that plaintiff is *mahant* is not barred. 34 Ind. Cas. 502. Suit under s. 92 is a representative one. 40 Mad. 110=3 L. W. 305=(1916) 1 M. W. N. 402=31 M. L. J. 229=34 Ind. Cas. 384. In order to make s. 92 applicable it is not necessary that the existence of trust should be admitted by the defendant. A. I. R. 1924 Pat. 657=5 P. L. T. 30=80 Ind. Cas. 980. Section 92 will not apply where claim is based on plaintiff's personal right of possession mingled with a claim based on breach of trust. A. I. R. 1923 Pat. 309=67 Ind. Cas. 464; see also A. I. R. 1924 Lah. 131=4 Lah. 295=5 Lah. L. J. 480=73 Ind. Cas. 645; A. I. R. 1923 A. 319=21 A. L. J. 191=45 A. 335=71 Ind. Cas. 767; 75 Ind. Cas. 670=(1921) Pat. 6; 76 Ind. Cas. 89=A. I. R. 1924 Pat. 502=5 P. L. T. 231; A. I. R. 1923 All. 120=20 A. L. J. 977=45 A. 215=71 Ind. Cas. 420. Under s. 92 it is presupposed that an express or constructive trust created for public purposes of a charitable or religious nature exists, but where the nature or existence of such a Court is in dispute s. 92 will not apply. A. I. R. 1934 Nag. 277; see also 150 Ind. Cas. 193=11 O. W. N. 323=A. I. R. 1934 Oudh 118.

**Express Trust.**—The expression "express or constructive trust" is not limited to "trust" as in English law "constructive trustee" includes person holding fiduciary position such as head of a *mutf* whose doings can be enforced in a Court of law. A. I. R. 1927 Mad. 614=50 M. 567=52 M. L. J. 418=25 L. W. 461=(1927) M. W. N. 233=39 M. L. T. 37=108 Ind. Cas. 427. Under s. 92 a suit against express trustees is maintainable. A. I. R. 1924 All. 884=22 A. L. J. 866=47 A. 17=84 Ind. Cas. 631; see also 86 Ind. Cas. 799=A. I. R. 1925 Cal. 1106.

**Constructive trust.**—Plaintiffs alleged that they were the *pujhris* of a temple that the management and control thereof was vested in them and that the defendant who were receiving certain profits and income for the use of the temple were not using them and consequently plaintiffs prayed for an order calling upon the defendants to render a true and complete account of the income and profits: *Held* that the claim was one alleging breach of a constructive trust for religious purposes and asking for accounts and that therefore it fell directly within sub-section (1) of section 92 and the suit was not consequently maintainable without the Advocate-General's sanction. 32 Bom. L. R. 1435=A. I. R. 1931 Bom. 33=128 Ind. Cas. 891. Constructive trustees include persons holding particular fiduciary position. A. I. R. 1924 Bom. 193=25 Bom. L. R. 747=84 Ind. Cas. 808. A stranger to a trust who receives money or property from the trustee, which he knows to be part of the trust estate, are to be handed or handed to him in breach of the trust is a constructive trustee; and the cases of a constructive trustee, or *dejuris* trustee, or trustee *de son tort* are covered by s. 92, C. P. Code. A. I. R. 1935 Cal. 805=39 C. W. N. 1103.

**Charitable Trust.**—All charitable corporations exist solely for the accomplishment of charitable purposes. Like other trustees, they also are subject to the jurisdiction of the Court. A. I. R. 1931 Mad. 12=59 M. L. J. 770=129 Ind. Cas. 235=53 M. 737. Charitable corporations are subject to Court's jurisdiction as they are trustees of the corporate properties. A. I. R. 1931 Mad. 12=53 M. 737=59 M. L. J. 770=33 L. W. 113=129 Ind. Cas. 235; see also A. I. R. 1930 All. 582=(1930) A. L. J. 1291=52 A. 863=128 Ind. Cas. 385. Collector's sanction is necessary for a suit claiming relief by injunction restraining defendants from preventing plaintiffs from enjoying the uses and objects for which property was dedicated. A. I. R. 1930 Sind 204=126 Ind. Cas. 49.

**Religious Trust.**—Where a person builds temple either out of his own funds or funds collected by subscription, direction, by him regarding manner of management and person by whom it is to be managed is not illegal. A. I. R. 1926 Mad. 150=51 M. L. J. 457=58 Ind. Cas. 208. Where endowment is partly secular and partly religious, before allocation to religious uses trust is governed by section 92. 122 Ind. Cas. 337. Suit for declaration of title to property attached to religious and charitable institutions is out of the scope of section 92. A. I. R. 1929 Lah. 740=120 Ind. Cas. 161; see also 99 Ind. Cas. 755=2 Lah. L. J. 457; A. I. R. 1930 Mad. 226=1929 M. W. N. 744=122 Ind. Cas. 455; A. I. R. 1925 Pat. 544=4 Pat. 471=88 Ind. Cas. 1035; 23 C. W. N. 138=49 Ind. Cas. 799. Mausoleum, mosque and *Khangah* of religious Muhammadan, founder of new religious order to whom there could be no succession is constructive trust of a religious nature for public purposes. 4 O. L. J. 174=40 Ind. Cas. 101; see also 38 Ind. Cas. 200=5 L. W. 402. Under s. 92 trust



must be for public purposes of religious or charitable nature. A. I. R. 1923 Mad. 376 = 17 L. W. 31 = 32 M. L. T. 47 = (1923) M. W. N. 111 = 46 M. 309 = 73 Ind. Cas. 991 ; see also 40 M. L. J. 289 = 62 Ind. Cas. 655. In a suit for change of management of a religious endowment, it is not the views of the majority entitled to sue, but original purposes of trust that must be looked to. A. I. R. 1926 Lah. 100 = 7 Lah. 275 = 27 P. L. R. 115 = 94 Ind. Cas. 695 ; see also A. I. R. 1921 Mad. 388 = 44 M. 205 = 59 Ind. Cas. 464. Where defendants raised constructions of trust property which interfered with public rights, suit by members of public some of whom were also trustees for demolition should be decreed. A. I. R. 1924 All. 850 = 46 A. 813 = 22 A. L. J. 747 = 81 Ind. Cas. 294. Person put in charge as *pujari* of an idol is a servant and not a trustee and a suit against him under this section is not maintainable. A. I. R. 1923 All. 247 = 21 A. L. J. 310 = L. R. 4 A. 190.

**Private Trust.**—The Advocate-General is not concerned with private trusts. A. I. R. 1921 Bom. 338 = 24 Bom. L. R. 1060. Persons claiming to be as heir of founder, is *prima facie* entitled to management of private trust. A. I. R. 1931 Bom. 170 = 32 Bom. L. R. 1687 = 129 Ind. Cas. 741. Beneficial interest in private trusts vests in definite individuals while in public trust it is vested in fluctuating body. A useful test for a Judge to apply to see whether the evidence satisfies the conditions of the private trust, is to ask himself whether any of the acts testified to by the witnesses could have been prevented or penalised by proceedings for trespass. A. I. R. 1922 All. 519 = 20 A. L. J. 789 = 77 Ind. Cas. 97. *Woodroffe and Ameer Ali's C. P. Code*, s. 92 ; see also A. I. R. 1922 P. C. 252 = 24 Bom. L. R. 937 = 49 I. A. 100 = 36 C. L. J. 57 = 49 C. 459 = 27 C. W. N. 174 = 67 Ind. Cas. 561. Persons having no interest in trust property cannot impeach acts of private trustee. 56 Ind. Cas. 707.

**Public Trust**—Whether purpose, is public or not, is to be found out from circumstances of each case. A. I. R. 1921 Pat. 511 = 75 Ind. Cas. 670 ; 8 A. L. J. 1120. Comparative evidence of other temples being public or private even when admitted by parties or held by Court to be proved should be excluded in considering the question whether temple in question is public or private. A. I. R. 1928 Mad. 879 = 113 Ind. Cas. 635. In deciding question as to whether a temple is public or private, *inam* proceedings are of great importance. *Ibid.* Where Hindu public freely uses temple for centuries without permission, strong evidence is required to prove temple to be private. 113 Ind. Cas. 635. Existence of obvious tests such as the use by the public, worship by the public and offerings by the public should be found out for determining whether endowment is public or private. A. I. R. 1924 Pat. 502 = 5 P. L. T. 231 = 76 Ind. Cas. 89. If surrounding circumstances indicate that beneficial interest vested in the public and not in individuals although the control and management vested in the members of the family the Court is entitled to hold that the trust was for public purposes. 1 P. L. T. 428 = 57 Ind. Cas. 270 ; see also 51 Ind. Cas. 42 = 10 L. W. 135 ; 34 A. 468 = 9 A. L. J. 809 = 11 Ind. Cas. 166 ; 20 C. L. J. 312 ; 45 Ind. Cas. 213 = 5 O. L. J. 97 ; 38 Ind. Cas. 800 = 20 O. C. 49 ; 34 Ind. Cas. 551 = 4 L. W. 228 ; 36 Ind. Cas. 270 = 31 M. L. J. 202 ; 51 Ind. Cas. 42 = 10 L. W. 135. Public means a section of the public. *Wakf* for maintenance of *Khan-Khos* and for distribution of alms and charities is a public trust. 11 P. 288 = 12 P. L. T. 817 = 136 Ind. Cas. 417 = A. I. R. 1932 Pat. 33 = A. L. R. 1932 P. 373. Where there is no direct evidence of dedication circumstances appearing in the evidence may raise a presumption of dedication to the public. Long user by the public worship by the public, and offerings by the public are some of the tests for considering whether there should be a presumption of dedication. 32 Bom. L. R. 1435 = A. I. R. 1931 B. 33 = 128 Ind. Cas. 891. Where the defendant contends that a trust is a private one, the cause of action survives after his death. 1934 A. L. J. 531 = A. I. R. 1934 All. 315.

**Direction of the Court.**—The words "where the direction of the Court is deemed necessary for the administration of any such trust" mean that where the Court has to give direction in nature of framing a scheme or otherwise for the administration of the trust. Mere appointment of *mutwali* is not such a direction. A. I. R. 1928 Cal. 368 = 55 Cal. 1254 = 32 C. W. N. 835 = 110 Ind. Cas. 416. Where persons interested in trust desire to modify scheme remedy is not by application but by fresh suit under this section. A. I. R. 1927 Sind 1 = 21 S. L. R. 220 = 97 Ind. Cas. 398. Where temple built from funds collected by subscription founder can make management hereditary where subscribers do not object to it. A. I. R. 1926 Mad. 1150 = 51 M. L. J. 457 = 98 Ind. Cas. 208. Court can remove trustee if necessary for continuance of institution. Interest of the institution and not of individuals is to be seen. A. I. R. 1926 Mad. 1150 = 51 M. L. J. 457 = 98 Ind. Cas. 208. This section

contemplates cases where the direction of the Court may be necessary even though there have no breach of trust. 148 Ind. Cas. 1153=35 Bom. L. R. 1119=A. I. R. 1934 Bom. 26.

**Administration of trust.**—The object of enquiry, in a suit under s. 92 is to devise the best method for fully and effectually carrying out the purposes for which the trust was created. In settling a scheme of management the Court has a wide discretion; the wishes of the founder regarding the management might be taken into consideration; but the primary right of the Court is to consider the general interests of the body of the public for whose benefit the trust is created and the Court might vary any rule of management which it finds to be impracticable or unsuited to the best interests of the institution. A. I. R. 1916 P. C. 132=43 C. 1085=14 A. L. J. 741=20 C. W. N. 1118=31 M. L. J. 290=24 C. L. J. 198=35 Ind. Cas. 30. Court's jurisdiction to frame a scheme is not excluded by existence of a temple committee. 39 M. 700=30 M. L. J. 29=32 Ind. Cas. 211. Court sanctioning scheme for administration of charitable trust is competent to vary from time to time on an application without fresh suit. 43 Ind. Cas. 772. Where liberty to apply is reserved in favour of certain persons under scheme, others cannot apply. A. I. R. 1930 Mad 226=1929 M. W. N. 774=122 Ind. Cas. 455. A scheme which goes beyond what is decided in scheme suit, and decides matters which come within the purview of s. 92 is so far *ultra vires*. A. I. R. 1930 Mad. 226=1929 M. W. N. 744=122 Ind. Cas. 455. Where a scheme is settled, a direction for applying for modification is *ultra vires*. A. I. R. 1928 Mad. 268=108 Ind. Cas. 199. True test of legal propriety of clause in a scheme is whether relief granted by that Court is such relief that if it was being sought before scheme was sanctioned, it would have to be sought by suit under s. 92. A. I. R. 1930 Mad. 226=122 Ind. Cas. 455. Where the institution is controlled by scheme, the Court has no power to interfere except by some method provided by scheme even where trustee omits to comply with scheme terms. A. I. R. 1929 Mad. 526=(1929) M. W. N. 300=120 Ind. Cas. 874; see also A. I. R. 1929 Mad. 625=119 Ind. Cas. 469.

**Persons having interest in the trust.**—Persons who are in the habit of worshipping at a temple and of making offerings and of giving subscriptions are persons having an interest in the temple and are entitled to maintain a suit under this section with necessary sanction. A. I. R. 1932 All. 708=1932 A. L. J. 886; 9 O. W. N. 966; A. L. R. 1933 Lah. 583=A. I. R. 1933 Lah. 920=146 Ind. Cas. 136. In a suit for declaration that certain property and income therefrom is *wakf*, certain person is its trustee and alienations thereof are void, heirs of the founder of the trust have *locus standi*. A. L. R. 1933 Lah 721=A. I. R. 1933 Lah. 670. Suit by constant visitors of temple who are close relatives of founder is maintainable. A. I. R. 1929 All. 133=1929 A. L. J. 438=117 Ind. Cas. 828; see also A. I. R. 1929 Lah' 428=116 Ind. Cas. 451. Collaterals of founder have sufficient interest to entitle them to sue. A. I. R. 1929 Lah. 428=116 Ind. Cas. 451. "Descendants in female line from founder of charity have an interest" therein although not directly obtaining benefit. A. I. R. 1924 P. C. 221=51 I. A. 282=47 M. L. J. 361=47 M. 884=22 A. L. J. 983=26 Bom. L. R. 1121=40 C. L. J. 454=29 C. W. N. 154=82 Ind. Cas. 804. Persons not having interest in trust will not be entitled to sue even with Advocate-General's written consent. A. I. R. 1924 P. C. 221=51 I. A. 282. Where founder lays down persons in whom the right of control is vested, they are not the only persons who can sue. A. I. R. 1929 Lah. 428=116 Ind. Cas. 461. A suit under this section can be maintained by Hindus of neighbouring villages attending the temple on important occasions. A. I. R. 1926 Mad. 267=49 M. L. J. 746=1926 M. W. N. 40=91 Ind. Cas. 924; see also A. I. R. 1925 Lah. 189=5 Lah. 455=85 Ind. Cas. 111; 35 M. L. J. 661=9 L. W. 1=25 M. L. T. 86. Mere worshipper as such cannot sue for possession of trust properties. A. I. R. 1925 Rang. 294=3 Rang. 213=89 Ind. Cas. 623; 96 Ind. Cas. 934=A. I. R. 1926 Lah. 425=8 Lah. L. J. 231=27 P. L. R. 833. Where property is dedicated to *chuttran* all persons entitled to receive food can sue. A. I. R. 1928 Mad. 268=108 Ind. Cas. 199. If the persons are interested in the trust it is not necessary that they should be personally affected. A. I. R. 1927 Mad. 462=50 M. 726=25 L. W. 594=(1927) M. W. N. 197=53 M. L. J. 545=102 Ind. Cas. 270; see also 44 C. L. J. 339=A. I. R. 1927 Cal. 130=31 C. W. N. 184=99 Ind. Cas. 205; see also A. I. R. 1929 Bom. 193=31 Bom. L. R. 349=117 Ind. Cas. 523. Interest must be clear, present and substantial. A. I. R. 1926 Mad. 466=23 L. W. 240=92 Ind. Cas. 950; A. I. R. 1926 Lah. 100=7 Lah. 275=27 P. L. R. 115=94 Ind. Cas. 695; A. I. R. 1930 Lah. 1=11 Lah. 142=31 P. L. R. 424=124 Ind. Cas. 305; A. I. R. 1935

Mad. 1018=86 Ind. Cas. 371; A. I. R. 1926 All. 518=101 Ind. Cas. 744; 73 Ind. Cas. 302; 58 Ind. Cas. 124=(1920) M. W. N. 478; 43 M. 720=30 M. L. J. 504=56 Ind. Cas. 450. Mere right to worship in a temple is not interest sufficient to sue for a scheme. 42 M. 360=36 M. L. J. 395=50 Ind. Cas. 693. The question whether there are sufficient grounds for the removal of a *shebait* is within discretion of the Court and the Court will be guided by the consideration of the welfare of the trust. 30 C. L. J. 177=24 C. W. N. 478=54 Ind. Cas. 5. Members of Church need not sue by virtue of office. 39 M. 1056=30 M. L. J. 423=3 L. W. 348=34 Ind. Cas. 557. Person who are in the habit of going to the *Thakurdwara* in the evening to worship the idol are persons who have sufficient interest in the trust to entitle to institute a suit under s. 92. A. L. R. 1933 Oudh 606=A. I. R. 1933 Oudh 22=9 O. W. N. 966=140 Ind. Cas. 896.

**Trust and Trustee.**—The words "trust" and "trustee" as used in s. 92 have not been used in any technical sense of the terms as used in English law or in the technical sense in which word "*wakf*" is used in the Mahomedan law. The words have been used in the ordinary sense. "Trust" in the most enlarged sense in which that term is used in English jurisprudence may be defined to be one equitable right, title or interest in the property, real or personal, distinct from the legal ownership thereof; and "trustee" is a person holding the legal title of property under an express or implied agreement to apply it and the income arising from it to the use and for the benefit of another person. Under the English conception of the term, trust conveys the idea of two estates and two parties. Had the word "trust" been used in the Code in the technical sense of the English jurisprudence the section would have been inapplicable either to *wakfs* of the Mahomedan law or to *debutter*s of the Hindu law. But it has been held in long series of decisions that this section does apply to Mahomedan *wakfs* and to Hindu *debutter*s where there is no conception of two estates and two ownerships. What is required for the purposes of section 92 is to find whether or not there is property burdened with obligations for public purposes of a charitable or religious nature. It will apply in all cases, whether *wakf* or not, where there is a clear indication that there is an obligation annexed to the property in favour of religious or charitable objects of a public nature. 11 P. 288=12 P. L. T. 817=136 Ind. Cas. 417=A. I. R. 1932 Pat. 33=A. L. R. 1932 Pat. 373.

**Parties.**—In a suit under s. 92, only the trustee is a necessary party and not those who may be in possession of trust properties even adversely to the trust. 12 P. L. T. 817. In a suit under s. 92 the defendants must be alleged to be either *de jure* or *de facto* managers of the trust and not merely servants of the trust. 1931 M. W. N. 898. Where the suit property is the service Inam of the *Archakas*, burdened with the service to the temple the appropriation of the income by the *Archakas* is not misappropriation of trust income and the *Archakas* are not managers *de son tort* of the trust. 1931 M. W. N. 898. Suit by only some of the persons obtaining sanction is not maintainable. A. I. R. 1930 Mad. 129=30 L. W. 951=1929 M. W. N. 911=58 M. L. J. 39=53 M. 223=124 Ind. Cas. 200; A. I. R. 1927 Lah. 382=100 Ind. Cas. 838. It is desirable that permission to apply should be given to any person interested in the trust. A. I. R. 1928 Mad. 268=108 Ind. Cas. 199. Suit by one relator with Advocate-General's sanction is valid where all cannot join on account of death or some other good reason. All living relators however must be added as parties. A. I. R. 1925 Sind 1=76 Ind. Cas. 345. Where trust is created for public purposes suit lies for settling scheme, and a heir at law is a proper party to such suit. A. I. R. 1923 Mad. 376=17 L. W. 31=32 M. L. T. 47=46 M. 300=73 Ind. Cas. 991. A trustee is not prevented from being plaintiff. A. I. R. 1925 Mad. 820=48 M. L. J. 535=87 Ind. Cas. 194. Where under Scheme Board of Trustee was given liberty to apply to the Court for directions, the Board as a whole must apply. A. I. R. 1929 Mad. 625=119 Ind. Cas. 469. Any decree passed, in suit under s. 92 is binding not only on the trustees, but also on all the worshippers. A. I. R. 1925 Mad. 1070=(1925) M. W. N. 505. In a suit instituted for settlement of scheme for *Dargah*, *Muttawalli* in possession is necessary party. A. I. R. 1929 Mad. 635=122 Ind. Cas. 644. Transferees of trust property can be impleaded. A. I. R. 1925 All. 683=47 A. 770=23 A. L. J. 601=89 Ind. Cas. 40; see also A. I. R. 1925 Cal. 187=80 Ind. Cas. 44; 32 Ind. Cas. 80=42 Cal. 1135; 33 Ind. Cas. 45=38 M. 1064. Son of defendant is necessary party in a suit to remove hereditary trustee. (1917) M. W. N. 550=6 L. W. 9=38 Ind. Cas. 133. In a suit for framing a scheme persons also *bona fide* allege to be trustees thereto, should be made parties. 50 Ind. Cas. 58. A trustee is not prevented from being plaintiff. A. I. R. 1925 Mad. 820=48 M. L. J. 535=87 Ind. Cas. 194.

Question of interest must be determined on the facts of each case. A. I. R. 1921 Mad. 563=41 M. L. J. 20=68 Ind. Cas. 631. Suit to recover trust property from trespasser or trustee transferee cannot be brought under s. 92 by virtue of either r. 3 or r. 10 (2) of Order 1. 28 C. L. J. 4=47 Ind. Cas. 111. A suit lies against trustees *de son tort*. A. I. R. 1924 All. 884=47 A. 17=22 A. L. J. 866=84 Ind. Cas. 631; see also A. I. R. 1925 Mad. 212=78 Ind. Cas. 950; A. I. R. 1922 All. 542=21 A. L. J. 105=44 A. 652=69 Ind. Cas. 990; 40 Ind. Cas. 165. Persons in possession of trust properties under claim adverse to trust are not necessary parties. 11 Pat. 288=12 P. L. T. 817=A. I. R. 1932 Pat. 33. When a scheme of management of public religious trust provides for its modifications by the Court on application by any person interested in the institution, any person who may, from time to time, have an interest in the institution whether or not he was party to the suit in which the scheme was originally framed, can apply for modification of the terms of the scheme. A. I. R. 1937 Bom. 124.

**Sanction.**—Advocate-General's permission is necessary unless plaintiff has a special claim or interest. 35 Ind. Cas. 846. With due sanction any two persons can sue where object of suit is to secure certain advantage to trust. 3 L. W. 512=35 Ind. Cas. 88. Where sanction is granted to more than two persons all must join. 29 M. L. J. 231=31 Ind. Cas. 236. Sanction granted for suit under s. 92 means any suit which may be raised under the section. It is not confined to one of the species of suits that could be raised on the application. 48 C. 493=25 C. W. N. 794=30 M. L. T. 194=48 I. A. 12 (P. C.)=62 Ind. Cas. 737 (P. C.). Status and position of those who come forward as representatives of community is an important consideration in giving sanction. Before giving sanction notice should be issued to the trustees. A. I. R. 1930 Mad. 129=30 L. W. 954=(1929) M. W. N. 911=58 M. L. J. 39=53 M. 223=124 Ind. Cas. 220. But sanction is not invalidated by want of notice to defendants. (1930) M. W. N. 456. Sanction is necessary even where suit does not specifically ask for relief mentioned in s. 92 but does so by implication. A. I. R. 1927 Mad. 886=26 L. W. 274. Fresh sanction is not required where new party is added but scope of scheme is not enlarged. A. I. R. 1929 Mad. 635=122 Ind. Cas. 644. Where some reliefs sanctioned by Collector while others refused, suit may be tried so far as relief sanctioned. A. I. R. 1923 Bom. 428=79 Ind. Cas. 200. Sanction is not necessary in the case of a suit in which one trustee sues another for accounts. A. I. R. 1923 Nag. 298=6 N. L. J. 209=74 Ind. Cas. 45; see also A. I. R. 1927 Mad. 948=39 M. L. T. 214=105 Ind. Cas. 194; 52 Ind. Cas. 628; 40 B. 439=18 Bom. L. R. 335=34 Ind. Cas. 167; A. I. R. 1922 Mad. 17 (F. B.)=15 L. W. 18=45 M. 113=41 M. L. J. 608=69 Ind. Cas. 304; A. I. R. 1923 Nag. 298; A. I. R. 1922 Mad. 17 (F. B.). This section is not applicable to suits by worshippers of temple for declaration that it is trust property. 1 Lah. L. J. 150=84 P. L. R. 1922=67 Ind. Cas. 320; see also 26 C. W. N. 587=A. I. R. 1921 Cal. 405=69 Ind. Cas. 910. Suit for declaration that the property is *wakf*, does not require sanction. A. I. R. 1927 Lah. 350=28 P. L. R. 486=8 Lah. 111; see also A. I. R. 1927 All. 257=49 A. 435=25 A. L. J. 329=99 Ind. Cas. 1045; A. I. R. 1925 Pat. 544; 4 Pat. 741=7 P. L. T. 4=88 Ind. Cas. 1035; A. I. R. 1928 Lah. 888=113 Ind. Cas. 120.

The condition precedent to the proper institution of a suit under s. 92 is the obtaining of the sanction of the Advocate-General and no other condition for the maintainability of a suit is to be found in the Code. The amendment of the law embodied in the present s. 92 has obviated the necessity for a representative suit. A. I. R. 1925 Mad. 1070=1925 M. W. N. 505; see also A. I. R. 1926 Mad. 280=50 M. L. J. 42=22 L. W. 701=92 Ind. Cas. 823. Objection as to sanction cannot be waived, for the object of sanction is that trustees should not be sued unless there is *prima facie* case against real trustee. A. I. R. 1926 Mad. 970=24 L. W. 413=(1926) M. W. N. 686=97 Ind. Cas. 462. Sanction obtained against a person who is not a trustee cannot subsequently be availed of against real trustee. *Ibid*; see also A. I. R. 1928 Lah. 717=116 Ind. Cas. 334; (1930) M. W. N. 456.

**Forum.**—Suit under s. 92, C. P. Code can be tried by Additional Judge by virtue of assignment of the functions of the District Judge under the Bengal Civil Courts Act, s. 8 (2). A. I. R. 1921 Cal. 210=48 C. 53=62 Ind. Cas. 115; see also 52 Ind. Cas. 45=22 O. C. 93; 31 Ind. Cas. 397. Suit under s. 92 cannot be referred to arbitration, as it is not a suit for determination of private rights. A. I. R. 1923 Nag. 112=6 N. L. J. 7. A suit under s. 92, C. P. Code, should be brought in place where the subject-matter of the trust *i. e.*, the trust property or trust money, or any of it is situate. 1935 M. W. N. 607=42 L. W. 505=A. I. R. 1935 Mad. 981=69 M. L. J. 274.

**Compromise of suit.**—A judge has Jurisdiction to pass a decree on the basis of *bona fide* compromise in a suit brought under section 92. A. I. R. 1925 Cal. 187=80 Ind. Cas. 44 ; see also 18 C. W. N. 1264. Court should not sanction compromise of suit under s. 92 under which any portion of trust properties is given to any party. 37 M. L. J. 489=47 Ind. Cas. 611. Where plaintiff approves appointment of certain persons as committee, the decree is not consent decree. A. I. R. 1927 Lah. 382=100 Ind. Cas. 838. Fraudulent compromise does not bar subsequent suit. 108 Ind. Cas. 199=A. I. R. 1928 Mad. 268. As regards effect of compromise by some of the plaintiffs, *vide* A. I. R. 1928 P. C. 16=32 C. W. N. 482=55 I. A. 96=55 C. 519=48 C. L. J. 55 (P. C.)=108 Ind. Cas. 361.

**Abatement of suit.**—Although one of the plaintiffs obtaining sanction for instituting suit dies, neither the suit nor appeal, therefrom abates. A. I. R. 1925 Mad. 244=47 M. L. J. 745=20 L. W. 882=85 Ind. Cas. 666 ; 97 P. R. 1918=73 P. W. R. 1918=47 Ind. Cas. 983. Suit under this section is prosecuted as representing general public, and so it does not abate on the death of the original plaintiff. 48 C. 493=13 L. W. 318=(1921) M. W. N. 24=17 N. L. R.; 37=484 I. A. 12=25 C. W. N. 794=30 M. L. T. 194 (P. C.)=62 Ind. Cas. 737. In a suit under s. 92, for removal of the defendant and framing a scheme, death of the defendant pending the suit does not cause the whole suit to abate. A. I. R. 1926 Mad. 162=48 M. 688=49 M. L. J. 324=91 Ind. Cas. 109. But order bringing on record new trustees instead of old ones, in evasion of section 92 is without jurisdiction. A. I. R. 1931 Cal. 281=52 C. L. J. 78=130 Ind. Cas. 866.

**Addition of Parties.**—Where suit is brought within sanction, subsequent amendment by addition of new parties without obtaining fresh sanction does not invalidate suit. A. I. R. 1923 Sind 35=16 S. L. R. 221=79 Ind. Cas. 539 ; see also 34 Ind. Cas. 384=40 M. 110 ; 43 M. 707=38 M. L. J. 201. Whether new sanction is necessary when new defendant is added, depends on whether scope of suit is enlarged or altered thereby. A. I. R. 1926 Mad. 970=24 L. W. 419=97 Ind. Cas. 462 ; see also 58 Ind. Cas. 124=(1920) M. W. N. 478 ; A. I. R. 1929 Mad. 635 ; but see A. I. R. 1928 Lah. 717. In order to be parties defendants do not require any permission of the Government Advocate. A. I. R. 1927 Rang. 180=5 Rang. 263=103 Ind. Cas. 261 ; see also 32 C. W. N. 482=A. I. R. 1928 P. C. 16=26 A. L. J. 464=55 I. A. 96=55 C. 519=30 Bom. L. R. 774=108 Ind. Cas. 361 (P. C.).

**Clause (a).**—Clauses (a) and (b) are distinct. A. I. R. 1930 Mad. 226=(1929) M. W. N. 744=122 Ind. Cas. 455. Section 92 applies as much to removal of a trustee *de son tort* as to the removal of ordinary trustee. 151 Ind. Cas. 138=A. I. R. 1934 Pat. 321. If the District Judge can remove a trustee for unfitness, it is difficult to see why he cannot do so for dishonesty or breach of trust. Section 92 does not say that a trustee being guilty of breach of trust can only be removed by a suit. A. I. R. 1937 Bom. 124. Trustees can be removed for mismanagement of endowment. In removing a trustee Court should be guided solely by considerations of the welfare of the trust. A. I. R. 1924 Cal. 1024=81 Ind. Cas. 850. Trustees may be removed for breach of trust. 21 A. 200. A *Mahant* can be removed from management of *muff* property, for keeping mistress and gambling. 80 Ind. Cas. 674=27 O. C. 149. To justify removal of trustee there must be some gross negligence or misconduct as to evidence a want either of capacity or of fidelity which is calculated to put the trust in jeopardy. Failure in the discharge of duty on account of mistake or misunderstanding is not a ground for removal unless such failure shows want of capacity to manage the trust. If the trustee renews a lease for his personal benefit, purchases the trust property concerns in a breach of trust, asserts a hostile title with knowledge that it was unfounded, fails to keep accounts, wrongfully alienates trust property, obstructs the management and wants only to waste the estate he may be removed. A. I. R. 1928 Cal. 225 ; see also A. I. R. 1925 Mad. 1070=(1925) M. W. N. 505 ; A. I. R. 1924 Lah. 107=4 Lah. 364=77 Ind. Cas. 398 ; A. I. R. 1927 Mad. 1033. A. I. R. 1922 P. C. 325=45 M. 565=43 M. L. J. 536=49 I. A. 237=24 Bom. L. R. 1214=21 A. L. J. 250=27 C. W. N. 317=36 C. L. J. 524 (P. C.)=68 Ind. Cas. 1. Clause in scheme providing for removal of trustee merely by application is invalid. A. I. R. 1931 Nag. 82=131 Ind. Cas. 423. A trustee cannot be removed for his mere indebtedness or failure to keep accounts. A. I. R. 1929 All. 433=(1929) A. L. J. 438=117 Ind. Cas. 828 ; A. I. R. 1923 Mad. 163=16 L. W. 839=32 M. L. T. 89=74 Ind. Cas. 35. The mere fact that hereditary trustees of a temple are also its *archakas* is no ground for their removal. 30 M. L. T. 101 (H. C.)=64 Ind. Cas. 816. Removal is discretionary with the Court. 24 C. W. N. 690=47 C.

866=58 Ind. Cas. 705 ; 48 Ind. Cas. 897=1918 M. W. N. 555. Order refusing to remove is not appealable. A. I. R. 1927 Mad. 427=99 Ind. Cas. 425. Trustees cannot be removed for the acts of his predecessor. A. I. R. 1928 Mad. 879=113 Ind. Cas. 635. Where tentative scheme provides for appointment but not removal of trustees appointed under it, such trustee cannot be removed except by a regular suit under s. 92. A. I. R. 1926 Mad. 799=94 Ind. Cas. 610. Trustee appointed by founder cannot be removed by him except under s. 92. A. I. R. 1922 All. 499=44 A. 721=20 A. L. J. 712=68 Ind. Cas. 786 ; see also 53 Ind. Cas. 605=42 M. 668=26 M. L. T. 143=(1919) M. W. N. 522. District Judge cannot take action under C. P. Code to protest public endowment property without suit under s. 92. 16 A. L. J. 742=47 Ind. Cas. 850. Suit by worshippers and beneficiaries in property attached to shrine for removal of trustee falls under s. 92. 11 P. W. R. 1918=44 Ind. Cas. 879. Clause in scheme providing for appeal from order removing or appointing trustee will not apply to order declining to remove a trustee. 5 L. W. 596=(1917) M. W. N. 520 ; 38 Ind. Cas. 415. Head of a *mutf* is not a trustee of *mutf* property and no suit lies for his removal. 32 M. L. J. 271=40 Ind. Cas. 627 affirmed 39 M. L. J. 98 (P. C.) ; but see 37 M. L. J. 231 ; 52 Ind. Cas. 914 ; 40 M. 745 ; 43 C. 707 ; 33 Ind. Cas. 583 (P. C.) ; 43 M. 253. *Bona fide* assertion of adverse title is no ground for removal. A. L. R. 1933 Mad. 571.

**Clause (b).**—Even where trust deed enjoins only one trustee Court can appoint additional trustees if interest of institution demand it. A. I. R. 1298 Mad. 955=(1927) M. W. N. 405=108 Ind. Cas. 649. Even where plaintiff has not prayed for the removal of the trustee Court can appoint Receiver *pendente lite*. A. I. R. 1923 Mad. 224=41 M. L. J. 545=68 Ind. Cas. 565. Section 92 is mandatory and cases which before 1908 held that founder or his heirs could sue for due performance of trust and to remove them and to appoint new ones without invoking aid of s. 92 are no longer good law. A. I. R. 1925 Pat. 544=4 Pat. 741=7 P. L. T. 4=88 Ind. Cas. 1035. Power of appointing new trustee and of making a scheme for administration of property is restricted to s. 92 only. A. I. R. 1925 Pat. 544=4 Pat. 741=7 P. L. T. 4=88 Ind. Cas. 1035.

**Clause (c).**—The words "vesting any property in a trustee" refer to cases where a new trustee is appointed and are not intended to cover cases in which it is sought to recover possession of the trust property by ejecting trespassers who are wrongfully in possession of it. 10 Rang. 342=A. I. R. 1932 Rang. 132=140 Ind. Cas. 317. Where in a suit under s. 92 prayer for possession is also included, Court is not justified in returning the plaint. 23 A. L. J. 601=89 Ind. Cas. 40 ; see also 31 M. L. J. 280=4 L. W. 264=36 Ind. Cas. 678.

**Clause (d).**—Suit for accounts and directions as to what should be done with trust funds falls within s. 92. A. I. R. 1924 Bom. 518=26 Bom. L. R. 950=86 Ind. Cas. 490 ; see also 28 Ind. Cas. 886 ; 2 C. L. J. 431 ; 21 B. 48 ; A. I. R. 1931 Bom. 33=32 Bom. L. R. 1435 ; A. I. R. 1928 Mad 879=113 Ind Cas 635. Suit by trustees against a co-trustee for accounts falls under cl. (1) and cannot be instituted except in conformity with Cl (1). A. I. R. 1921 Mad. 696=16 L. W. 155=1922 M. W. N. 83=66 Ind. Cas. 837 ; but see A. I. R. 1922 Mad. 17=45 M. 113=15 L. W. 18=41 M. L. J. 608=69 Ind Cas. 304 ; A. I. R. 1929 Nag. 298. Suit by a trustee against a person whom he alleges to have lawfully dismissed is outside the scope of s. 92. A. I. R. 1921 Mad. 403=14 L. W. 38=(1921) M. W. N. 439=62 Ind. Cas. 761. Suit by general trustee for balance of amount due brought against subordinate trustee is bad for want of sanction. A. I. R. 1921 Mad. 479=14 L. W. 238=62 Ind. Cas. 911.

**Clause (g).**—In a suit under s. 92 for removal of defendant and for forming a scheme, the scheme can be framed only if the trust is a public one. 148 Ind. Cas. 882=1934 A. L. J. 531=A. I. R. 1934 All. 315. In a suit brought under s. 92 of Code, the Court framed a scheme for the management of a trust and appointed trustees and made therein a provision for appointment of a successor in case any of the appointed trustees died : *Held* that the provision in a scheme giving authority to Court to appoint a successor in place of a deceased trustee could not be regarded as a modification of the original scheme as such was not *ultra vires*. A. I. R. 1937 Oudh 193. The right to have a scheme framed or accounts examined under s. 92 accrues before passing of the preliminary decree and originates from facts which constitute the foundations of the suit itself. Preliminary decree only records the findings of the Court, and the rights cannot be said to be originated from the preliminary decree. A. I. R. 1937 Cal. 150. No relief can be granted with reference

to prayers not covered by sanction. A. I. R. 1930 Mad. 129=58 M. L. J. 39=53 M. 223=124 Ind. Cas. 220. Modification or alteration of a scheme being in effect to frame a new scheme is subject to conditions under s. 92. A. I. R. 1929 Rang. 20=6 R. 594=114 Ind. Cas. 293; see also A. I. R. 1934 Pat. 443. Interests of beneficiaries should be protected from waste in settling a scheme for the conduct of institution. A. I. R. 1929 P. C. 27=31 Bom. L. R. 243=33 C. W. N. 352=(1929) P. C. 50 (P. C.) =114 Ind. Cas. 10. Where temple properties and *Kattalai* properties dedicated for special purposes separate scheme should be framed by each. A. I. R. 1928 Mad. 955=(1927) M. W. N. 405=108 Ind. Cas. 649. Where malversation is not proved no scheme can be settled. A. I. R. 1928 Mad. 401=105 Ind. Cas. 375. Section 75, Religious Endowments Act, cannot be construed as having retrospective effect with regard to scheme settled under s. 92. A. I. R. 1929 Mad. 322=115 Ind. Cas. 54. Scheme not ascertaining income expenses and remuneration of person in charge is unsatisfactory. 6 L. W. 134=42 Ind. Cas. 474. Where the Court is asked to frame scheme, one essential enquiry to be made is what are properties belonging to the charity, and for this purpose Court is entitled to go into questions not directly in suit. A. I. R. 1921 Mad. 563=41 M. L. J. 20=68 Ind. Cas. 631. A scheme should be made where there has been gross mismanagement of affairs of temple. A. I. R. 1924 Mad. 168=18 L. W. 247=74 Ind. Cas. 115. In framing scheme for Hindu charitable endowment Court can sanction *cypres* application if there is general charitable intention. Trustee himself cannot apply income *cypres* without Court's sanction. 37 M. L. J. 489=47 Ind. Cas. 611. Suit for partition of right of management and superintendence in respect of property of temple does not lie. 39 A. 651=15 A. L. J. 666=41 Ind. Cas. 835. Court has complete discretion in arranging for the management of trust although it must take into consideration such matters, as the founder desired. 40 Ind. Cas. 177; 17 A. L. J. 957=58 Ind. Cas. 566. Where the scheme is settled the suit comes to an end and the parties cannot invest Court with internal management of religious institutions. A. I. R. 1926 Mad. 559=49 M. 580=1926 M. W. N. 226=95 Ind. Cas. 720; see also 47 Ind. Cas. 548=(1918) M. W. N. 595=8 L. W. 357; A. I. R. 1926 Mad. 655=1926 M. W. N. 283=95 Ind. Cas. 5; 85 Ind. Cas. 188=A. I. R. 1925 Mad. 411=47 M. L. J. 714=20 L. W. 687. No distinction can be drawn between interpretation of an Act, and of scheme under section 92. A. I. R. 1924 Mad. 369=47 M. 139=18 L. W. 237=(1923) M. W. N. 664=75 Ind. Cas. 189. Where scheme drawn up by the Court contains a provisions permitting parties interested to apply to the Court for directions and modifications to be made in the scheme already existing, the proper remedy for defects discovered in the original scheme is to apply to the Court and not to file a regular suit. A. I. R. 1922 Mad. 413=(1922) M. W. N. 477=70 Ind. Cas. 579. Court sanctioning a scheme for administration of a charitable trust can vary the scheme from time to time. But the rules of succession of High Priest cannot be raised. A. I. R. 1924 Cal. 330=37 C. L. J. 281=76 Ind. Cas. 220. Where most of the worshippers are Bengalee Muhammadans scheme should provide for majority of Bengalee Mahomedan Trustees. A. I. R. 1924 Rang. 134=2 Bur. L. J. 208. A suit for the settlement of scheme for the management of the trust properties in rotation is barred under this section. A. L. R. 1933 Mad. 529=A. I. R. 1933 Mad. 70=63 M. L. J. 703=1932 M. W. N. 1340=140 Ind. Cas. 197. Where the decree in a suit for a scheme for the due administration of a mosque declared the right of certain persons to use a mosque, held that a clause could not be inserted in the scheme framed pursuant to the decree preventing those persons from joining the congregational prayers or from offering or conducting their own prayers in the mosque. 34 Bom. L. R. 655=A. I. R. 1932 Bom. 434=138 Ind. Cas. 810=A. L. R. 1932 Bom. 999. Obviously no trivial deviation from formal compliance with the rules under the scheme will do any real injury to any party, and no injury is done if the rules have been substantially complied with. A. I. R. 1932 Mad. 658=36 L. W. 669=140 Ind. Cas. 443=1932 M. W. N. 1311. A direction in the scheme decree providing for the removal of the trustee on a petition made in Court is *ultra vires*. A. I. R. 1931 Nag. 82=131 Ind. Cas. 423. A rule in the scheme of management giving liberty to apply for modification of the scheme is not *ultra vires*. 33 Bom. L. R. 546=A. I. R. 1931 Bom. 388=133 Ind. Cas. 823. Such application can be made without sanction of the Advocate-General. *Ibid*; see 33 Bom. L. R. 520=A. I. R. 1931 Bom. 391=133 Ind. Cas. 740=55 Bom. 414; 24 B. 45; 27 Bom. L. R. 872; 28 Bom. L. R. 309; 37 C. L. J. 281; A. I. R. (1923) P. 420.

**Clause (h).**—"Further or other relief" in clause (h) must be read *ejus dem generis* with clauses (a) to (g) of section 92 (1). 33 Bom. L. R. 1575=135 Ind. Cas. 806=A. I.

R. 1932 Bom. 65. Where the relief sought is joint management of a mosque by plaintiffs together with defendants and the residents of their *mohalla*, it is not one under clause (h). 33 Bom. L. R. 1575=135 Ind. Cas. 806=A. I. R. 1932 Bom. 65. The words "further or other relief" in this clause means reliefs on the nature of those which are enumerated in cls (a) to (g). A. I. R. 1928 P. C. 16=55 C. 519=55 I. A. 96=32 C. W. N. 482=26 A. L. J. 464=54 M. L. J. 609=30 Bom. L. R. 774=48 C. L. J. 55=108 Ind. Cas. 361. Legislature did not intend to include relief against third parties in cl. (h) under "further or other relief." *Ibid.* Decree for actual possession against transferees from trustee cannot be passed. A. I. R. 1925 All. 683=47 A. 770=23 A. L. J. 601=89 Ind. Cas. 40. Words "such further relief as the nature of the case may require" cover every subsidiary order or direction on details necessary for carrying out main purposes of section. 40 Ind. Cas. 182. Under s. 92 (h) Court has inherent power to appoint new trustees and to direct old ones to deliver properties. 17 A. L. J. 957=58 Ind. Cas. 566.

**Other reliefs.**—Prayer for declaration that property is not personal property of defendant but public charitable property is one for relief not covered by s. 92. A. I. R. 1930 Bom. 167=32 Bom. L. R. 205=125 Ind. Cas. 445; see also A. I. R. 1928 Rang. 143=6 Rang. 188=110 Ind. Cas. 595; A. I. R. 1926 Mad. 1029=24 L. W. 286=97 Ind. Cas. 630. Omission to include some of the reliefs' sanction invalidates suit if omission is material. A. I. R. 1928 Mad. 205=39 M. L. T. 628=107 Ind. Cas. 130; 85 Ind. Cas. 1045=A. I. R. 1925 Mad. 636=21 L. W. 71. Suit by new trustee against old to recover property is governed by s. 92. 42 B. 742=20 Bom. L. R. 954=48 Ind. Cas. 514. Though Court has very wide powers under s. 92, it cannot impose control which was not a part of the original trust. A. I. R. 1922 Mad. 409=(1922) M. W. N. 620=70 Ind. Cas. 87. Suit brought under s. 92 must be limited to matters included in it and it is not competent to grant reliefs other than those included therein. 50 P. W. R. 1919=144 P. R. 1919=51 Ind. Cas. 611. Decree for damages for loss caused to *Devashthanam* by the trustee's misconduct cannot be passed. A. I. R. 1926 Mad. 509=92 Ind. Cas. 520. Suit is not bad where additional prayer not covered by sanction was added and subsequently removed. A. I. R. 1927 Mad. 1033=26 L. W. 581=106 Ind. Cas. 134. Where there is no *mutwalli*, Court can appoint one in respect of a *wakf* even without suit under this section. A. I. R. 1928 Cal. 368=55 C. 1254=32 C. W. N. 835=110 Ind. Cas. 416.

**Court-fees.**—Suit under section 92 is governed by Art. 17 (4), Schedule II of the Court-Fees Act and not by section 7 (iv) (C). A. I. R. 1928 Lah. 113=8 Lah. 730=29 P. L. R. 97=10 Ind. Cas. 264. Madras High Court Fee Rules (1925) do not exempt payment of fees in respect of suits under s. 92. A. I. R. 1927 Mad. 940=53 M. L. J. 457=26 L. W. 378=105 Ind. Cas. 119; see also 12 C. L. J. 211=14 C. W. N. 932; 97 P. R. 1918=173 P. W. R. 1918; 19 A. 104; 11 M. 149 note. Where in a suit under s. 92 no beneficial interest is claimed by the plaintiff, but it is only claimed that the trustee should be compelled to restore misappropriated sums to trust. Art. 17 (b), Sch. II, Court-fees Act applies. A. I. R. 1925 Mad. 722=48 M. L. J. 514=87 Ind. Cas. 25.

**Limitation.**—Where the suit is brought on behalf of the public there is no bar of limitation. 69 Ind. Cas. 15=43 M. L. J. 448=(1922) M. W. N. 464=A. I. R. 1922 Mad. 394.

**Cost.**—Judge deciding absence of misfeasance cannot record decision that trust is public nor award costs. 26 C. W. N. 1354.

**Appeal.**—No appeal nor revision lies from an order of District Judge as *persona designata* under scheme of management of a charitable institution. A. I. R. 1926 Bom. 167=28 Bom. L. R. 64=93 Ind. Cas. 195. Orders passed in relation to a scheme sanctioned in scheme suit are not in execution. Hence no appeal lies. A. I. R. 1927 Mad. 1110=102 Ind. Cas. 633; A. I. R. 1930 Mad. 918=54 M. 315=60 M. L. J. 514=128 Ind. Cas. 515. Application to Court to enforce executable part of a scheme decree is one in execution, and order thereon is appealable. A. I. R. 1928 Mad. 61=39 M. L. T. 579=27 L. W. 32=107 Ind. Cas. 136. As regards appeal in scheme suit returned for representation but not represented within time, *vide* A. I. R. 1928 Mad. 456=28 M. L. W. 279=54 M. L. J. 629=108 Ind. Cas. 208. Where scheme is framed, appeal from order of the Court in the matter of its execution does not lie. A. I. R. 1926 Mad. 659=91 Ind. Cas. 794. Where Court reserves to itself right to confirm elections held under scheme framed by itself and application for confirmation



is filed by parties on one side and opposed by parties on other side, Court's order being decree is appealable as such. A. I. R. 1928 Rang. 168=6 Rang. 97=110 Ind. Cas. 41. Where remedy is not asked in the suit but given in the scheme, it cannot be and need not be asked in execution and as such order thereon is not appealable. A. I. R. 1924 Mad. 369=47 M. 139=75 Ind. Cas. 189. Where scheme provides for application to amend scheme order on such application not being in execution cannot be appealed against. A. I. R. 1926 Mad. 559=1926 M. W. N. 226=49 M. 580=95 Ind. Cas. 720. The rules framed by Court under a scheme decree to regulate the functions *Dharm Kartas* and to enforce office discipline are not appealable. A. L. R. 1933 Mad. 993.

**93. [S. 539, last para.]** The powers conferred by sections 91 and 92 on the Advocate General may, [outside the Presidency-towns], be, with the previous sanction of the "Provincial Government,"\* exercised also by the Collector or by such officer as the "Provincial Government"\* may appoint in this behalf.

**Local Government in Burma.**—The words "outside Presidency-town" within square brackets have been omitted and the words "Provincial Government" have been substituted by the word "Governor".—*Vide* G. B. Order of 1937.

**Scope.**—The Collector is not bound to sign every order that is issued to third persons and there is nothing wrong in the Collector delegating his power of signing the order to the Sheristadar and such an official act of his is presumed to have been done properly until contrary is proved. 27 L. W. 42=39 M. L. T. 628=107 Ind. Cas. 130=A. I. R. 1928 Mad. 205. But such order cannot be signed by the Assistant Collector during Collector's absence. 35 B. 243=13 Bom. L. R. 207. Conditional order is defective. 30 Ind. Cas. 17=39 B. 580=17 Bom. L. R. 625. The effect of the section is that no suit relating to public religious or charitable trust, outside the Presidency-town may be brought without the previous sanction of the Local Government whether by the Collector or by any other officer so that the fact that the Legal Remembrancer is in the United Provinces invested as a rule with the duties elsewhere discharged by the Advocate-General is no reason why for the purpose of a particular suit the Local Government may not appoint the Collector or any other officer to prosecute it. Hence a suit by the Collector is competent. (1931) A.L.J. 369=A. I. R. (1931) P. C. 121=(1931) P. C. 229=33 Bom. L. R. 968=35 C. W. N. 6,9=53 C.L.J. 537=61 M. L. J. 402=132 Ind. Cas. 745 (P. C.). Section 93 provides for two distinct matters, the appointment of an officer to exercise the powers conferred by ss. 91 and 92 of the Code on the Advocate-General and the "previous sanction" of the Local Government to the exercise of such powers. In each case both the appointment and the previous sanction of the Local Government to the exercise of such powers are necessary before the provisions of s. 93 can be utilized. Having regard to the terms of section 93 the previous sanction of the Local Government is necessary whether the suit is instituted by a Collector or by an officer appointed by the Local Government, or whether the suit is instituted by two or more persons with the consent in writing of such Collector or officer. 59 I. A. 121=53 A. 990=62 M. L. J. 249=55 C. L. J. 54=36 C. W. N. 257=35 L. W. 224=9 O. W. N. 53=1932 A. L. J. 182=34 Bom. L. R. 494=136 Ind. Cas. 461=A. I. R. 1932 P. C. 51=1932 M. W. N. 685=A. L. R. 1932 P. C. 56 (P. C.). The result of this decision is that large number of pending suits would have been rendered subject to dismissal through no fault of plaintiffs. The Public Suits Validation Act (XI of 1932) was passed to remove this hardship. It validated all such suits then pending, and also provided retrial of all claims which might have been in the meantime dismissed whether in the Court of first instance or in the Court of appeal, on the ground of the absence of the requisite sanction. *Vide* ss. 2, 3, 4 of the *Public Suits Validation Act of 1932*; see also 9 O. W. N. 966.

## PART VI.

### SUPPLEMENTAL PROCEEDINGS.

**94. [New.]** In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed,—  
Supplemental proceedings.

\* The words "Provincial Government" have been substituted for the words "Local Government" by G. I. Order of 1937.

(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison ;

(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property ;

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold ;

(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property ;

(e) make such other interlocutory orders as may appear to the Court to be just and convenient.

**Scope.**—A *prima facie* case must be established before a relief can be granted in an application for an interlocutory order. A. I. R. 1928 Cal. 469=55 C. 978=32 C. W. N. 576=112 Ind. Cas. 712.

**Clause (a).**—*Vide* Order 38, rules 1 to 4.

**Clause (b).**—*Vide* Order 38, rules 5 to 12 ; see also 14 W. R. 384 ; 31 C. L. J. 179. *Panchayat* being a public body can be compelled by Court to produce documents in its possession. A. I. R. 1928 Mad. 299=51 Mad. 1=54 M. L. J. 174=108 Ind. Cas. 760.

**Clause (c).**—*Vide* order 39. Order 39 governs s. 94. A. I. R. 1926 Cal. 604=30 C. W. N. 214=94 Ind. Cas. 871. Plaintiff is not entitled to temporary injunction on the ground that interference with collection of rent and breach of peace is apprehended. A. I. R. 1926 Cal. 601=30 C. W. N. 214=94 Ind. Cas. 871. Rule 2 (3) of order 39, is sufficiently wide and it applies to disobedience of all the injunctions under s. 94 also. A. I. R. 1926 Mad. 574=50 M. L. J. 401=95 Ind. Cas. 196. Injunctions cannot be granted by a Civil Court to party to proceeding under s. 40 of the Bengal Tenancy Act preventing him from further proceeding with application to Revenue Court under the same section. 5 P. L. J. 76=(1919) Pat. 461=53 Ind. Cas. 37. No doubt s. 94 (c) authorises the Court where injunction has not been obeyed to punish the delinquent. A. I. R. 1935 Pesh. 182.

**Clause (d).**—*Vide* Order 40, rules 1 to 5. The appointment of a receiver is discretionary with the Court. 16 C. W. N. 997.

**Clause (e).**—*Vide* 17 C. W. N. 318.

**95. [Ss. 491, 497]** (1) Where, in any suit in which an arrest or attachment has been effected or a temporary injunction granted under the last preceding section,—

(a) it appears to the Court that such arrest attachment or injunction was applied for on insufficient grounds, or

(b) the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the same, the defendant may apply to the Court and the Court may, upon such application, award against the plaintiff by its order such amount, not exceeding one thousand rupees, as it deems a reasonable compensation to the defendant for the expense or injury caused to him :

Provided that a Court shall not award, under this section, an amount exceeding the limits of its pecuniary jurisdiction.

(2) An order determining any such application shall bar any suit for compensation in respect of such arrest, attachment or injunction.

**Scope.**—In order to entitle the plaintiff to succeed in an action for damages under s. 95 it is necessary that process contemplated in his favour should have terminated in his favour or superseded or discharged. Section 95 applies only when the attachment is actually effected though a separate suit lies where a larger compensation than Rs. 1,000 is claimed, basis of the suit in any way differs from the basis

on which the compensation is allowed excepting that in a suit the plaintiff has to show that attachment was applied for not merely on insufficient grounds but that it was done maliciously and without probable cause. A. I. R. 1925 Bom. 357=49 B. 629=27 Bom. L. R. 525=87 Ind. Cas. 1026. Section 95 is not inapplicable to cases in which the plaintiff happens to be a minor, 158 Ind. Cas. 831=1935 M. W. N. 1055=42 L. W. 542=A. I. R. 1935 Mad. 886. Damage to prestige and humiliation do not amount to "injury" for which compensation can be awarded under s. 95. 39 C. W. N. 915. A person whose property was attached wrongfully can claim damages from the attaching creditor though acting *bona fide*. A. I. R. 1929 Lah. 200=112 Ind. Cas. 848. This provides for compensation as a limited and incidental relief; and in cases of wrongful attachment, it gives an alternative remedy. In a suit for damages for attachment before judgment, the plaintiff should prove that the defendant had no reasonable and probable cause for applying and also malice in fact. The rule in England is that actual malice must be proved, which this section allows a limited remedy without such proof. 35 M. 598=10 M. L. T. 365=(1911) 2 M. W. N. 414; 32 M. 170. Injury having been caused as a result of what was actually done though attachment was not completed, may entitle plaintiff to claim compensation. A. I. R. 1922 Mad. 206=45 M. 527=15 M. L. W. 440=66 Ind. Cas. 760. That the defendant was actually about to dispose up his property is sufficient to justify attachment before judgment but not on his mere straightened circumstances. 25 M. L. J. 45=9 L. W. 69=49 Ind. Cas. 86. A person whose property was attached wrongfully can claim damages from the attaching creditor though acting *bonafide*. A. I. R. 1929 Lah. 200=112 Ind. Cas. 848. A claim made in counter affidavit for compensation for wrongful attachment of property before judgment is no bar to a suit for damages. Section 95 acts as a bar only if either of the conditions mentioned therein have been fulfilled. 38 M. L. J. 324=55 Ind. Cas. 786. This section is not applicable in case of enforcement of security bond for larger amount than Rs. 1,000. A. L. R. 1933 Mad. 858=A. I. R. 1933 M. 671=145 Ind. Cas. 1011=38 L. W. 385=65 M. L. J. 342=1933 M. W. N. 985. Having regard to the express language of this section an order for compensation for attachment before judgment on sufficient grounds, must be embodied in the decree in the suit, and is not capable of being passed after the decree in the suit has been given. 17 M. L. J. 310. Amount of damages to be awarded by the Bombay High Court is not limited to Rs. 1,000 as by virtue of Rule 319 of that Court. S. 95 does not apply to suits under the ordinary original civil jurisdiction. A. I. R. 1926 Bom. 523=28 Bom. L. R. 1077=97 Ind. Cas. 763. If no evidence as to the damages suffered is forthcoming, general damages can be claimed in an action for damages under s. 95. Where an injunction was granted after hearing both parties on sufficient grounds, and the plaintiff has not filed in his suit it is uncertain if damages can be awarded. A. I. R. 1923 Mad. 352=17 L. W. 150=71 Ind. Cas. 450. Where on plaintiff's application a conditional order of attachment of certain movable was made under Order 38, rule 5 and the attachment was subsequently withdrawn on defendant's furnishing security compensation under s. 95 can be awarded as there is nothing in the section to exclude conditional attachment from its operation. 35 C. W. N. 546; see also (1931) M. W. N. 956; 25 M. L. T. 46. General damages such as damages for defamation or humiliation are also included in expense or injury in s. 95 for wrongful arrest. 32 Ind. Cas. 592=3 L. W. 30=(1916) M. W. N. 76. The question to be decided under s. 95 is whether there are no sufficient grounds for applying for attachment and not whether there are no reasonable grounds stated in the creditor's application for attachment. A. I. R. 1937 Nag. 126.

**Whether this section bars a regular suit.**—An order determining any application of the injured party for compensation under section 95 shall bar a suit for compensation in respect of such arrest, attachment or injunction. Therefore the injured defendant is at liberty to file an independent suit, instead of making an application under this section. 35 M. 598. The suit barred under s. 95 (2) and the application must be *ejus dem generis* with the same cause of action. 1932 M. W. N. 536=A. L. R. 1932 Mad. 973. It is doubtful whether, independently of section 95, upon proof that a person maliciously and without probable cause asked for an attachment before judgment and obtained it by making untrue statements to the Court, a cause of action in the nature of malicious prosecution would arise. 59 C. 1073=36 C. W. N. 447=A. I. R. 1932 Cal. 821. Except for malice or want of probable cause, damage cannot be awarded in an independent suit merely on the ground that an injunction was issued preventing him from doing what was subsequently held to be

within his right. A. I. R. 1928 Cal. 1=46 C. L. J. 455. Suit for damages can lie for having wrongfully obtained temporary injunction on insufficient grounds. A. I. R. 1927 Cal. 247=53 C. 1008=100 Ind. Cas. 318; 16 C. W. N. 540; 18 C. W. N. 1189; 30 C. W. N. 465. Tortious temporary injunction is a sufficient ground for a separate suit for compensation. In absence of sufficient grounds in an action under s. 95 (2) malice can be inferred if the plaintiff has suffered injury. A. I. R. 1922 Lah. 303=45 P. L. R. 1922=69 Ind. Cas. 523. In an independent suit for damages where plaintiff was not a party to the suit, it is not necessary to prove that the prosecution was taken out maliciously and without probable cause. In such a cause a suit will lie in case of wrongful attachment though made in good faith. A. I. R. 1924 Rang. 302=83 Ind. Cas. 433.

**Appeal.**—An appeal lies from an order under this section. 49 Ind. Cas. 86=25 M. L. J. 45=9 L. W. 69; 11 Ind. Cas. 917=4 Bur. L. T. 204. But no second appeal lies. 21 Ind. Cas. 756; 4 Bur. L. T. 204=11 Ind. Cas. 917. An appeal does not lie when an order under this section is passed by a Small Causes Court. 50 Ind. Cas. 886=36 M. L. J. 435=(1919) M. W. N. 490; 26 Ind. Cas. 359.

## PART VII.

### APPEALS.

#### APPEALS FROM ORIGINAL DECREES.

**96. [S. 540, Jud. Act, 1873, S. 43.]** (1) Save where otherwise Appeal from original decree. expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed *ex parte*.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

**Appeal, meaning of.**—There is no definition of appeal in the C. P. Code, but any application by a party to an appellate Court asking to set aside or reverse a decision of a subordinate Court is an appeal within the ordinary acceptance of the term, and it is no less an appeal because it is irregular or incompetent. 59 I. A. 283=63 M. L. J. 389=36 C. W. N. 803=34 Bom. L. R. 1065=1932 A. L. J. 643=9 O. W. N. 681=55 C. L. J. 528=137 Ind. Cas. 529=33 P. L. R. 621=A. I. R. 1932 P. C. 165=A. L. R. 1932 P. C. 435 (P. C.). The distinction between an appeal and an application for revision is that in the former case when the appeal is dismissed, the appellate Court exercises its jurisdiction while in the latter it is entirely discretionary with the High Court to exercise it or not. A. I. R. 1931 Nag. 17=130 Ind. Cas. 145. The word an "appeal" in this section includes the filing of a fresh appeal unless the dismissal of the first appeal bars a fresh one. A. I. R. 1933 Pat. 514=4 P. L. T. 405=75 Ind. Cas. 284.

**Appeal shall lie from every decree.**—In order that a decision may amount to a "decree" it a decision must be a final disposal whichever way it has been or may be decided. A. I. R. 1929 Mad. 404=122 Ind. Cas. 519. The right of appeal is a creature of statute and it can be exercised only by those in whom the power is vested expressly or impliedly by the statutes. 57 M. 670=150 Ind. Cas. 538=1934 M. W. N. 697=A. I. R. 1934 Mad. 360=39 L. W. 824=66 M. L. J. 532. This section gives right of appeal from every decree passed by a Court of original jurisdiction. 151 Ind. Cas. 25=A. I. R. 1934 All. 677; see also A. I. R. 1934 Oudh 307=11 O. W. N. 606; A. I. R. 1934 All. 531. Appeal does not lie from a prayer by person who sought the relief granted. A. I. R. 1930 Lah. 190=124 Ind. Cas. 673. Suit dismissed against minor defendant does not amount to a decree and as such no cross-appeal lies. A. I. R. 1929 Cal. 669=33 C. W. N. 742=24 Ind. Cas. 75. Because an appeal lies under the Letters Patent, does not necessarily mean that a similar appeal lies in every other case governed by the provisions of C. P. Code unless it is so allowed by the Code itself. A. I. R. 1929 Rang. 198=120 Ind. Cas. 693. Where two suits are in respect of the same transaction and a party is plaintiff in one and defendant in the other and *vice versa*, it is to be taken

that they are consolidated. One appeal is enough unless the party against whom the appeal is made is impleaded as respondent, *pro forma* or otherwise. A. I. R. 1930 All. 706=(1930) A. L. J. 842=52 A. 886=128 Ind. Cas. 390. Subsequent enactment during the pendency of a suit cannot take away the right of appeal which is a substantive one. A. I. R. 1930 All. 706=(1930) A. L. J. 842=52 A. 886=128 Ind. Cas. 390. An appeal lies under s. 96 from a decision in reference under s. 30 of the Land Acquisition Act, though not under s. 54. A. I. R. 1929 Mad. 223=29 L. W. 237=57 M. L. J. 387=115 Ind. Cas. 345. Right of appeal exists in all civil proceedings though not called suits, unless it is expressly barred by the Code. *Ibid.* Plaintiff can be said to have sustained an injury if joint possession instead of an exclusive one is awarded by a decree. A. I. R. 1924 Cal. 850=28 C. W. N. 865=40 C. L. J. 90=82 Ind. Cas. 386. Where the order in a decree was that certain defendants are not liable for *mesne* profits, appeal lies from a decree and not against judgment. A. I. R. 1924 Cal. 1006=39 C. L. J. 251=81 Ind. Cas. 527. No appeal lies from an order as to costs unless a question of principle is involved. A. I. R. 1921 All. 794=80 Ind. Cas. 39. Appeal does not lie from an order rejecting the claim of a person as a legal representative of deceased plaintiff, and not conclusively determining the rights of the parties. Hence remedy by way of revision lies. A. I. R. 1924 Mad. 813=47 M. L. J. 370=(1924) M. W. N. 763=80 Ind. Cas. 242. A preliminary decree cannot be appealed against after the passing of the final decree. But appeal may be allowed to be so amended as to convert into one against the final decree. 33 C. L. J. 414=25 C. W. N. 776=48 C. 1036=61 Ind. Cas. 928; see also A. I. R. 1925 Sind 178=18 S. L. R. 133=78 Ind. Cas. 978. Appeal must be dismissed if the decree appealed from has been set aside on review during the pendency of an appeal. 140 P. R. 1919=54 Ind. Cas. 966. Appeal lies against decree making defendants liable for their own costs on withdrawal of claim against some of them. 18 M. L. T. 460=31 Ind. Cas. 312.

An appellate Court can dismiss an appeal though originally remanded for taking additional evidence, if it afterwards find that it can stand. A. I. R. 1931 Cal. 353=34 C. W. N. 839=131 Ind. Cas. 562. If a review is successful to any extent whatever and appeal is pending, the proper cause is to draw a fresh decree as it appears in a final shape. 34 C. W. N. 1002=A. I. R. 1931 Cal. 323=130 Ind. Cas. 145; see also A. I. R. 1925 P. C. 174=89 Ind. Cas. 195=26 P. L. R. 526.

Where there is a difference of opinion between the two Judges of the High Court hearing the appeal from the *mofussil*, the opinion of the confirming Judge to prevail. A. I. R. 1925 Mad 1032=21 L. W. 721=86 Ind. Cas. 857. Interference with the finding of fact when the question depends on credibility or otherwise of witness of the trial Judge should so far as possible be avoided but it is otherwise when the question in issue depends upon circumstantial evidence and the evidence has not been shifted by the trial Court with reference thereto. A. I. R. 1922 Cal. 260=34 C. L. J. 384=25 C. W. N. 779=49 C. 132=66 Ind. Cas. 782; A. I. R. 1933 Oudh 242=10 O. W. N. 412; A. I. R. 1933 Oudh 142=10 O. W. N. 201. Decree in suit transferred from Small Cause Court to the Original Side under s. 23, Pro. S. C. C. Act is appealable. 45 Ind. Cas. 645. Order declaring the suit to have abated amounts to dismissal of suit though not expressly provided so by rr. 3 and 4, Order XXII, C. P. Code and hence is appealable. 34 Ind. Cas. 372=19 M. L. T. 364=30 M. L. J. 486=(1916) 1 M. W. N. 301. An order of remand under s. 151, C. P. Code is not appealable. It is however open to revision. 32 P. L. R. 169=A. I. R. 1931 Lah. 302. It is not necessary for the party aggrieved by an order under Order 23, rule 3 to appeal both from the order and the decree, in order to maintain his appeal against the order under Order 23, rule 3. 36 C. W. N. 1013.

**Appeal is continuation of suit.**—An appeal is continuation of original suit and appellate Court's decree is decree in suit. (1916) 1 M. W. N. 223=30 M. L. J. 379=33 Ind. Cas. 9=19 M. L. T. 268; see also 18 W. R. 261; 19 C. W. N. 359; 3 C. W. N. 62 (n); 4 C. W. N. 44; 30 Ind. Cas. 753=(1915) M. W. N. 844; 24 M. L. J. 112 (F. B.)=18 Ind. Cas. 55.

**Who can appeal.**—An appeal does not lie by a decree-holder from a decree with adverse finding. A. I. R. 1929 Pat. 586=8 Pat. 617=10 P. L. T. 643=119 Ind. Cas. 554. Appeal lies from a decree though formally in favour of a mortgagor but with adverse findings on their contentions on the strength of which the Court dismissed the plaintiff's suit. A. I. R. 1926 Mad. 974=51 M. L. J. 211=97 Ind. Cas. 346. Persons wrongly joined as defendant cannot appeal. Similarly no person

has a right of appeal unless he is prejudicially affected by a decision. 2 P. L. W. 108=41 Ind. Cas. 468. Where adverse finding necessarily arising in a case operates as *res judicata* and decree, one aggrieved by it has a right of appeal. 40 Ind. Cas. 771. Defendant has no right of appeal in finding of certain facts when a suit was dismissed for want of cause of action. 20 C. W. N. 1354=35 Ind. Cas. 837. Right of appeal exists by express rules of statute and when the competency of appeal is in question, it is for the appellant to establish his right. 43 C. 857=20 C. W. N. 594=23 C. L. J. 443=34 Ind. Cas. 934. Findings in judgments as between co-defendants in a suit dismissed and not embodied nor implied in a decree do not operate as *res judicata* nor does an appeal lie therefrom. A. I. R. 1924 Mad. 858=47 M. L. J. 612=(1924) M. W. N. 867=85 Ind. Cas. 868. Mere adverse finding in a particular matter against an appellant though suit against him was dismissed is not a sufficient ground for the maintenance of an appeal. A. I. R. 1925 Mad. 264=47 M. L. J. 743=20 L. W. 734=84 Ind. Cas. 945. Decree holder can appeal against adverse finding if it substantially be in issue and if the decree was passed in his favour merely on some other ground. A. I. R. 1924 Mad. 689=29 L. W. 63=83 Ind. Cas. 960=47 M. 633=(1924) M. W. N. 491. Where an appeal is dismissed respondent is not an aggrieved party, and therefore, he cannot appeal. A. I. R. 1923 Lah. 504=77 Ind. Cas. 477. Appeal lies against decision whether such decision was in favour of the plaintiff or not in a suit for rent where the plaintiff's title was proved but relation of the tenancy disproved. 43 C. L. J. 384=63 Ind. Cas. 520. Opinions on adverse finding made in the judgment by appellate Court cannot operate as *res judicata* when in point of law no appeal lay and when the Court was incompetent to adjudicate on the rights of the parties. 44 Ind. Cas. 723. Findings in judgment as between co-defendants in a suit dismissed and not embodied nor implied in a decree do not operate as *res judicata* nor does an appeal lie therefrom. A. I. R. 1924 Mad. 858=47 M. L. J. 612=(1924) M. W. N. 867=85 Ind. Cas. 868.

**An appeal shall lie from an *ex parte* decree.**—An appeal lies against a consent decree passed *ex parte* by a person not a party to the compromise by his abstention from appearance. A. I. R. 1928 Mad. 922=108 Ind. Cas. 784. In an appeal from *ex parte* decree appellate Court is to look to the merits only and whether there has been proper service of summons is not a subject-matter of an appeal but of special proceedings under Order XX. A. I. R. 1924 Rang. 137=2 Bur. L. J. 282=2 Rang. 108=79 Ind. Cas. 506. Where an *ex parte* decree was passed in a suit after hearing the plaintiff's application for re-hearing was rejected but no appeal therefrom preferred and appeal against decree was dismissed, it was held that no interference could be made in second appeal, the appeal having been dismissed on merits. The proper remedy was to appeal against the order to the District Judge. 39 A. 143=14 A. L. J. 1226=36 Ind. Cas. 277. Wrongly excluded evidence can be directed to be produced by the appellate Court even in case of *ex parte* decree. 34 Ind. Cas. 493=9 S. L. R. 191. In a suit for foreclosure, the Court made a compromise decree in which the present plaintiff was *ex parte*. No steps were taken to set aside *ex parte* decree and the present suit was brought for a declaration that the *ex parte* decree was a nullity: Held though the decree might be wrong it was not without jurisdiction. Not having questioned by way of appeal plaintiff is bound by it. (1931) A. L. J. 301=A. I. R. 1931 All. 425.

**No appeal from consent decree.**—Where the parties agree to abide by the finding on a particular matter the decision in such cases is in the nature of an arbitrator's award and as such is not appealable. 113 Ind. Cas. 365; see also 19 A. L. J. 14=43 A. 266=A. I. R. 1921 All. 310=59 Ind. Cas. 787; see also 109 Ind. Cas. 713=10 Lah. L. J. 333; A. I. R. 1926 Bom. 39=27 Bom. L. R. 1279=91 Ind. Cas. 294; A. I. R. 1926 All. 90=89 Ind. Cas. 586. Appeal does not lie from decisions arrived at by Court by spot inspection and oral statements at spot, at the instance of the parties themselves in a dispute respecting land. A. I. R. 1930 All. 127=(1930) A. L. J. 452=122 Ind. Cas. 685. Where parties agree as to the procedure to be adopted to come to decision on merit and also agree that such decision will be binding, the decision not being an adjustment under Order XXIII, bars a right to appeal therefrom. A. I. R. 1929 Oudh 451=6 O. W. N. 771=120 Ind. Cas. 826. When order recording compromise is not contested, decree passed in terms of such compromise is not appealable. 57 B. 206=35 Bom. L. R. 127=A. I. R. 1933 Bom. 205=144 Ind. Cas. 448=A. L. R. 1933 Bom. 209; A. L. R. 1933 Pat. 329; see also A. L. R. 1933 Sind 28=A. I. R. 1933 Sind 29=26 S. L. R. 395; A. I. R. 1929 Bom. 68=30 Bom. L. R. 1610.

Compromise decree can be appealed against by a person not a party to the compromise. 22 C. L. J. 332=20 C. W. N. 178=31 Ind. Cas. 426. Appeal lies from a decree on compromise by a person on whose behalf the suit was compromised by a party without authority. A. I. R. 1929 Oudh 385=6 O. W. N. 604=4 Luck. 562=118 Ind. Cas. 753. Sub-section (3) does not take away the right of appeal by a person who denies that he was a party to the alleged decree. A. I. R. 1929 Sind 32=114 Ind. Cas. 101. Appeal lies against an order directing that a consent decree be passed, not limited merely to the property in dispute. A. I. R. 1929 Sind 32=114 Ind. Cas. 101. Appeal lies as to the exact nature of the compromise in dispute. A. I. R. 1928 Cal. 108=46 C. L. J. 353=106 Ind. Cas. 529. Consent decree ceases to be consent decree if consent to it has been caused by the compulsion of the Court. A. I. R. 1923 Lah. 129=69 Ind. Cas. 653 Order passed with the consent of the pleader under a mistake of fact can be set aside only if grave injustice is established. A. I. R. 1923 P. C. 184=40 C. L. J. 272=47 M. L. J. 164=26 Bom L. R. 189=46 M. L. J. 160=77 Ind. Cas. 355. The Judge does not become arbitrator in a case where he is asked to dispose of it off and in a particular manner by the parties unless they agree to abide by his decision. 76 Ind. Cas. 309=A. I. R. 1924 Sind 134=18 S. L. R. 305; see also 44 L. W. 351=1936 M.W.N. 740=A. I. R. 1936 Mad. 856=71 M. L. J. 281; 15 Lah. 726=A. I. R. 1934 Lah. 176; 15 Lah. 305=149 Ind. Cas. 1102=A. I. R. 1934 Lah. 67. S. 96 (3) is not applicable to mutation proceedings. 35 P. L. R. 395. Where the parties to a suit agree and say that the determination of their disputes by a third person is to be final between them, it is to be regarded as an undertaking not to appeal. 60 C. L. J. 173. Where a decree is passed on the basis of the statements filed by the plaintiff and defendant specifically praying that a decree may be granted in favour of the plaintiff against the defendant is a consent decree and no appeal lies against it. 156 Ind. Cas. 1035. The fact of the defendant not objecting to a particular relief decree, does not make a decree a consent decree, if the relief is eventually given. 49 Ind. Cas. 840=15 N.L.R. 39. Decree passed under Ord r 23, rule 3, is not *ipso facto* a consent decree within s. 96. A decree based on finding against the consent is not within s. 96 (3) and is appealable. A decree dismissing the suit on the ground of an alleged compromise cannot be said to be under Order XXIII, rule 3 46 Ind. Cas. 775 It is within the competence of the Court to set aside an interlocutory order made by consent if a proper case is made out by an application in the same suit. A. I. R. 1933 Bom. 362=32 Bom. L. R. 667=125 Ind. Cas. 697. Second appeal does not lie against the order correcting omission made in judgment of the appellate Court of a suit compromised in appeal. A. I. R. 1928 Lah. 352=9 Lah. 176=30 P. L. R. 135=119 Ind. Cas. 257. The only remedy by which an objection can be taken by a party to a compromise is either by review or by a separate suit and not by way of appeal. A. I. R. 1926 Cal. 512=91 Ind. Cas. 620. Appeal does not lie from order recording compromise after decree has been passed thereon. A. I. R. 1926 Cal. 412=29 C. W. N. 928=87 Ind. Cas. 248; A. I. R. 1922 Mad. 446=43 M. L. J. 290=(1922) M. W. N. 495=70 Ind. Cas. 425; 66 Ind. Cas. 837=A. I. R. 1921 Mad. 697=15 L. W. 155=(1922) M. W. N. 83; 66 Ind. Cas. 258=A. I. R. 1922 Lah. 399=3 Lah. 175; 30 C. L. J. 231=57 Ind. Cas. 539. The plea of limitation having been waived the decree following is a consent decree and hence not appealable. A. I. R. 1920 P. C. 139=18 A. L. J. 625=39 M. L. J. 68=28 M. L. T. 97=12 L. W. 260=24 C. W. N. 1055=22 Bom. L. R. 1313=47 I. A. 200=56 Ind. Cas. 539. Order dismissing a suit under Order 23, rule 3 is not appealable. 20 C. W. N. 752=34 Ind. Cas. 186. Decree under Order 23, rule 3 is passed after order to record a compromise. Consent decree passed without such order can be set aside on appeal in spite of bar under s. 96 (3). 33 Ind. Cas. 769. There is a distinction between a decree passed by consent of parties to which s. 96 applies and a compromise of suit under Order 23, rule 3. Section 96 does not in all cases bar an appeal which involves a consent decree. Where an order recording a compromise is passed under Order 23, rule 3, an appeal lies from it under Order 43, rule 1, cl. (m) and s. 96 (3) is not a bar to such appeal. 29 S. L. R. 437=A. I. R. 1936 Sind 59. Resolution by the District Board to the effect that appeal from the decision be not preferred is no ground for the dismissal of an appeal if filed by the Board itself. A. I. R. 1930 Oudh 434=7 O. W. N. 843=128 Ind. Cas. 732. Where after the decree of the appellate Court, the parties entered into a compromise and acted on it and the defendant agreed not to prefer a second appeal, but in spite of that filed a second appeal: Held the appellant was estopped from and could not be allowed to carry on the second appeal. A. I. R. 1931 Nag. 126. The next friend of minor through his pleader signed an agreement to abide by the decision of the

Court after the local inspection. The Court acting upon the agreement made a local inspection and pronounced judgment. Record did not disclose that he was aware that minors have been involved and that he applied his mind to the question whether the agreement was for their benefit : *Held* that it was not a reference to arbitration. It amounts to a compromise between the parties and as no express leave of the Court was granted, the minor is not bound by that compromise. It is not a consent decree under s. 96 (3) from which no appeal can be preferred. (1931) A. L. J. 76. A decree passed on the basis of challenged oath is found on evidence and is not a consent decree. A. I. R. 1934 Lah. 67.

**97. [New.]** Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

**Appeal from final decree where no appeal from preliminary decree.**

**Scope.**—If appeal against preliminary decree in partition suit is not filed, right to object against the order embodying the report of the Commissioner appointed by Court to which party submitted is lost. A. I. R. 1930 P. 557=11 Pat. L. J. 456=127 Ind. Cas. 841. If a party aggrieved by a preliminary decree does not appeal from it, he is under this section precluded from disputing its correctness afterwards. A. I. R. 1933 Oudh 466=A. I. R. 1933 Oudh 410=146 Ind. Cas. 310=10 O. W. N. 884. Points which could have been raised in an appeal against the preliminary decree, cannot be raised again in an appeal against final decree when the preliminary decree was not appealed against. 40 B. 321=18 Bom. L. R. 38=33 Ind. Cas. 749. In an appeal against the final decree, appellate Court can question the correctness of the preliminary decree though appellant cannot. A. I. R. 1924 Cal. 80=38 C. L. J. 111=75 Ind. Cas. 319. Bar of limitation cannot be pleaded as an appeal against final decree if not already pleaded before passing of the preliminary decree. 50 Ind. Cas. 747. Provisions of personal decree in preliminary decree must be appealed against within the period of limitation ; otherwise right to object is lost. 6 O. W. N. 969=123 Ind. Cas. 215 ; see also 6 O. W. N. 974 ; 11 O. W. N. 1196=151 Ind. Cas. 1055. Where the Memorandum of Appeal filed purported to be from the final judgment and decree and was accompanied by a copy of the final decree and a copy of the preliminary judgment, held that the appeal in no conceivable view be regarded as an appeal from the preliminary decree which was not even referred to in the Memorandum and no copy of which accompanied it. 59 C. 781=36 C. W. N. 420=A. I. R. 1932 Cal. 589=140 Ind. Cas. 662.

**Where no preliminary decree is drawn up.**—There can be no appeal under this section from a preliminary finding unless a formal decree is drawn. 15 Bom. L. R. 382=37 B. 480=19 Ind. Cas. 894 ; see 14 Bom. L. R. 560=36 B. 536=16 Ind. Cas. 159 ; 16 Bom. L. R. 67=38 B. 331=23 Ind. Cas. 605 ; but see 19 C. W. N. 755=20 C. L. J. 476. Under the Civil Procedure Code it is the duty of the Court to draw up a decree. 38 B. 331=16 Bom. L. R. 67=23 Ind. Cas. 605.

**Right to appeal against preliminary decree.**—Right to appeal against the preliminary decree still exists even after the final decree is passed but if no appeal is preferred against preliminary decree it cannot be objected to in an appeal against the final decree. A. I. R. 1930 Pat. 177=11 Pat. L. T. 61=127 Ind. Cas. 449 (F.B.) ; 32 C. W. N. 858=48 C. L. J. 28=117 Ind. Cas. 557=A. I. R. 1928 Cal. 720 ; A. I. R. 1928 Nag. 68=105 Ind. Cas. 567 ; A. I. R. 1929 Nag. 359=120 Ind. Cas. 334 ; 68 Ind. Cas. 475 ; 19 C. W. N. 1132=33 Ind. Cas. 59 ; see also A. I. R. 1935 Lah. 482=157 Ind. Cas. 416. Appeal from a preliminary decree after final decree is not competent unless the final decree is also appealed against. A. I. R. 1926 Cal. 157=91 Ind. Cas. 358 ; A. I. R. 1928 Lah. 73=107 Ind. Cas. 610 ; 71 Ind. Cas. 290 ; 82 P. L. R. 1922=A. I. R. 1921 Lah. 265=67 Ind. Cas. 278 ; 33 C. W. N. 414 ; 25 C. W. N. 776 ; 67 Ind. Cas. 261 ; 33 Ind. Cas. 146=18 Bom. L. R. 76 ; 33 Ind. Cas. 137. An appeal from preliminary decree after the final decree is competent. Appeal against final decree is unnecessary for maintaining an appeal against preliminary decree though final decree may not wholly be dependant on preliminary decree. A. I. R. 1929 Cal. 689=50 C. L. J. 566=34 C. W. N. 66=57 C. 1013=123 Ind. Cas. 305 (F.B.). Final decree passed during the pendency of an appeal against preliminary decree is valid. A. I. R. 1929 A. 287=1929 A. L. J. 480=51 A. 640=119 Ind. Cas. 510 ; 107 Ind. Cas. 581 ; A. I. R. 1928 All. 192. If during the pendency of appeal against preliminary decree, final decree is passed, the



appeal thereby does not become an appeal against the final decree. A. I. R. 1924 Oudh 299=74 Ind. Cas. 485. If appeal against preliminary decree after final decree is allowed, the final decree falls to the ground. A. I. R. 1928 Cal. 167=106 Ind. Cas. 128. Court cannot go behind the preliminary decree while passing the final decree. A. I. R. 1929 All. 252=1929 A. L. J. 425=115 Ind. Cas. 462; see also 111 Ind. Cas. 713=26 A. L. J. 1370=A. I. R. 1929 All. 65. Success in appeal from preliminary order renders appeal against final order based on preliminary one, unnecessary, though appeal may be necessary if final order refers to what happened after preliminary decree. A. I. R. 1928 Mad. 107=39 M. L. T. 563=27 L. W. 267=107 Ind. Cas. 793. Where no steps are taken to set aside the final decree after the success of appeal against preliminary decree, such an appeal is infructuous. A. I. R. 1927 Cal. 492=54 C. 328=31 C. W. N. 550=103 Ind. Cas. 538. Where in an appeal against preliminary decree no stay order was obtained and the final decree was passed appellant must appeal or at least inform the appellate Court of the final decree. A. I. R. 1926 Bom. 43=27 Bom. L. R. 1492=92 Ind. Cas. 545.

Where appeal was filed against preliminary decree but was dismissed before passing of the final decree, it was held that right to second appeal exists even after the final decree is passed. A. I. R. 1927 Cal. 559=101 Ind. Cas. 15. Second appeal against preliminary decree cannot stand unless final decree also is appealed against. A. I. R. 1924 Cal. 543=78 Ind. Cas. 290. Where preliminary order entitling certain persons to *mesne* profits was followed by another order determining amount it was held that in one appeal against second order, first order could not be attacked when appeal against it was time-barred. A. I. R. 1930 Lah. 24=113 Ind. Cas. 270. Final decree based on preliminary decree ceases to be effective on the reversal of preliminary decree. 35 M. L. J. 361=48 Ind. Cas. 7. Appeal against preliminary decree can be heard even after passing of the final decree subsequently. 20 C. W. N. 1174=1 Pat. L. J. 406=35 Ind. Cas. 873. An appeal against preliminary decree after the final decree is passed but before it is signed is maintainable. 22 C. W. N. 831=46 Ind. Cas. 802; see also 52 Ind. Cas. 697. Order fixing interest at any suitable rate in a preliminary decree, cannot be objected to, if no appeal has been made against it. 4 P. L. J. 306=51 Ind. Cas. 738. Order of remand after settlement of certain issues is a preliminary decree and hence appeal lies therefrom. 20 C. W. N. 43=32 Ind. Cas. 866. Finding that notice was necessary is not preliminary decree and hence is not appealable. (1917) 3 U. B. R. 1=11 Bur. L. T. 95=40 Ind. Cas. 677. Finding on an issue whether the plaintiff was an agriculturist is not a preliminary decree. A. I. R. 1922 Bom. 336=70 Ind. Cas. 728. Single appeal from both the preliminary and final decree is permissible in a suit for accounts, and the appellant is bound by the valuation in the plaint for the purposes of Court-fee. A. I. R. 1921 Mad. 406=14 L. W. 389=(1921) M. W. N. 558=70 Ind. Cas. 392. Appeal from order granting application from final decree having been objected by the judgment-debtor on the ground that the decree was satisfied, is chargeable with *advalorem* Court-fee. A. I. R. 1925 Oudh 102=27 O. C. 227=84 Ind. Cas. 742. Decision on a preliminary issue as to jurisdiction or limitation is not a preliminary decree. A. I. R. 1921 Bom. 220=23 Bom. L. R. 92=45 B. 627. Execution case subsequently dismissed does not debar an appeal from preliminary order in execution. If the appeal succeeds, execution will be in accordance with the decree of the appellate Court. A. I. R. 1928 Cal. 804=115 Ind. Cas. 591.

**98. [S. 575.]** (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed :

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in opinion on a point of law, they may state the point of law upon which they differ and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

\*“(3) Nothing in this section shall be deemed to alter or otherwise affect any provision of the Letters Patent of any High Court.”.

**Local Amendment in British Burma.**—In sub-section (3) for the words “any High Court” substitute “the High Court.”—*Vide* G. B. Order of 1937

**Scope**—“This section with certain variations reproduces section 575 of the former Code. But there is difference between the two Codes which make a very important difference for the purposes of a reference such as that now before me. Under the old Code the appeal was referred to one or more of the other Judges. Under the present Code it is a point of law that is to be heard by one or more of the other Judges. The result is that whereas under the old Code I could have disposed of this appeal on a reference, under the present Code I cannot. The intention of section 98 is that the Judges hearing the appeal should come to a complete decision with the reservation on the point of law on which they differ, and they should by their judgments make it clear that if the point of law is decided in one way it will have a certain final result, and if it decided in another way it will have another and a different final result.” *Per Jenkins C. J.* in 18 C. W. N. 33 (36); see also 39 C. 353=14 C. L. J. 552. If an appeal against a decree heard by two Judges, only that part of decree will be reversed upon which the Judges were agreed and decree will be confirmed as to the rest. A. I. R. 1928 Mad. 180=51 M. 291=51 M. L. J. 703=28 L. W. 158=109 Ind. Cas. 153. Section 98 governs when Bench differs in deciding an appeal. A. I. R. 1926 Cal. 121=52 C. 1018=91 Ind. Cas. 897; A. I. R. 1926 Lah. 65=7 Lah. 179=27 P. L. R. 50=8 Lah. L. J. 13=93 Ind. Cas. 344. Where two Judges differ appeal is confirmed. A. I. R. 1925 Mad. 1032=21 L. W. 721=86 Ind. Cas. 857; A. I. R. 1926 Lah. 65=7 Lah. 179=27 P. L. R. 50=8 Lah. L. J. 13=93 Ind. Cas. 344; 22 C. L. J. 525=31 Ind. Cas. 965. Section 98 is confined to appeals from Mofussil Courts and does not apply to Letters Patent appeal. A. I. R. 1923 Bom. 218=76 Ind. Cas. 317. Section 98 (2) proviso restricts third Judge to give decision of points of law referred. A. I. R. 1922 Oudh 189=9 O. L. J. 219=25 O. C. 213=68 Ind. Cas. 209. Third Judge disagreeing with referring Judges can only express his opinion. A. I. R. 1922 Cal. 541=26 C. W. N. 985. If he disagrees he should confirm the judgment. *Ibid.* In case of Division Bench differing in point of law reference must be made under s. 98. 109 P. W. R. 1916=154 P. L. R. 1916=71 P. R. 1917=34 Ind. Cas. 714. Section 98 does not apply in revision. 18 M. L. T. 591=32 Ind. Cas. 330; 85 Ind. Cas. 1016=47 M. L. J. 876. Award given should be governed when Judges differ in Land Acquisition appeal. 41 M. 643=8 L. W. 261=35 M. L. J. 110=49 Ind. Cas. 27. Where an appeal is from subordinate Court, and Judges of Bench of High Court hearing the appeal differs in opinion one of the Judges being for its dismissal and the other for allowing it, s. 98 comes into operation and the appeal will be dismissed. A. L. R. 1932 Lah. 966; see also 28 N. L. R. 80=140 Ind. Cas. 630=A. I. R. 1932 Nag. 88.

Section 98 does not control cl. 36 of Letters Patent. A. I. R. 1921. P. C. 6=45 B. 718=19 A. L. J. 409=23 Bom. L. R. 623=30 C. L. J. 488=25 C. W. N. 605=40 M. L. J. 519=48 I. A. 181=(1921) M. W. N. 408=60 Ind. Cas. 822. Appeals from Mofussil Courts are governed by s. 98 and cl. 36 of Letters Patent. 43 B. 433=21 Bom. L. R. 157 (F. B.)=50 Ind. Cas. 715. Section 98 applies to appeal from subordinate Courts and not to Letters Patent appeals. A. I. R. 1925 Pat. 625=4 Pat. 510=6 P. L. T. 634=87 Ind. Cas. 849. Section 98 supersedes where clause 36 of Letters Patent inconsistent. A. I. R. 1925 Cal. 845=41 C. L. J. 456=29 C. W. N. 755=52 C. 894. Section 98, C. P. Code and cl. 36 Letters Patent, contain rules of procedure whereas cl. 15, Letters Patent, gives a right of appeal in certain cases. A. I. R. 1927 Mad. 641=52 M. 563=57 M. L. J. 264=116 Ind. Cas. 343; see also A. I. R. 1929 Mad. 641=29 L. W. 823=53 M. 563=57 M. L. J. 264=116 Ind. Cas. 343. Where there is a difference between the Judges as regards points of law, a third Judge is competent to decide. 17 C. W. N. 1165=35A 487 (P. C.); see also 23 C. L. J. 592. Where in a suit there are several items for adjudication and where Judges composing the Bench differ in their view as to some of the items, the decree appealed from should be varied so far as the Judges composing the Bench agree to vary it and should be confirmed as regards the rest. The word “decree” in section 98 does not mean the document described by that name, but the formal expression of an adjudication as regards all or any of the matters in controversy in a suit. If there are several matters in controversy the formal repression of adjudication

as regards each of these matters in a "decree" so that, in that sense, adjudication as regards every item in dispute between the parties is a decree. Where the Judges composing the Bench do not agree in confirming the adjudication made by the lower Court in respect of one item, such decree or adjudication relating to that item should be confirmed. At the same time, if they agree in reversing the decree or adjudication by the latter as regards another item in dispute, the decree in respect of such item shall be varied. The provisions of s. 98 of C. P. Code should be applied with reference to the adjudication of each item. A. L. R. 1934 All. 55.

**Sub-section (3).**—The amendments state in precise terms the fact implicit in s. 4 of the C. P. Code, that the Letters Patent of the High Courts override the provisions of s. 98. *Statement of Objects and Reasons* of Act 18 of 1928. With the addition of sub-section 8, s. 98, C. P. Code made by the Repealing and Amending Act 18 of 1928, that section has no application to cases heard by Division Bench of a Chartered High Court, whether such appeals from decrees of subordinate Courts or from decrees passed by a Judge of the High Court on the original side. All cases of difference of opinion among the Judges composing the Division Bench are governed by cl. 26, Letters Patent, and the Division Bench should state expressly the points of difference. A. I. R. 1934 Lah. 371 = 15 Lah. 425 = 149 Ind. Cas. 575 = 35 P. L. R. 760 (F. B.). Sub-section (3) excludes chartered High Courts from the operation of s. 98. 11 P. 772. Section 98 cannot control or override the provisions of cls. 10 and 27 of the Letters Patent. 135 Ind. Cas. 58 = 1931 A. L. J. 1157 = A. I. R. 1932 All. 195 ; (1931) A. L. J. 1157.

The words of sub-section (3) of s. 98 cannot be construed to mean that s. 98 (1) and (2) is superseded by reason of certain provisions of the Letters Patent. Cl. 27, Letters Patent, Allahabad and s. 98 of the Code are not incongruous. Cl. 27 of the Letters Patent and s. 98 do not overlap and are applicable to different sets of circumstances. Where there is an appeal under the Letters Patent and two Judges hearing the appeal differ in their opinion, the procedure is governed by cl. 27, Letters Patent, but where the appeal is under the C. P. Code the procedure is governed by s. 98. Under cl. 27 of the Letters Patent the reference is imperative and obligatory and not discretionary as in s. 98, and under cl. 27 the subject of the reference is wider in scope as it may relate to both questions of fact and of law and is not restricted to points of law only as in s. 98. *Ibid.* Section 98 would apply only when there is no similar provision in the Letters Patent ; but if there is specific provision, s. 98 would not apply to a chartered High Court. A. I. R. 1933 All. 861 (F. B.) = 1933 A. L. J. 1127 = 146 Ind. Cas. 84 ; but see A. I. R. 1933 Lah. 648 = 34 P. L. R. 584 = 142 Ind. Cas. 427.

**99. [S. 578.]** No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court.

**Scope.**—Provision of s. 99 and s. 105 do not conflict. A. I. R. 1927 Rang. 150 = 5 Rang. 80 = 102 Ind. Cas. 379. Section 99 applies when the appellate Court admits additional evidence *r.o.* affecting merits. A. I. R. 1921 Sind 155 = 16 S. L. R. 17 = 66 Ind. Cas. 833. A Judgment which offends Order 20, rules 1 and 2 cannot be reversed except upon proof either that the jurisdiction was affected on the merits of the case. 52 C. L. J. 566 = A. I. R. 1931 Cal. 164 ; see also 32 Bom. L. R. 300 = A. I. R. 1930 Bom. 225. The question of jurisdiction is not one contemplated by s. 99. A. I. R. 1935 Pesh. 151 = 158 Ind. Cas. 971.

**Misjoinder of parties.**—Necessary parties must be added ; if not the suit should be dismissed. Proper party may be added. Objection as to non-joinder must however be taken at the earliest stage. A. I. R. 1922 Mad. 317 = 15 L. W. 283 = (1922) M. W. N. 106 = 42 M. L. J. 133 = 31 M. L. T. 266 = 70 Ind. Cas. 645. Non-joinder of party is not fatal when the order in appeal is in his favour. A. I. R. 1922 Mad. 439 = 70 Ind. Cas. 572 = (1922) M. W. N. 717. It is doubtful whether misjoinder includes non-joinder. A. I. R. 1923 Mad. 337 = 17 L. W. 241 = 44 M. L. J. 249 = 72 Ind. Cas. 63. Joinder of unnecessary party is a mere irregularity. 52 Ind. Cas. 105 ; 54 Ind. Cas. 850. If no prejudice is caused, objection to misjoinder of parties and causes of action cannot be entertained in appeal. 43 Ind. Cas. 960 ; 108 Ind. Cas.

545=(1928) M. W. N. 82. Misjoinder of parties affecting merits or jurisdiction affords no ground for second appeal. 18 P. L. R. 1916=37 Ind. Cas. 197. Non-joinder is a mistake and is covered by s. 99. A. I. R. 1926 Cal. 592=92 Ind. Cas. 899. When the merits of the case have been satisfactorily disposed of in spite of the complication of the proceedings, no effect can be given to the objection of misjoinder. 41 C. W. N. 418 (P. C.) ; A. I. R. 1937 P. C. 42 ; *Thomas v. Moore*, (1918) 1 K. B. 555

**Misjoinder of causes of action.**—In partition suit objection as to misjoinder of causes of action must be taken in lower Court. 33 C. L. J. 317=63 Ind. Cas. 161. Multifariousness if not affecting merits is no ground for interference. A. I. R. 1929 All. 148=(1929) A. L. J. 204=114 Ind. Cas. 881. Non-joinder or misjoinder if affecting jurisdiction cannot be protected by s. 99. A. I. R. 1930 Mad. 714=58 M. L. J. 613=31 L. W. 757=130 Ind. Cas. 453. This section does not apply where there is misjoinder both of parties and cause of action. A. I. R. 1926 Lah. 645=89 Ind. Cas. 333. Section 99 does not cover case where non-joinder affects merits. A. I. R. 1926 Cal. 419=89 Ind. Cas. 121.

**Error, defect or irregularity in any proceeding.**—The irregularity of not delivering the judgment in person owing to illness of the Judge cannot be cured by s. 99. A. I. R. 1931 Cal. 164=52 C. L. J. 566=130 Ind. Cas. 573. Where parties' remedy is lost by Court's action this section applies. A. I. R. 1924 Oudh 337=27 O. C. 35=83 Ind. Cas. 850. Section 99 applies where there was no fraud but only a formal defect in presenting the case to Court. A. I. R. 1924 Pat. 114=74 Ind. Cas. 1033 ; see also A. I. R. 1937 Pat. 147. Omission to sign or to verify plaint is no ground for interference in appeal. A. I. R. 1930 Lah. 735=128 Ind. Cas. 303 ; see also A. I. R. 1928 Pat. 51=8 P. L. T. 820=104 Ind. Cas. 747. But plaint signed and verified by next friend of a plaintiff who was major before institution of the suit is not valid as it is a material irregularity. A. I. R. 1924 All. 54=45 A. 701=21 A. L. J. 626=77 Ind. Cas. 30. Absence of general power of attorney in a suit is a mere irregularity and can be no ground to disturb the decree appealed from. A. I. R. 1923 Bom. 44=24 Bom. L. R. 1302=47 B. 227=76 Ind. Cas. 34 ; see also A. I. R. 1923 Rang. 206=74 Ind. Cas. 100. Court's mistake in procedure must not make the party suffer. A. I. R. 1931 Oudh 22=126 Ind. Cas. 385. Questions about constitution of a right to maintain suit do not arise in proceedings in suit and so it is doubtful if s. 99 applies. A. I. R. 1929 Cal. 445=49 C. L. J. 357=125 Ind. Cas. 299. After appellate decree is passed, an application simply for revival of the execution proceedings by the party executing the decree, though had in form is merely an error of procedure which is curable under s. 99 of the Code. A. I. R. 1930 Bom. 225=32 Bom. L. R. 300=127 Ind. Cas. 199. Defect of signature on pleading is curable by s. 99. 1 P. L. T. 647=59 Ind. Cas. 282. Order under wrong section but in substance right was not set aside. 41 Ind. Cas. 89. Where plaint states all facts freely, the defendant cannot object to the frame of the plaint in appeal. 12 N. L. R. 90=34 Ind. Cas. 704. Amendment may be allowed when suit is wrongly brought in firm's name. A. I. R. 1935 Rang. 240. Where a plaintiff has been allowed to withdraw a suit under Order 23, rule 1, with liberty to bring a fresh suit on condition that he pays the defendant's costs but the Order fixes no date for payment of costs to the defendant, it is an irregularity not affecting the merits and not resulting in prejudice or injustice and as such curable under s. 99, C. P. Code or in principles underlying it. A. I. R. 1935 Nag. 56. Omission to appoint guardian of a minor is fatal to the suit. A. I. R. 1921 Cal. 534=25 C. W. N. 525=62 Ind. Cas. 464. But mere absence of a formal order of appointing guardian *ad litem* is a mere irregularity when the Court by its action is supposed to have sanctioned the appointment. If there be no fraud or collusion even failure to give notice to the minor concerned is not fatal. A. I. R. 1923 Oudh 206=26 O. C. 113=74 Ind. Cas. 409 ; see also A. I. R. 1935 Oudh 287=1935 O. W. N. 333. When minor appears through different guardians and no objection was taken the defect is curable under this section. 61 Ind. Cas. 605.

There can be sale without attachment and no objection to attachment can be taken after confirmation of sale. (1917) M. W. N. 89=37 Ind. Cas. 564. Omission to prove loss of document before giving secondary evidence is not fatal. 59 Ind. Cas. 461 ; see also A. I. R. 1929 Cal. 459=49 C. L. J. 546=122 Ind. Cas. 552. Court having wrong view as to onus not affecting merits is not fatal. Appellate Court will not interfere. A. I. R. 1923 Nag. 62=69 Ind. Cas. 541. But Court's refusal to summon witnesses or examine them affects the merits of the case. A. I. R. 1923

Nag. 58. Judgment though based on inadmissible evidence is curable by s. 99 if it is based on positive evidence for plaintiff and absence of evidence for the defendant. The case need not be remanded. A. I. R. 1924 Cal 370=71 Ind. Cas. 300. Even where after the Court's finding that the defendant is major the suit is not amended, and the major defends the suit with a pleader the irregularity is cured by the conduct of the parties. A. I. R. 1923 All. 257=71 Ind. Cas. 447. Refusing inspection on grounds of delay and absence of possibility of benefiting party does not vitiate the trial. A. I. R. 1925 Bom. 105=26 Bom. L. R. 907=84 Ind. Cas. 363. Omission to give notice to natural guardian before appointing a guardian by which a minor is not prejudiced is a mere irregularity and is cured by this section. A. I. R. 1925 All. 548=88 Ind. Cas. 294.

Error of Court-fee is cured by s. 99. A. I. R. 1925 Rang 65=2 Rang. 462=84 Ind. Cas. 971. Omission to apply to Court for substitution of name of legal representative of judgment-debtor and where he acquiesces the irregularity is covered by this section. 12 O. L. J. 146=2 O. W. N. 73=28 O. C. 330=87 Ind. Cas. 21; see also A. I. R. 1926 Lah. 34=24 P. L. R. 740=90 Ind. Cas. 1050. Defect of omission to hear argument is cured by s. 99. 13 O. L. J. 473=93 Ind. Cas. 291. Failure to amend plaint is no ground for interference, where merits are not affected. A. I. R. 1928 Bom. 425=30 Bom. L. R. 1099=113 Ind. Cas. 38. Omission to frame issue when suit decided as if issue framed is covered by s. 99. A. I. R. 1926 Bom. 384=28 Bom. L. R. 743=96 Ind. Cas. 827. Tenants possessing several holding were made defendants in a single suit. The landlord, in spite of the irregular procedure, cannot object to the use of evidence given in the case of some tenants as evidence in favour of all. 43 M. 567=47 I. A. 76=38 M. L. J. 476=18 A. L. J. 707=22 Bom. L. R. 578=25 C. W. N. 485 (P. C.)=56 Ind. Cas. 117. After appellate decree is passed an application simply for revival of the execution proceedings by the party executing the decree, though bad in form, is merely an error of procedure which is curable under s. 99 of the Code. A. I. R. 1930 Bom. 225=32 Bom. L. R. 300=127 Ind. Cas. 199. Where the objection raised is technical and error did not affect the merits of the case or the jurisdiction of the Court the case would be covered by s. 99. A. I. R. 1929 Cal. 445=49 C. L. J. 357=125 Ind. Cas. 299. Want of jurisdiction is not cured by s. 99. A. I. R. 1926 All. 650=95 Ind. Cas. 406. Decision in appeal on technical ground ignoring s. 99 can be interfered in revision. 93 Ind. Cas. 938=A. I. R. 1926 Lah. 402. Appellate Court can interfere where non-joinder affects the jurisdiction of the trial Court. 31 L. W. 757=130 Ind. Cas. 453=A. I. R. 1930. Mad. 757=58 M. L. J. 613. Omission to sign and verify the plaint is a mere irregularity. A. I. R. 1930 Lah. 735=128 Ind. Cas. 303; see also 40 A. 147; 22 A. 55; 20 A. 442; A. I. R. 1925 All. 79; A. I. R. 1929 Pat. 51; 56 B. 448=34 Bom. L. R. 1216=A. I. R. 1932 B. 1153. No man should suffer by an error of procedure committed by the Court. 126 Ind. Cas. 385=3 Luck 116=7 O.W.N. 655=A. I. R. 1931 Oudh 22. Where there has been no service of summons at all or where there has not been a service of summons in accordance with law, such error or irregularity as regards service affects the jurisdiction of the Court in regard to the defendant and s. 99 has no application to such a case. 59 C. 496=138 Ind. Cas. 637=A. I. R. 1932 Cal. 541; see also A. L. R. 1933 Lah. 1213. Appellate Court can interfere with a decree on account of non-joinder of necessary party. A. L. R. 1933 Mad. 805=A. I. R. 1933 Mad. 664=146 Ind. Cas. 72=(1933) M. W. N. 1209=38 L. W. 247=65 M. L. J. 291. Where the Commissioner on appeal in order to satisfy himself whether a certain claimant was admitted to tenancy or not obtained evidence of certain records but failed to record his reason for doing so as required by s. 41, rule 27, the failure is mere irregularity which does not affect the merits of the case. 14 L. R. 366 (Rev.).

#### APPEALS FROM APPELLATE DECREES.

100. [S. 584.] (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court, on any of the following grounds, namely:—

(a) the decision being contrary to law or to some usage having the force of law;

(b) the decision having failed to determine some material issue of law or usage having the force of law;

(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.

(2) An appeal may lie under this section from an appellate decree passed *ex parte*.

**Scope of the section.**—A second appeal lies to the High Court. In the first appeal the appellate Court can interfere with the erroneous finding of fact by the lower Court. Second appeal cannot change finding of fact. A. I. R. 1929 All. 885= (1930) A. L. J. 340=118 Ind. Cas. 715. Lower Court should carefully consider the entire material on record for giving finding of fact. A. I. R. 1930 Lah. 12=123 Ind. Cas. 573. Finding of fact must be supported by evidence and not based on surmise. A. I. R. 1921 Pat. 50=2 P. L. T. 225=60 Ind. Cas. 308. When second appeal decided only on question of fact, that decision should be set aside. A. I. R. 1921 Lah. 341=4 Lah. L. J. 464; see also 43 A. B. 515=19 A. L. J. 499=63 Ind. Cas. 221. A second appeal is only competent on the grounds mentioned in this section. 16 C. 753=16 I. A. 125. A fresh legal point can be raised. A. I. R. 1925 All. 783=47 A. 932=23 A. L. J. 856=88 Ind. Cas. 1013. A plea of *res judicata* not raised in Memorandum of Appeal was allowed in second appeal. A. I. R. 1923 Lah. 560=5 Lah. L. J. 163=74 Ind. Cas. 577. New facts indicating *prima facie* ground of claim can be made a ground of appeal. A. I. R. 1923 All. 176=45 A. 59. This section appears to supply a reasonable interpretation of the expression "illegality" and "with material irregularity" occurring in s. 115. Clauses (a) and (b) embody what s. 115 refers to in the illegality; that is to say, to cases where the Court below has in the exercise of its jurisdiction, come to a decision which is contrary to some specified law or usage having the force of law or failed to determine some material issue of law or usage. The clause (c) indicates the meaning of "material irregularity" which means some material irregularity in procedure which may possibly have produced error or defect in the decision on the merits. 8 A. 111 (F. B.)=A. W. N. 1886, 28. The question as to the competency of an inferior Court can be allowed to be raised before the High Court, even though it has not taken before the inferior Court. 25 C. 146=2 C. W. N. 137. Finding of fact based on that of law can be disturbed on second appeal. A. I. R. 1930 All. 510=(1930) A. L. J. 1119=127 Ind. Cas. 591. Court will decide in second appeal only admissibility of the documentary evidence and not their evidentiary value. A. I. R. 1926 Cal. 727=92 Ind. Cas. 104. Court in second appeal cannot reverse finding of lower appellate Court on authority not quoted before it. A. I. R. 1930 Lah. 737=126 Ind. Cas. 433. Where the decision is arbitrary the appellate Court can come to independent decision. A. I. R. 1922 Lah. 127=65 Ind. Cas. 464. But the fact that upon the evidence, the High Court would have come to a different conclusion is no ground for second appeal. A. I. R. 1926 Nag. 192=50 Ind. Cas. 209; see also 31 C. W. N. 32=A. I. R. 1927 Cal. 1=99 Ind. Cas. 189; 101 Ind. Cas. 695=A. I. R. 1927 All. 524; 57 Ind. Cas. 561=A. I. R. 1921 Pat. 61=5 Pat. L. J. 410=1 P. L. T. 702.

Appeal to the High Court under s. 142 (3) Calcutta Municipal Act, is not a second appeal under s. 100, C. P. Code and hence is not restricted to only question of law. A. I. R. 1925 Cal. 450=47 C. L. J. 315=32 C. W. N. 378=109 Ind. Cas. 618; see also A. I. R. 1927 Cal. 802=46 C. L. J. 760=31 C. W. N. 1040=55 C. 228=103 Ind. Cas. 533. Trial Court's finding cannot be set aside without considering all important material. A. I. R. 1925 Cal. 993=85 Ind. Cas. 540. Finding of trial Court accepted on grounds of appeal cannot be examined in appeal though counsel was careless in drafting the grounds. 21 P. W. R. 1921=59 Ind. Cas. 689. In an appeal against an order of remand the appellant's only grounds to attack the judgment are those which would be available to him in second appeal. A. I. R. 1926 Mad. 475=91 Ind. Cas. 462. In setting aside lower Court's judgment of appeal must state grounds of disbelief in evidence and for not agreeing with finding. A. I. R. 1925 Cal. 408=79 Ind. Cas. 412. A decision of the lower appellate Court which was right according to the need of the law then prevailing is liable to be set aside in second appeal if the subsequent ruling of the Privy Council takes a contrary view. A. I. R. 1926 Nag. 49=60 Ind. Cas. 210; see also A. I. R. 1926 All. 725=66 Ind. Cas. 775. Whether parties to a suit agreed or not is a pure question of fact. A. I. R. 1929 Bom. 68=30 Bom. L. R. 1610=114 Ind. Cas. 372. What a foreign law on a particular subject is a question of fact. A. I. R. 1926 Mad. 218=22 L. W. 679=92 Ind. Cas. 112. Where an injunction is granted on a finding of fact it cannot be reversed in second appeal. A. I. R. 1926 Cal. 536=91 Ind. Cas. 480. Question

whether particular trees could or could not be removed with their roots is one of fact. A. I. R. 1929 All. 330=113 Ind. Cas. 405. Whether particular property still has character of grove is finding of fact. A. I. R. 1924 Oudh 306=27 O. C. 76=11 O. L. J. 565=79 Ind. Cas. 663. Urging of an alternative argument is allowable in second appeal under certain circumstances. A. I. R. 1932 All. 289. No second appeal lies against a decision under s. 53 of the Provincial Insolvency Act. A. L. R. 1934 Lah. 78.

**Second appeal when decision is contrary to law.**—"It is true as laid down by their Lordships of the Privy Council in the *Secretary of State v Rameshwaram*, 1934 P. C. 112=148 Ind. Cas. 778=61 I. A. 163=57 M. 652=11 O. W. N. 775. That under s. 100, Civil Procedure Code, the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate Court unless they are vitiated by some error of law." A. I. R. 1935 Oudh 394=1935 O. W. N. 674=155 Ind. Cas. 1087. The term "law" means general law and is not confined to statute law. 20 C. 93 (99)=19 I. A. 228. Right construction of document is a question of law and can be raised for the first time in second appeal A. I. R. 1931 Nag. 25=130 Ind. Cas. 103 ; 22 A. 609=22 I. A. 51. Whether Court's reducing period of redemption was justified is a question of law and ground for second appeal. A. I. R. 1930 Lah. 1060=130 Ind. Cas. 57. Deducing agency from facts in question is a question of law for second appeal. A. I. R. 1930 Cal. 815=53 C. L. J. 235=129 Ind. Cas. 769=35 C. W. N. 133=58 C. 585. What is proper legal effect of proved fact is essentially a question of law. A. I. R. 1931 Oudh 19=7 O. W. N. 1091=129 Ind. Cas. 335. Finding that mere adjustment of his personal debt by means of the firm's debt, by a partner, is of itself prejudicial to the firm is open to interference in second appeal. A. I. R. 1931 Lah. 136. A finding that there has or has not been a disruption of joint Hindu family is not a finding of fact, and can be questioned in second appeal. It is an inference of the legal effect of the facts found. I. R. 6 Nag. 31. Finding of soundness of mind based on expert and other evidence, is open to challenge in second appeal. 34 P. L. R. 297=A. I. R. 1933 Lah. 458=144 Ind. Cas. 741. Where a certain land is accretion or formation in *situ* is a question of fact. But where inference is to be drawn from documents is a mixed one of fact and law. A. I. R. 1930 Cal. 764=53 C. L. J. 229=129 Ind. Cas. 416. Question whether certain local conditions constitute a place, a town or village is one of law. A. I. R. 1921 Lah. 121=62 Ind. Cas. 808. Finding following not from custom but from application of judicial authorities is one of law and can be questioned in second appeal. A. I. R. 1929 Lah. 426=11 L. J. 110=10 Lah. 868=31 P. L. R. 93=117 Ind. Cas. 380. Judicial exercise of discretion in admitting appeal beyond time, cannot be interfered with in second appeal. 123 Ind. Cas. 83. Reducing period for redemption by lower Court can be questioned in second appeal. A. I. R. 1930 Lah. 1060=120 Ind. Cas. 274. Plea of estoppel where facts are all admitted and the question is what consequence would flow from is pure question of law and can be raised in appeal, though not taken in trial Court 110 Ind. Cas. 190. Where adverse possession has been established is a question of law. A. I. R. 1926 Lah. 482=27 P. L. R. 89=98 Ind. Cas. 161. The conclusion that a certain process was not scientific involves a question of law. A. I. R. 1926 Nag. 435=95 Ind. Cas. 614. An allegation of absence of evidence to support a specific finding of fact affords a ground of law. 40 Ind. Cas. 139=4 O. L. J. 140. Where presumption arising from habits of people is not considered in coming to decision, error of law is committed rendering second appeal competent. 2 Lah. 206=113 P. L. R. 1920=56 Ind. Cas. 728. But exercise of discretion in allowing extension of time under s. 5, Limitation Act is a mere question of fact 130 Ind. Cas. 840=A. I. R. 1931 All. 28=(1930) A. L. J. 1256. It is a question of law if transfer of occupancy rights under the Punjab Pre-emption Act is saleable or not. A. I. R. 1930 Lah. 141=31 P. L. R. 338=120 Ind. Cas. 683. Whether son was effectively represented in a former suit is a question of law and not one of fact. A. I. R. 1927 Mad. 406=38 M. L. T. 107=99 Ind. Cas. 539. If a tenant is entitled to occupy land appurtenant to his house is not a pure question of law. A. I. R. 1927 Oudh 37=3 O. W. N. 937=98 Ind. Cas. 1044. Question of burden of proof is one of law and can be attacked in second appeal. 2 Lah. 249=64 Ind. Cas. 901. Legal inferences from facts may be examined in second appeal. A. I. R. 1929 Lah. 392=3 Lah. 257=68 Ind. Cas. 551 ; see also 46 C. 189=23 C. W. N. 345=45 I. A. 183 (P. C.)=51 Ind. Cas. 760 ; 23 M. L. T. 85=7 L. W. 210=1918 M. W. N. 231=35 M. L. J. 308=44 Ind. Cas. 523 ; 19 C. W. N. 1330=32 Ind. Cas. 117 ; 18 M. L. T. 521=(1916) 1 M. W. N. 123=31 Ind. Cas. 487 ; 65 Ind. Cas. 398=A. I. R. 1922 Oudh 98=8 O. L. J. 609. A finding as to legitimacy is a question of fact. A. I. R. 1927 All. 410=100 Ind. Cas. 650. Whether payment of interest can be said to be made

"as such" is a question of fact. A. I. R. 1926 All. 329=93 Ind. Cas. 295. Finding if agreement is meant to quiet existing disputes or is binding for future is question of law. A. I. R. 1929 All. 519=(1929) A. L. J. 1083=116 Ind. Cas. 302. Where creditor instead of being actually paid took renewed pronote at enhanced rate of interest, the question whether new debt is substituted in place of old is a question of fact. A. I. R. 1927 Cal. 538=45 C. L. J. 233=31 C. W. N. 703=102 Ind. Cas. 871.

New question of law may be raised for first time in second appeal. A. I. R. 1930 Cal. 616=52 C. L. J. 68; 110 Ind. Cas. 190; A. I. R. 1925 All. 361=23 A. L. J. 138=86 Ind. Cas. 589; 59 Ind. Cas. 116=43 A. 193=18 A. L. J. 1033 (F. B.); 47 Ind. Cas. 685. Question of law necessitating taking of evidence cannot be raised in second appeal for the first time. Where it is never suggested in lower Court that a deed of gift was invalid for non-acceptance, the invalidity of the gift cannot be urged on that ground in second appeal. A. I. R. 1922 Bom. 148. The principle that a point of law can always be taken in second appeal is limited to cases where the point of law does not require a finding of fact to support it. A. I. R. 1928 Pat. 109=8 P. L. T. 850=105 Ind. Cas. 33. Meaning of a word is a question of law. A. I. R. 1922 Bom. 416=24 Bom. L. R. 416=47 B. 18=67 Ind. Cas. 852; but see 46 Ind. Cas. 794. It is not always an easy matter to separate a finding of fact from a question of law. A question of what constitutes exclusion from a joint estate may well in many cases be a question of law. 21 C. W. N. 1142=(1917) M. W. N. 642 (P. C.)=42 Ind. Cas. 258. Question of waiver is a mixed question of fact and law. 5 L. W. 514=38 Ind. Cas. 302. Question whether a sub-sequent suit can rectify a previous decree is a substantial question of law. A. I. R. 1923 Cal. 387=71 Ind. Cas. 371. Question, if stipulation within s. 74 of Contract Act is by way of penalty, is one of law. A. I. R. 1925 Mad. 84=47 M. L. J. 605=(1924) M. W. N. 861=82 Ind. Cas. 751. The question whether Hindu law or Succession Act governs a certain person is a question of pure law. 138 Ind. Cas. 335=A. I. R. 1932 Lah. 328. The question whether the admitted facts and circumstances constitute sufficient and reasonable cause under s. 5 of the Limitation Act is one of law and not of fact. 135 Ind. Cas. 221=32 P. L. R. 907=A. I. R. 1932 Lah. 183.

**Usage having the force of law.**—The expression "usage having the force of law" means "a local or family usage as distinguished from the general law." 20 C. 93=19 I. A. 228; 34 C. 941=11 C. W. N. 959. The expression "usage having the force of law" should ordinarily be confined to the usages of the country or of the community, the law merchant and usages referred to in s. 11 of Act (VIII of 1865). 40 M. 1108=5 L. W. 346=32 M. L. J. 237=40 Ind. Cas. 516. Questions as to the existence of an ancient custom are questions of mixed law and fact. Whether things done pursuant to a custom satisfy the requirements of the law is a question of law. 40 M. 709=21 C. W. N. 729=19 Bom. L. R. 565=44 I. A. 147=39 Ind. Cas. 722 (P. C.); 41 M. 374 (F. B.); 18 N. L. J. 172; A. I. R. 1935 All. 720=158 Ind. Cas. 109; A. I. R. 1936 Nag. 95=164 Ind. Cas. 825; A. I. R. 1936 Oudh. 235=1936 O. W. N. 260; A. I. R. 1934 All. 890=150 Ind. Cas. 758=1934 A. L. J. 879. Under this section the usage must be in derogation of the law, and have the force of law. 1917 M. W. N. 98=37 Ind. Cas. 879. It is the duty of the Court to examine the evidence bearing upon the custom. 29 M. 24; 7 M. 3; 30 A. 311; 28 A. 698; A. I. R. 1927 All. 471; 18 C. L. J. 559=18 C. W. N. 55. Whether on evidence a custom is established is a question of fact but whether evidence is legally sufficient to establish the alleged custom is a question of law. A. I. R. 1927 All. 201=99 Ind. Cas. 292; see also A. I. R. 1926 Oudh 460=3 O. W. N. Sup. 10=94 Ind. Cas. 987; A. I. R. 1926 All. 215=93 Ind. Cas. 363; A. I. R. 1926 Lah. 251=92 Ind. Cas. 763; 91 Ind. Cas. 942=A. I. R. 1926 Oudh 143. A finding as to particular custom should not be disturbed unless it is based on insufficient evidence or the necessary requisites are not established. A. I. R. 1926 Bom. 153=50 B. 133=28 Bom. L. R. 49=93 Ind. Cas. 135. Whether facts prove essentials of custom is a question and can be discussed in second appeal. Decision that custom is not established by evidence on record is a decision on question of fact. 25 C. L. J. 613=21 C. W. N. 972=45 C. 285=41 C. L. J. 959.

Finding of custom cannot be challenged in second appeal for insufficiency of evidence. 35 Ind. Cas. 630. The finding of the lower Courts that certain documents are sufficient proof of the custom binds the second appellate Court. 2 O. L. J. 607=32 Ind. Cas. 748. The words "usage having the force of law" do not give the Court any large powers of interference with findings as to custom in so far as they are findings of fact. If inspite of uncontradicted instances ranging over a long period



and recognized judicially in several cases, the lower appellate Court finds against the existence of a custom on the ground that in its opinion the instances are not sufficient in number, the High Court has power to hold on the facts found that the custom is legally established. 41 M. 371=34 M. L. J. 104=(1918) M. W. N. 350=7 L. W. 243 (F. B.)=44 Ind. Cas. 699. Finding of existence of custom is a mixed question of law and fact and can be challenged in second appeal. 38 M. L. J. 275=27 M. L. T. 111=55 Ind. Cas. 380; 55 Ind. Cas. 770=12 L. W. 371; A. I. R. 1921 Mad. 694=41 M. L. J. 437=14 L. W. 702=(1921) M. W. N. 754=69 Ind. Cas. 570; A. I. R. 1929 Mad. 751=19 Ind. Cas. 476. Question whether custom exists to remit rent of land allowed to lie fallow is one of fact. A. I. R. 1930 P. C. 2:4=(1930) M. W. N. 835=53 M. 597=59 M. L. J. 289=52 C. L. J. 265=32 L. W. 558 (P. C.)=126 Ind. Cas. 84 (P. C.). Where customary right of way in agricultural tract is set up, whether the custom is reasonable or not is a question of fact. A. I. R. 1927 Mad. 653=52 M. L. J. 674=38 M. L. J. 395=103 Ind. Cas. 331.

If the lower appellate Court has passed judgment based on illegal or in sufficient evidence to establish customs, there can be second appeal. 116 Ind. Cas. 799 (All); see also 102 Ind. Cas. 596=A. I. R. 1927 All. 605; A. I. R. 1927 All. 471=100 Ind. Cas. 605; A. I. R. 1926 All. 153=89 Ind. Cas. 89; A. I. R. 1926 All. 43=48 A. 77=23 A. L. J. 932=88 Ind. Cas. 752; A. I. R. 1924 All. 477=79 Ind. Cas. 134; 75 Ind. Cas. 657=A. I. R. 1923 All. 341; A. I. R. 1922 All. 88=20 A. L. J. 57=64 Ind. Cas. 956; A. I. R. 1922 All. 241=66 Ind. Cas. 613. Existence of custom not challenged in lower Court cannot be challenged in second appeal. A. I. R. 1923 Pat. 509=67 Ind. Cas. 464.

Finding as to the existence of tribal or family custom is one of fact and cannot be disturbed in second appeal. A. I. R. 1930 Oudh 330=7 O. W. N. 333=123 Ind. Cas. 15. The weight and value of evidence cannot be discussed in second appeal. A. I. R. 1928 Oudh 301=5 O. W. N. 432=112 Ind. Cas. 42. But all questions of interpretation involve an element of law. A. I. R. 1928 Oudh 269=5 O. W. N. 275=112 Ind. Cas. 68. In second appeal an enquiry can be started whether all the attributes of a local custom had been established or not by evidence accepted by the lower Court. There is no difference between cases where custom is accepted and those in which the existence of the custom is not accepted. A. I. R. 1929 Oudh 53=2 O. W. N. 838=90 Ind. Cas. 525. Finding that a custom has not been established by reliable evidence is a finding of fact. A. I. R. 1928 Oudh 121=4 O. W. N. 1229=107 Ind. Cas. 560; see also 91 Ind. Cas. 942=A. I. R. 1926 Oudh 143=13 O. L. J. 21=3 O. W. N. 69. Existence of custom is a mixed question of law and fact and can be considered afresh. A. I. R. 1925 Oudh 55=81 Ind. Cas. 1033; see also A. I. R. 1925 Oudh 239=11 O. L. J. 738=82 Ind. Cas. 810; A. I. R. 1924 Oudh 157=26 O. C. 386=76 Ind. Cas. 774; 9 O. L. J. 518=A. I. R. 1923 Oudh 102; 64 Ind. Cas. 86=24 O. C. 237. Where evidence as to custom is found to be unreliable by lower appellate Court, its value will not be discussed in second appeal merely on the ground that the Court expressed an erroneous opinion as to its relevancy. 8 O. L. J. 202=61 Ind. Cas. 781.

Existence of custom derived from facts proved can be agitated. A. I. R. 1925 Nag. 179=82 Ind. Cas. 815. Tenant of a house whether entitled to sell site is question of mixed fact and law. A. I. R. 1925 All. 718=87 Ind. Cas. 749. Insufficiency of evidence can be called into question when custom has been proved by single instance. A. I. R. 1925 Bom. 380=27 Bom. L. R. 880=88 Ind. Cas. 891. Question of special custom cannot be raised in absence of a certificate in second appeal. A. I. R. 1923 Lah. 53=70 Ind. Cas. 838; 66 Ind. Cas. 492=2 Lah. 53; A. I. R. 1922 Lah. 426=69 Ind. Cas. 507. High Court will interfere if finding is erroneous in law or misrepresents a document. L. R. 3A. 504. The existence of a custom or usage having the force of law is a mixed question of fact and law. S. 100 of C. P. Code precludes the High Court from interfering in second appeal within the findings arrived at by the lower appellate Court of actual facts from which the existence of custom has been inferred. A. I. R. 1933 Mad. 390=142 Ind. Cas. 228=1933 M. W. N. 743. A finding to the existence or non-existence of a custom, in so far as it is a finding that a certain practice does or does not prevail is a finding of fact. The question whether a prevailing practice has the essential attributes of a legally binding custom is a question of law. A. I. R. 1933 All. 478=A. I. R. 1933 All. 306=141 Ind. Cas. 668; see also 33 P. L. R. 363=137 Ind. Cas. 873=13 Lah. 31=A. I. R. 1932 Lah. 274.

**Question of law.**—Where the lower Court Judge states the law correctly and does not misdirect himself and comes to a particular conclusion, he decides the

point as a question of law and not as a question of fact. A. I. R. 1936 Pat. 136=17 Pat. L. T. 366. Failure to appreciate the legal effect of proved or admitted facts gives rise to question of law. A. I. R. 1936 Lah. 104=163 Ind. Cas. 81; see also 63 I. A. 140=63 C. L. J. 160=40 C. W. N. 417=1936 A. L. J. 145=1936 A. W. N. 169=160 Ind. Cas. 837=70 M. L. J. 190=A. I. R. 1936 P. C. 77=1936 M. W. N. 314=38 Bom. L. R. 353=43 L. W. 289; A. I. R. 1936 Rang. 383=164 Ind. Cas. 1100; A. I. R. 1936 Pat. 384=17 Pat. L. T. 202=163 Ind. Cas. 415. A provisional finding upsetting a very closely reasoned and elaborate judgment of the trial Court without any discussion of evidence whatever or without giving any reason except the general reason that the evidence is not satisfactory is contrary to law. A. I. R. 1937 Mad. 282. Although second appellate Court cannot entertain an appeal upon any question as to the soundness of findings of fact upon a Second Court, it can nevertheless, adjudicate as matter of law upon the soundness of the conclusions which have been decided from those findings. A. I. R. 1937 Oudh. 47.

**Substantial error and defect in procedure.**—For a second appeal it is not enough to show that there was a defect in procedure of the trial Court. It is necessary to show that the alleged defect in procedure may possibly have produced error or defect in the decision upon the merits by the lower appellate Court. A. I. R. 1937 All. 105. No second appeal lies where there is no error of procedure. A. I. R. 1933 Rang. 35=142 Ind. Cas. 829. In second appeal the High Court has the power of considering whether the procedure adopted by the lower appellate Court in dealing with the facts is proper or not; and whether the inferences of fact or law derived by that Court from facts established to its satisfaction are well founded or not. 6 C. W. N. 185. Where the lower appellate Court, has not apparently considered all the material facts and circumstances of the case the procedure adopted by it in the trial of the case is not one in accordance with law and is a substantial defect which may lead to an error in the decision of the case on the merits. 6 C. W. N. 357. Where the lower Court disposed of a suit upon a case not raised by the parties and to which evidence had not been directed, held that there was a substantial error or defect of procedure within the meaning of this section. 29 B. 1=6 Bom. L. R. 770=1 A. L. J. 637 (P. C.)=8 C. W. N. 865. Omission to try material issue is a substantial error in procedure. A. W. N. 1896, 101. Question of fact decided by Court holding itself bound by a previous decision of the High Court: *Held* that the Court committed a substantial error or defect in procedure which may possibly have produced error or defect in the decision of the case upon the merits and therefore a second appeal lay. A. I. R. 1927 Pat. 209=6 Pat. 298=9 Pat. L. T. 722 (F. B.)=105 Ind. Cas. 633. Finding of fact based on misconception of law and an error of procedure can be questioned in second appeal. A. I. R. 1924 Pat. 310=2 Pat. 919=5 P. L. T. 310=76 Ind. Cas. 347; see also A. I. R. 1925 Cal. 98=39 C. L. J. 261=81 Ind. Cas. 599. Omission to determine critical question between parties and to consider oral evidence adduced is a substantial error of procedure. 56 Ind. Cas. 40. The rejection of a Commissioner's report without directing further enquiry in a case which Court ought not to be decided without any investigation is a substantial error or defect in procedure which may possibly have produced an error or defect in the decision upon the merits. 23 C. L. J. 600=34 Ind. Cas. 30. Where a Judge disposes of a suit on a point taken by himself on appeal without affording the parties an opportunity of proving what is necessary to meet the point, he commits an error of law. 11 Bur. L. T. 1=43 Ind. Cas. 488. Where both parties have agreed to proceed on evidence both before Munsiff and before Commissioner, there is defect of procedure affecting merits in trial of appeal if lower appellate Court tells party that case should proceed after discarding evidence before Commissioner. In such a case interference in second appeal is proper. A. I. R. 1928 Cal. 136=46 C. L. J. 558=106 Ind. Cas. 841. Where in a case of boundary dispute the Court of first instance accepted the relaying of the Commissioner's map, but the lower appellate Court, by taking comparative measurements with a pair of dividers of some plots of the Commissioner's map and the settlement map, held that the Commissioner's plotting was incorrect and rejected the Commissioner's map: *Held*, that the lower appellate Court in adopting this procedure acted illegally in discarding the evidence on the point and proceeding either on surmise or substituting his evidence in place of the evidence on the record. 39 C. W. N. 1233.

**Error in dealing with evidence.**—Finding of fact though very clear, but based on inadmissible evidence are not binding in second appeal. A. I. R. 1930 Lah. 672=31 P. L. R. 198=125 Ind. Cas. 50; A. I. R. 1924 Lah. 470=6 Lah. L. J. 204=80 Ind. Cas. 705; 36 C. L. J. 389=74 Ind. Cas. 383; 71 Ind. Cas. 825=A. I. R.

1923 Lah. 150 ; A. I. R. 1922 All. 439=66 Ind. Cas. 313 ; A. I. R. 1921 Lah. 119=2 Lah. 271=64 Ind. Cas. 929 ; A. I. R. 1921 Oudh 137=24 O. C. 237=64 Ind. Cas. 86. Where admission of document produced at a late stage is refused, second appeal lies. A. I. R. 1924 Pat. 208=72 Ind. Cas. 397. An objection that a document that *per se* is not admissible in evidence, has been improperly admitted in evidence cannot be entertained in the Court of Appeal. A. I. R. 1923 Cal. 378=72 Ind. Cas. 985. Case must be remanded if certain evidence has been refused. A. I. R. 1925 Cal. 1034=41 C. L. J. 374=86 Ind. Cas. 734 ; see also A. I. R. 1921 Pat. 17=1 Pat. L. T. 702=5 Pat. L. J. 410=57 Ind. Cas. 561.

The appellant cannot raise objections to the admissibility of documents received in evidence in the lower Court where the application is quite too late. 34 Ind. Cas. 57 (F. B.) ; see also 34 Ind. Cas. 534 ; 52 Ind. Cas. 463 ; 41 Ind. Cas. 726 ; 53 Ind. Cas. 863. Entries in *batwara* papers are admissible in evidence. 2 P. L. T. 343=63 Ind. Cas. 226. Question of relevancy and proof of document is one of law and can be raised at any stage but question of proof is one of procedure and can be waived. A. I. R. 1922 Pat. 122=3 Pat. L. T. 149. Question of admissibility and legal effect of evidence if not raised in first appeal cannot be agitated afresh. A. I. R. 1924 All 709=22 A. L. J. 153=78 Ind. Cas. 221. Fresh objection regarding admissibility of evidence can be taken. A. I. R. 1925 Cal. 1034=41 C. L. J. 374=86 Ind. Cas. 734. Inadmissible evidence which is at least material part of the basis of the finding, though it may not be the main part of it renders remand necessary. A. I. R. 1923 Nag. 107=18 N. L. R. 182=77 Ind. Cas. 911. Admissibility of a document is a question of fact. Where objection to admissibility is not taken in lower Court it cannot be taken in second appeal. 97 Ind. Cas. 414 (Cal). Illegal exclusion of documentary evidence can be raised in second appeal. A. I. R. 1934 Pat. 48=146 Ind. Cas. 937. Where the finding of fact is based partly on inadmissible evidence the High Court can in second appeal go into the question and decide if there was other evidence to support the finding. 35 P. L. R. 360. Where finding of lower Court is supportable on admissible evidence, no necessity for a revised finding. A. I. R. 1933 Pat. 636=145 Ind. Cas. 944 ; 138 Ind. Cas. 399=33 P. L. R. 225 ; 136 Ind. Cas. 783=A. I. R. 1932 Mad. 173 ; A. I. R. 1934 Nag. 124=150 Ind. Cas. 306. Where material facts and evidence are ignored in arriving at a finding of fact such finding can be challenged in second appeal. 1932 A. L. J. 615=A. I. R. 1932 All. 603 ; see also 136 Ind. Cas. 710=33 P. L. R. 263=A. I. R. 1932 Lah. 322 ; 137 Ind. Cas. 115=32 P. L. R. 861=A. I. R. 1932 Lah. 293 ; A. L. R. 1934 Pat. 20. A finding arrived at by the final Court of fact after discussion of the evidence which can in no sense be regarded as proper is not binding in second appeal. A. L. R. 1934 Pat. 8=A. I. R. 1934 Pat. 66. The High Court cannot interfere with the findings of fact unless those findings have been based upon a misconception of the evidence or upon some mistake which has arisen in consideration of that evidence in the lower Court. 61 C. 365=A. I. R. 1934 Cal. 633 ; see also A. I. R. 1934 Oudh 97=11 O. W. N. 674.

**Irregularity in taking additional evidence.**—Finding on fresh evidence allowed without stating reasons can be cast out in appeal. A. I. R. 1933 All. 413=79 Ind. Cas. 408. Where an appellate Court admitted certain documents in appeal but did not base its finding upon them, its finding of fact will not be disturbed in second appeal. A. I. R. 1926 Mad. 864=92 Ind. Cas. 661 ; see also A. L. R. 1933 Lah. 136=34 P. L. R. 99=A. I. R. 1933 Lah. 328=144 Ind. Cas. 954. Rejection of fresh evidence not with discretion, but due to pre-apprehension of insurmountable difficulty can be agitated. A. I. R. 1925 All. 288=47 A. 412=23 A. L. J. 193=86 Ind. Cas. 761. Order of lower appellate Court rejecting application for admission of additional evidence under Order 41, rule 27 (1) cannot be disturbed in second appeal. 42 M. 737=37 M. L. J. 125=53 Ind. Cas. 274 ; *contra per Sadasiva Aiyar in Ibid.* The High Court should not admit fresh evidence as to facts in second appeal. *Per Sadasiva Aiyar J.* in 39 Ind. Cas. 954=1917 M. W. N. 560 ; *contra per Spencer J. in ibid.* ; see also A. I. R. 1922 Bom. 147=77 Ind. Cas. 515 ; A. I. R. 1925 Mad. 260=47 M. L. J. 686=84 Ind. Cas. 973 ; 14 L. R. 102 Rev.=17 R. D. 120. Where lower appellate Court refuses to admit a certain material document as additional evidence in appeal the High Court will not interfere in second appeal. 32 P. L. R. 813.

**New plea whether can be raised in second appeal.**—Whether new plea patent on record and hence could be raised, should be allowed to be raised depends upon facts of case and nature of plea. A. I. R. 1930 Lah. 937=12 Lah. L. J. 203=130 Ind. Cas. 513. New question of law not requiring fresh investigation of facts

can be allowed in second appeal. 54 C. 424=A. I. R. 1927 Cal. 393=45 C. L. J. 191=101 Ind. Cas. 130; (1928) M. W. N. 601=113 Ind. Cas. 547; A. I. R. 1923 Lah. 491=83 Ind. Cas. 768. A new point may be raised by a party for the first time in appeal if it is a pure question of law and does not take his opponent by surprise. But the new plea cannot be allowed in second appeal when the new plea raises question of fact or mixed question of fact or law. A. I. R. 1923 Cal. 247=36 C. L. J. 336=71 Ind. Cas. 849; see also 71 Ind. Cas. 381=A. I. R. 1923 All. 343; A. I. R. 1921 Pat. 326=2 P. L. T. 285=60 Ind. Cas. 393; 18 A. L. J. 923=48 A. 18=57 Ind. Cas. 206; 51 Ind. Cas. 588=10 L. B. R. 10=12 Bur. L. T. 75; 41 Ind. Cas. 45=13 N. L. R. 98; 44 C. 47=20 C. W. N. 1099=24 C. L. J. 140=34 Ind. Cas. 869; 2 Lah. L. J. 255=67 Ind. Cas. 919.

New plea cannot be allowed to be raised in second appeal so as to change nature of suit. A. I. R. 1930 Oudh 389=7 O. W. N. 541=127 Ind. Cas. 254; 27 Ind. Cas. 810; 6 C. 55; 68 Ind. Cas. 557=A. I. R. 1922 Lah. 363=3 Lah. 239; 10 A. 495; 26 A. 331; 39 B. 149. An objection to jurisdiction can be raised for the first time in second appeal. 12 C. W. N. 636; A. I. R. 1934 Oudh 55=9 Luck. 365. A point of law requiring investigation into facts cannot be allowed to be taken for the first time in second appeal. 43 Ind. Cas. 857=3 P. L. W. 213=43 Ind. Cas. 857; see also 43 Ind. Cas. 955=5 P. L. W. 136; 50 Ind. Cas. 190=6 O. L. J. 76=22 O. C. 3; 51 Ind. Cas. 256; 57 Ind. Cas. 883; 3 Lah. L. J. 516; 62 Ind. Cas. 761; 4 Lah. L. J. 437; A. I. R. 1922 All. 124=66 Ind. Cas. 858; A. I. R. 1923 Cal. 285=67 Ind. Cas. 770; 68 Ind. Cas. 557=A. I. R. 1922 Lah. 363=3 Lah. 239; 69 Ind. Cas. 655=A. I. R. 1924 Cal. 353; 70 Ind. Cas. 417=A. I. R. 1922 Bom. 233; 96 Ind. Cas. 304 (All); A. I. R. 1926 All. 707=97 Ind. Cas. 342; A. I. R. 1927 Mad. 411=38 M. L. T. 102=99 Ind. Cas. 367; 99 Ind. Cas. 691=A. I. R. 1927 Mad. 455; A. I. R. 1927 all 763=101 Ind. Cas. 426; A. I. R. 1927 Nag. 351=104 Ind. Cas. 584.

New plea even of law cannot be raised in second appeal, unless good cause is shown why they were not taken in the lower appellate Court. A. I. R. 1930 All 885=126 Ind. Cas. 18. Point not taken in the lower Court, cannot be allowed for first time in the second appeal. A. I. R. 1923 All. 358=45 A. 53=74 Ind. Cas. 1004; A. I. R. 1923 All. 430=75 Ind. Cas. 612; A. I. R. 1924 Mad. 116=18 L. W. 553=75 Ind. Cas. 613; A. I. R. 1922 Pat. 398=3 Pat. 23=3 P. L. T. 795=69 Ind. Cas. 185; 72 Ind. Cas. 131=A. I. R. 1923 Mad. 306=17 L. W. 169; A. I. R. 1923 Cal. 177=27 C. W. N. 218=76 Ind. Cas. 213; see also A. I. R. 1934 Rang. 289; A. I. R. 1924 Mad. 639=152 Ind. Cas. 464=1934 M. W. N. 118; A. I. R. 1934 All. 770=149 Ind. Cas. 93; 10 O. W. N. 1186=147 Ind. Cas. 952; A. I. R. 1934 Pat. 55=150 Ind. Cas. 541; A. I. R. 1934 Oudh 55=11 O. W. N. 193=147 Ind. Cas. 910=9 Luck 365; 40 L. W. 610=1934 M. W. N. 951=152 Ind. Cas. 246=A. I. R. 1934 Mad. 551=67 M. L. J. 268; A. I. R. 1934 All 941; A. I. R. 1936 Rang. 260; 152 Ind. Cas. 615=A. I. R. 1935 All. 143; A. I. R. 1936 Rang. 260. But the question of admissibility of evidence can be raised for the first time in second appeal. A. I. R. 1936 Lah. 1005. Plea as to absence of notice cannot be raised for the first time in second appeal. A. I. R. 1923 Lah. 609=72 Ind. Cas. 779. A technical plea should not be allowed to be taken for the first time in appeal. A. I. R. 1924 Lah. 328. Point involving additional evidence cannot be urged in second appeal. A. I. R. 1923 Bom. 37=72 Ind. Cas. 993. A point of law not dependent on any question of fact can be raised in second appeal though not raised before. 15 Pat. 356=160 Ind. Cas. 1096=17 Pat. L. T. 57=A. I. R. 1936 Pat. 104; A. I. R. 1936 Lah. 448=38 P. L. R. 608=164 Ind. Cas. 30.

A point not taken in the Court below, whether omission was by the appellant in that Court or whether the respondent failed to support his decree by taking the point will not be permitted to be raised except possibly (i) where the point may be described as involving a question of public policy; *e. g.*, (i) involving jurisdiction (ii) involving the principles of *res judicata* (iii) where the decision on the point would prevent future litigation. In the above mentioned cases the plea may be allowed to be argued only if it can be decided from the materials before the Court and does not involve the taking of further evidence or the sending of any case or any issue back to the lower Court or a decision of a question of fact. (2) Where the plaint discloses no cause of action or the written statement on ground of defence, it is not a ground for permitting a new point to be argued merely (i) that it was omitted by oversight in the Court below (ii) that the materials are all on record and that the answer to the point is plain. 53 A. 65=133 Ind. Cas. 428=1930 A. L. J. 601=A. I. R. 1931 All. 35 (F. B.); see also A. I. R. 1931 All. 219=132 Ind. Cas.

426 ; A. I. R. 1933 Lah. 606=144 Ind. Cas. 669 ; 27 S. L. R. 41=A. I. R. 1933 Sind 176 ; 1934 M. W. N. 118 ; 11 O. W. N. 317.

Fresh question of law and fact cannot be admitted for the first time in second appeal. A. I. R. 1924 Mad. 913=47 M. L. J. 503=(1924) M. W. N. 820=83 Ind. Cas. 1009 ; A. I. R. 1923 Lah. 56=79 Ind. Cas. 990 ; A. I. R. 1925 Mad. 207=81 Ind. Cas. 498 ; A. I. R. 1925 Cal. 225=29 C. W. N. 17=40 C. L. J. 564=85 Ind. Cas. 875 ; A. I. R. 1926 Nag. 164=89 Ind. Cas. 1009 ; A. I. R. 1925 Lah. 192=6 Lah. L. J. 467. Fresh point of inadmissibility for want of registration or irrelevancy of document cannot be allowed at any stage. A. I. R. 1925 Cal. 370=82 Ind. Cas. 949 ; but see A. I. R. 1927 Mad. 92=25 L. W. 327=98 Ind. Cas. 195. When a question of part payment under s. 20 of the Limitation Act involves the determination of a question of fact, it cannot be allowed for the first time in second appeal. A. I. R. 1923 Bom. 82=47 B. 128=24 Bom. L. R. 1284=76 Ind. Cas. 115. But question, if defendant is a necessary party, can be pressed in second appeal where no fresh evidence is not required. A. I. R. 1925 Lah. 65=6 Lah. L. J. 351=82 Ind. Cas. 603. Whether unregistered deed is Will or deed of gift, being inadmissible and not being point of law cannot be called into question in appeal for first time. A. I. R. 1929 Lah. 875=117 Ind. Cas. 907.

Point of law for right decision of which there is no material in pleadings and judgment cannot be raised in second appeal. A. I. R. 1929 All. 456=116 Ind. Cas. 749 ; see also A. I. R. 1930 All. 726=127 Ind. Cas. 525. Whether a gift is bad as offending against the doctrine of *musha* is a mixed question of law and fact and cannot for the first time be raised in second appeal. A. I. R. 1928 Cal. 49=140 Ind. Cas. 126. Question whether a document is naturally changed is a question of fact. A. I. R. 1929 Mad. 622=119 Ind. Cas. 472. In winding up of business question whether partner has authority to bind firm by his acknowledgment of debt, being a mixed question of law and fact cannot be put forth in second appeal for the first time. A. I. R. 1929 Lah. 266=118 Ind. Cas. 529 ; see also A. I. R. 1929 Lah. 154=112 Ind. Cas. 375. In a suit for partition, objection to maintainability on the ground of its being for partial partition cannot be raised for first time in second appeal. A. I. R. 1927 Mad. 528=100 Ind. Cas. 202. Where the facts are not disputed a question of limitation can be raised for the first time in second appeal. A. I. R. 1927 All. 177=99 Ind. Cas. 280.

Question of procedure dependent on facts cannot be raised for the first time in second appeal. 94 Ind. Cas. 417. A mixed question of law and fact cannot be raised for the first time in second appeal. A. I. R. 1927 All. 59 ; 97 Ind. Cas. 611=(1926) M. W. N. 559 ; 92 Ind. Cas. 1047=A. I. R. 1926 Mad 635. The plaintiff must be pinned down to the specific case he has made out in his plaint and must not be allowed to set up a new case in the second appeal for which there was no adequate investigation in the lower Courts. 96 Ind. Cas. 304 (All.) ; see also 8 Lah. L. J. 430=27 P. L. R. 628=98 Ind. Cas. 268 ; A. I. R. 1927 Nag. 129=23 N. L. R. 1=99 Ind. Cas. 187 ; A. I. R. 1927 Lah. 426=28 P. L. R. 181=102 Ind. Cas. 426. But no decree can follow from plea not stated in plaint nor being consistent with it. A. I. R. 1921 Mad. 345=30 L. W. 787=118 Ind. Cas. 219.

Validity of imposition of the personal tax under s. 85 of the old Bengal Municipal Act could not be questioned for the first time in the argument in the High Court. A. I. R. 1929 Cal. 452=49 C. L. J. 383=33 C. W. N. 684=124 Ind. Cas. 335. If not complained against at earliest opportunity non-compliance by Court with Order XIII, cannot be pleaded in second appeal. A. I. R. 1923 Lah. 704=108 Ind. Cas. 374. So raising of new point for the first time cannot be allowed in the second appeal. 3 P. L. T. 623=65 Ind. Cas. 277 ; see also 67 Ind. Cas. 322=22 Bom. L. R. 323=46 B. 966 ; 49 C. 1048=28 C. W. N. 92=69 Ind. Cas. 530 ; 44 M. L. J. 596=69 Ind. Cas. 363 ; 4 Lah. L. J. 437 ; 36 C. L. J. 186=64 Ind. Cas. 266=A. I. R. 1921 Cal. 781 ; 59 Ind. Cas. 3 ; 59 Ind. Cas. 316 (Cal.) ; 59 Ind. Cas. 709=A. I. R. 1921 Nag. 94 ; 62 Ind. Cas. 884=19 A. L. J. 442=3 U. P. L. R. (All) 81. Question whether parties constituted joint Hindu family cannot be introduced as a new plea in second appeal. 3 Lah. L. J. 137=66 Ind. Cas. 881. New plea prejudicial to other party cannot be raised in second appeal. A. I. R. 1923 Cal. 292=65 Ind. Cas. 701. Issue depending on fact cannot be raised as new plea. 65 Ind. Cas. 706. Consideration of evidence cannot be made in second appeal. A. I. R. 1922 Pat. 167=65 Ind. Cas. 666. Objection taken in trial Court but not argued in the lower appellate Court cannot be raised in second appeal. 19 A. L. J. 511=43 A. 555=63 Ind. Cas. 366 ; 55 Ind. Cas. 481

=16 N. L. R. 89. Respondent first coming to know of erroneous order restoring the appeal without notice can object to its validity in second appeal. A. I. R. 1922 Pat. 281=6 P. L. J. 625=3 P. L. T. 117=63 Ind. Cas. 90. Point not raised before lower appellate Court though mentioned in the Memorandum of Appeal cannot for the first time be allowed in second appeal. 55 Ind. Cas. 441=7 O. L. J. 17. New plea on which issue was not framed cannot for the first time be allowed in second appeal. 31 C. L. J. 78=24 C. W. N. 53=54 Ind. Cas. 719; see also 52 Ind. Cas. 517=(1919) M. W. N. 548=10 L. W. 137. Question of interest cannot be raised for the first time in second appeal. 48 Ind. Cas. 465. Plaintiffs cannot ask in second appeal for retrial on an issue of fact not raised or considered in the Courts below. 43 Ind. Cas. 18. A Court of second appeal should not allow a point of law to be taken which was not taken in the lower Courts and involving questions of fact. 22 C. W. N. 156=44 Ind. Cas. 91. Point of law patent upon record but not raised in lower Court or in Chief Court cannot be given effect to by the Court *suo motu* in second appeal. 31 P. L. R. 1918=54 P. W. R. 1918=27 P. L. R. 1918=45 Ind. Cas. 101. Tenants failing to establish plea or permanent tenancy in suit for injunction cannot in second appeal ask for fresh enquiry to determine whether pecuniary compensation would suffice instead of injunction. 55 Ind. Cas. 951. The point as to whether the notice to quit was legal and sufficient, when not raised in lower appellate Court cannot be raised in second appeal. 2 Pat. L. J. 595=2 P. L. W. 52=42 Ind. Cas. 665. Substituted defendants in place of a deceased defendant cannot raise in second appeal a plea of abatement raised in their written statement but as to which no express issue was framed. 41 Ind. Cas. 1. A finding of fact based on admissible evidence cannot be questioned in second appeal. 3 O. L. J. 241=19 O. C. 166=34 Ind. Cas. 745. Whether a suit for declaration of a right of way by grant must fail for want of legally sufficient evidence to prove the grant can be argued in appeal though not taken in Courts below. 20 C. W. N. 1158=34 Ind. Cas. 450.

A new point which was not taken in either of the Courts below, cannot for the first time be taken in second appeal. A. I. R. 1933 All. 911; 146 Ind. Cas. 939=A. I. R. 1933 Lah. 615; A. I. R. 1933 Lah. 845; 29 N. L. R. 342=A. I. R. 1933 Nag. 318; A. I. R. 1932 Oudh 244=138 Ind. Cas. 808=9 O. W. N. 523. When a point raised in the original objection was not dealt with in the order under appeal and was not mentioned in the Memorandum of Appeal, but was raised at the preliminary hearing of the appeal and was noted at the time when the notice was issued to the respondents: *Held* that the point did not take the respondent by surprise and that it may be decided by the appellate Court, where it is a question of law apparent on the face of the record. A. L. R. 1934 Pesh. 6=A. I. R. 1934 Pesh. 3. A new point of law may be urged in second appeal, provided the facts found are sufficient for the determination of the point. 3 A. W. R. 456; 38 C. W. N. 492. Where adverse possession was never pleaded, there was no issue upon it and it had never been discussed, it is a matter of evidence and cannot be dealt with in second appeal. 3 A. W. R. 486.

**Abandonment of a point in Lower Court.**—Point even of law abandoned in lower appellate Court cannot again be raised in second appeal. A. I. R. 1930 Oudh 268=7 O. W. N. 523=127 Ind. Cas. 865; A. I. R. 1929 Nag. 343=119 Ind. Cas. 698; A. I. R. 1929 Lah. 81; see also A. I. R. 1929 Rang. 213; A. I. R. 1928 Mad. 90=109 Ind. Cas. 178; A. I. R. 1926 Nag. 160=89 Ind. Cas. 18; 88 Ind. Cas. 477=A. I. R. 1925 Cal. 1184; A. I. R. 1931 Sind 170=85 Ind. Cas. 387=A. I. R. 1925 Oudh 510; 79 Ind. Cas. 462=A. I. R. 1923 Lah. 252=5 Lah. L. J. 14; 69 Ind. Cas. 44; A. I. R. 1922 Oudh 102=65 Ind. Cas. 408=8 O. L. J. 600; A. I. R. 1929 Pat. 717. High Court is bound to take notice of legal point considered by the first Court but not by appellate Court. A. I. R. 1925 Oudh 506=12 O. L. J. 382=2 O. W. N. 529=89 Ind. Cas. 563.

**Abandonment whether a question of law or fact.**—Finding of abandonment of right in house is question of law. A. I. R. 1930 Lah. 215=125 Ind. Cas. 188; see also A. I. R. 1928 Cal. 891=32 C. W. N. 1111=114 Ind. Cas. 482; A. I. R. 1921 Lah. 229=3 Lah. L. J. 26=66 Ind. Cas. 935. A finding on abandonment of a holding is a question of fact and hence a second appeal only in matters of legal principle arising out of these facts can be taken up. 41 P. R. 1919=82 P. R. 1919=51 Ind. Cas. 396. Abandonment or non-abandonment is a question of fact. A. I. R. 1929 Cal. 120=48 C. L. J. 390=141 Ind. Cas. 153; A. I. R. 1921 Lah. 162=3 Lah. L. J. 445; 88 Ind. Cas. 1032=4 Pat. 838=6 P. L. T. 503=A. I. R. 1925 Pat.

741 ; A. I. R. 1924 Cal. 366=71 Ind. Cas. 304 ; 32 Ind. Cas. 355 ; 91 Ind. Cas. 493=A. I. R. 1926 Cal. 751. Question whether a person has abandoned a particular trade mark is a question of fact. A. I. R. 1928 Lah. 924=9 Lah. 487=29 P. L. R. 615=113 Ind. Cas. 228.

**Admission.**—The evidence of admission is like other evidence in the suit, a matter the cogency of which is for the lower appellate Court to determine, and cannot be questioned in second appeal. A. I. R. 1933 Pat. 698.

**Abatement.**—Though no second appeal lies from an order of abatement, it may be questioned in second appeal if it affects the decision of the case. 1933 A. L. J. 561=144 Ind. Cas. 133=A. I. R. 1933 All. 294.

**Decision regarding adverse possession.**—Decision regarding adverse possession derived from inference of facts can be questioned in second appeal on ground of legality of conclusion. A. I. R. 1929 Pat. 590=117 Ind. Cas. 644 ; A. I. R. 1929 Oudh 337=6 O. W. N. 536=115 Ind. Cas. 440 ; A. I. R. 1923 Nag. 65=6 N. L. J. 70=74 Ind. Cas. 51 ; A. I. R. 1924 Oudh 266=10 O. L. J. 646=27 O. C. 77 ; 34 Ind. Cas. 616=1 Pat. L. J. 47 ; A. I. R. 1931 Lah. 489 ; 32 P. L. R. 727. When adverse possession is inferred from documents it is not a question of fact, and concurrent findings of Indian Courts can be upset by Privy Council. 42 A. 152=46 I. A. 197=18 A. L. J. 235=38 M. L. J. 259=22 Bom. L. R. 451=24 C. W. N. 394 (P. C.)=55 Ind. Cas. 486. The question of adverse possession is a mixed question of fact and law. Whether a defendant did act in a particular manner is a question of fact but the true legal effect of that act upon the title of the plaintiffs is a question of law. 29 C. L. J. 241=51 Ind. Cas. 123 ; see also 54 Ind. Cas. 873=170 P. R. 1919=2 Lah. L. J. 136 ; 40 Ind. Cas. 420 ; 91 Ind. Cas. 38=A. I. R. 1926 Cal. 881 ; 26 C. W. N. 890=68 Ind. Cas. 200=A. I. R. 1922 Cal. 54 ; 33 C. L. J. 344=60 Ind. Cas. 298. Adverse possession is a mixed question of fact and law, and cannot be allowed to be pleaded for the first time in second appeal. A. I. R. 1927 Lah. 522=102 Ind. Cas. 476. Finding regarding absence of adverse possession is one of fact. A. I. R. 1921 Lah. 264=4 Lah. L. J. 309 ; see also A. I. R. 1921 Lah. 264=4 Lah. L. J. 309 ; A. I. R. 1923 All. 382=75 Ind. Cas. 672 ; A. I. R. 1931 All. 323=130 Ind. Cas. 286 ; 135 Ind. Cas. 680=33 P. L. R. 494 ; I. R. 1932 Lah. 628.

When a question of adverse possession is one of legal inference to be drawn from established facts, it is not a question of simple fact but one of law. 32 P. L. T. 727 ; A. I. R. 1932 Lah. 72. Question whether possession is adverse or not is a mixed question of law and fact. A. I. R. 1931 All. 323=130 Ind. Cas. 296. A decision that a party's possession is adverse being an inference from facts, the correctness of this as a legal conclusion to be drawn or not is a question open to second appeal. 32 P. L. R. 467=A. I. R. 1931 Lah. 489 ; see also 54 A. 628=1932 A. L. J. 425=140 Ind. Cas. 653=A. I. R. 1932 All. 393. Finding as regards adverse possession is one of fact and is binding in second appeal. A. I. R. 1932 Lah. 825 ; see also 135 Ind. Cas. 680=32 P. L. R. 494 ; A. L. R. 1932 Lah. 628 ; A. I. R. 1933 Oudh 462=10 O. W. N. 1011.

**Question of Acquiescence.**—The question of waiver, acquiescence or estoppel is a question of legal inference from facts found, which can be examined by High Court in second appeal. A. I. R. 1929 Cal. 437=56 C. 201=116 Ind. Cas. 733 ; see also A. I. R. 1928 Nag. 87=23 N. L. R. 192=107 Ind. Cas. 522 ; A. I. R. 1927 Cal. 220=44 C. L. J. 434=100 Ind. Cas. 302 ; A. I. R. 1926 Nag. 416=95 Ind. Cas. 636 ; 82 Ind. Cas. 309=A. I. R. 1925 Cal. 288 ; 41 Ind. Cas. 927=103 P. W. R. 1917=69 P. R. 1917 ; 71 Ind. Cas. 942=A. I. R. 1924 Nag. 56 ; 73 Ind. Cas. 137=A. I. R. 1921 Nag. 167. Whether there is waiver in the case is a question of fact and finding thereon is not challengeable in second appeal. 14 S. L. R. 128=59 Ind. Cas. 607.

**Ancestral nature of property.**—Finding by lower Court of property as with ancestral or otherwise is a finding of fact and the High Court will not interfere such finding in second appeal. A. I. R. 1921 Lah. 138=3 Lah. L. J. 414=67 Ind. Cas. 439 ; A. I. R. 1924 Lah. 263=5 Lah. L. J. 449=76 Ind. Cas. 147 ; A. I. R. 1921 Lah. 380=20 P. L. R. 1922 ; 42 P. L. R. 1919 ; A. I. R. 1934 Lah. 351=35 P. L. R. 378 ; A. I. R. 1934 Lah. 274=36 P. L. R. 315=15 Lah. 645 ; A. I. R. 1934 Lah. 406=35 P. L. R. 406. But if such finding is based on no evidence but on mere conjecture a second appeal is competent. 64 Ind. Cas. 428=A. I. R. 1922 Lah. 65=4 Lah. L. J. 31 ; A. I. R. 1926 Lah. 659=8 Lah. 30=8 Lah. L. J. 485=27 P. L. R. 721=97 Ind.

**Cas. 241.** Whether the self-acquired property of a member of a joint Hindu family has been thrown into the common stock or not is a question of fact. A. I. R. 1926 Mad. 963=51 M. L. J. 167=96 Ind. Cas. 1051. The question whether it is the intention of the family that the brother who takes up residence elsewhere should sever all connection with their ancestral land or whether it is the intention of the family that the member who remains a resident in the village should continue in charge of the ancestral land on behalf of the whole family is a finding of fact. 16 R. D. 105=13 U. D. 68. The question whether the suit land is ancestral is one of fact. 34 P. L. R. 739=A. I. R. 1933 Lah. 350 ; A. I. R. 1933 Lah. 765=34 P. L. R. 567=145 Ind. Cas. 628 ; A. I. R. 1934 Lah. 351.

**Birth, date of.**—Finding as regards date of birth is a finding of fact. 28 N.L.R. 127=140 Ind. Cas. 66=A. I. R. 1932 Nag. 117=A. L. R. 1932 Nag. 227.

**Attestation of a document.**—Whether a scribe is an attesting witness or not is a question of fact. A. I. R. 1926 Cal. 150=90 Ind. Cas. 774. So also whether from the attestation of a document, assent to its terms may be implied is a question of fact. 51 Ind. Cas. 621. But the High Court is competent to come to a finding that the execution was witnessed by the attesting witnesses. A. I. R. 1923 Mad. 36=46 M. 64=43 M. L. J. 745=(1922) M. W. N. 708=71 Ind. Cas. 153.

**Bonafides.**—Question of good faith or *bona fides* of a party is always a question of fact. A. I. R. 1925 Lah. 507=7 Lah. L. J. 358=26 P. L. R. 641=92 Ind. Cas. 602 ; 138 Ind. Cas. 646=33 P. L. R. 740=A. I. R. 1932 Lah. 531 ; A. I. R. 1921 Sind 13=15 S. L. R. 11=62 Ind. Cas. 507 ; see also A. I. R. 1925 Mad. 1285=49 M. L. J. 549=22 L. W. 560=91 Ind. Cas. 742 ; 4 Lah. 40=A. I. R. 1921 Lah. 291 ; A. I. R. 1927 Lah. 909=102 Ind. Cas. 628 ; 103 Ind. Cas. 412 ; 109 Ind. Cas. 776. Finding by the lower appellate Court that a suit is not collusive cannot be questioned in second appeal. A. I. R. 1921 Lah. 45=3 Lah. L. J. 86=59 Ind. Cas. 585. Question regarding plaintiff's *bona fide* mistake is one of law. 29 C. W. N. 51=A. I. R. 1925 Cal. 152=82 Ind. Cas. 638. Where there are no facts and no evidence from which to make an inference of *bona fide* conduct, the finding is not binding in second appeal. 33 P. L. R. 263=136 Ind. Cas. 710=A. I. R. 1932 Lah. 322=A. L. R. 1932 Lah. 456. Whether a purchaser has acted in good faith so as to have the benefit of s. 41 of T. P. Act is a question of fact. 34 P. L. R. 642=A. I. R. 1933 Lah. 738.

**Benami, question of.**—A question of *benami* or fraud is not a question of pure facts. It is a mixed question of fact and law. If improper inference is drawn, the error is one of law and can be interfered with in second appeal. 3 P. L. W. 399=43 Ind. Cas. 49 ; but see A. I. R. 1929 Oudh 83=5 O. W. N. 1122=4 Luck. 265=115 Ind. Cas. 99. Where it has been held that the question of *benami* being a purely finding of fact, cannot be raised in second appeal ; see also A. I. R. 1936 Cal. 178=63 C. 846=62 C. L. J. 846. The finding that a person is a *benamidar* is a finding of fact and cannot be disturbed in second appeal. 32 P. L. R. 295 ; 32 P. L. R. 289 ; 34 P. L. R. 642=A. I. R. 1933 Lah. 738.

**Consideration.**—Finding that a pro-note is for a consideration or not is one of fact. A. I. R. 1924 Lah. 39=5 Lah. L. J. 198=71 Ind. Cas. 783. Nature of consideration is also a question of fact. 103 Ind. Cas. 444=A. I. R. 1927 Lah. 530=28 P. L. R. 388=9 Lah. L. J. 319.

**Contract.**—Questions of existence of contract and consideration for it are questions of facts. 40 B. 646=18 Bom. L. R. 700=35 Ind. Cas. 794 ; 110 Ind. Cas. 408 ; A. I. R. 1936 Pat. 95=160 Ind. Cas. 1079. A finding of the lower Court that a contract was not acted upon by the parties is a finding of fact. 38 P. L. R. 590. Whether time is an essence of a contract or not is also a question of fact. 67 Ind. Cas. 157. Finding as regards breach of contract also cannot be interfered with in second appeal. 4 Lah. L. J. 317. In absence of written contract, the finding as regards payment of earnest money is also a question of fact. A. I. R. 1922 All. 478=20 A. L. J. 742=68 Ind. Cas. 761. Questions as to contract for sale of goods and reasonable time for examining goods are questions of facts. 135 Ind. Cas. 498=A. I. R. 1932 Lah. 52.

**Contributory negligence.**—The question of contributory negligence in a suit for damage is a question of fact. A. I. R. 1933 All. 214=144 Ind. Cas. 1914.

**Construction of documents.**—Construction of documents is a question of law and can properly be gone into in second appeal. A. I. R. 1930 Bom. 317=128 Ind. Cas. 19=32 Bom. L. R. 610 ; see also A. I. R. 1929 Lah 833=120 Ind. Cas. 420 ;



A. I. R. 1929 Lah. 38=115. Ind. Cas. 77 ; 120 Ind. Cas. 557 ; 57 C. 170=50 C. L. J. 208=A. I. R. 1930 Cal. 113 ; 113 Ind. Cas. 373 ; A. I. R. 1929 Oudh 241=113 Ind. Cas. 367 ; 111 Ind. Cas. 402=A. I. R. 1928 Nag. 289 ; 43 C. 1104=43 I. A. 172=20 C. W. N. 1245=18 Bom. L. R. 838=14 A. L. J. 1009=37 Ind. Cas. 223 (P. C.) ; 37 Ind. Cas. 297=120 P. L. R. 1916=115 P. W. R. 1916 ; 16 P. W. R. 1918=47 Ind. Cas. 351 ; 52 Ind. Cas. 119 ; A. I. R. 1925 Rang. 255=88 Ind. Cas. 395 ; A. I. R. 1926 Pat. 49=88 Ind. Cas. 820 ; A. I. R. 1925 Pat. 725=91 Ind. Cas. 735 ; 91 Ind. Cas. 423. The construction of document includes two things namely, meaning of words and its legal effect. The former is a question of fact and the latter is a question of law. A. I. R. 1926 Lah. 21=26 P. L. R. 605=90 Ind. Cas. 1047 ; A. I. R. 1926 All. 75=23 A. L. J. 869=89 Ind. Cas. 617 ; A. I. R. 1925 Rang. 255=4 Bur. L. J. 27=88 Ind. Cas. 314 ; A. I. R. 1925 Mad. 177=47 M. L. J. 833=85 Ind. Cas. 261 ; A. I. R. 1924 Nag. 422=79 Ind. Cas. 621 ; A. I. R. 1923 Lah. 626=80 Ind. Cas. 264 ; A. I. R. 1925 Lah. 150=78 Ind. Cas. 36 ; A. I. R. 1925 Oudh 64=75 Ind. Cas. 1021 ; A. I. R. 1923 All. 337=76 Ind. Cas. 686 ; 73 Ind. Cas. 629=A. I. R. 1924 Pat. 147 ; 37 C. L. J. 480=72 Ind. Cas. 55=A. I. R. 1923 Cal. 358 ; A. I. R. 1922 Nag. 52=18 N. L. R. 163=5 N. L. J. 25=69 Ind. Cas. 800 ; 64 Ind. Cas. 350=A. I. R. 1921 Lah. 212=14 P. L. R. 1922 ; 36 Ind. Cas. 199=77 P. L. R. 1917=68 P. R. 1916=18 P. W. R. 1916=77 P. L. R. 1917 ; 95 Ind. Cas. 81=28 Bom. L. R. 467=A. I. R. 1926 Bom. 493 ; 53 C. 453=30 C. W. N. 405=44 C. L. J. 275=A. I. R. 1926 Cal. 607 ; 93 Ind. Cas. 927=A. I. R. 1926 Oudh 260=13 O. L. J. 565 ; see also A. I. R. 1934 Lah. 35 ; 149 Ind. Cas. 1016=A. I. R. 1934 Lah. 193=36 P. L. R. 98 ; 39 C. W. N. 581=61 C. L. J. 143 ; A. I. R. 1935 Cal. 282=60 L. L. J. 412=155 Ind. Cas. 833 ; A. I. R. 1935 Lah. 857 ; A. I. R. 1935 Lah. 378. A finding of fact which is based upon interpretation of a title-deed in a suit may be challenged in second appeal 154 Ind. Cas. 1017=1935 O. W. N. 365=A. I. R. 1935 Oudh 304. But where the question to be decided is one of fact, it does not involve an issue of law merely because documents which were not instruments of title or otherwise the direct foundation of rights, but were merely historical materials, have to be construed for the purpose of deciding that question. 61 C. 45=A. I. R. 1934 Cal. 461 ; see also A. I. R. 1936 Oudh 225=1936 O. W. N. 100. The construction of a document of title is a question of law or at any rate of mixed fact and law and the second appellate Court can go into such matter. A. I. R. 1936 Pat. 287=162 Ind. Cas. 838 ; see also 1936 O. W. N. 375=162 Ind. Cas. 334. But this rule is not applicable where the documents construed were not documents of title. A. I. R. 1936 Pat. 129=161 Ind. Cas. 465. If extrinsic evidence is needed for interpretation of a document, the construction of document is one of fact. A. I. R. 1925 Cal. 656=29 C. W. N. 353=85 Ind. Cas. 693 ; see also 50 Ind. Cas. 288 ; 36 P. R. 1919=79 P. L. R. 1919=51 Ind. Cas. 380 ; 45 A. 581=21 A. L. J. 503=77 Ind. Cas. 572. The date at which a particular holding first began to be held as a definite holding is essentially a question of fact, and must depend on evidence. A. I. R. 1923 P. C. 187=4 P. L. T. 627=25 Bom. L. R. 1287=45 M. L. J. 663=74 Ind. Cas. 482. Misreading of documents is not of title and misconstruction thereof is not a point of law and would not justify interference in second appeal. A. I. R. 1923 Pat. 154=67 Ind. Cas. 435 ; see also A. I. R. 1922 Lah. 240=65 Ind. Cas. 580 ; 55 Ind. Cas. 179=15 P. L. T. 126=5 P. L. J. 251 ; 90 Ind. Cas. 1047=A. I. R. 1926 Lah. 21 ; 32 P. L. R. 156=A. I. R. 1931 Lah. 417.

Finding as to intention of parties to deed of transfer whether certain property should pass in one of fact and not open to challenge in second appeal. 63 Ind. Cas. 746. Where no other evidence is accepted wrong construction of document and wrong inference therefrom constitute an error of law. 18 A. L. J. 195=55 Ind. Cas. 366 ; see also 56 Ind. Cas. 466=2 U. P. A. R. (Pat.) 47 ; 41 Ind. Cas. 755=54 P. W. R. 1917 ; 46 Ind. Cas. 734=42 B. 344=20 Bom. L. R. 654. Construction of deposition is not a question of law, it is only what Court thinks is proved by it. 63 Ind. Cas. 575 ; see also A. I. R. 1923 All. 362=71 Ind. Cas. 369 ; A. I. R. 1926 Oudh 151=90 Ind. Cas. 911 ; A. I. R. 1924 Lah. 260=80 Ind. Cas. 494. Fresh law point following interpretation of document or from facts proved should be admitted even in Court of last instance. A. I. R. 1925 Nag. 104=108 Ind. Cas. 607.

Finding that a document is so worded that its true meaning is hidden is not one of interpretation and as such is not a point of law. A. I. R. 1929 Nag. 342=119 Ind. Cas. 698. Considerations which led to particular conclusion regarding intention of parties to contract cannot be reconsidered. A. I. R. 1930 Mad. 590=126 Ind. Cas. 492. Where interpretation given to a document by a Court below is possible, it should be upheld in second appeal. A. I. R. 1930 Lah. 139=123 Ind. Cas. 533 ;

see also A. I. R. 1931 Ma I. 137=33 L. W. 540 Finding of lower appellate Court by interpreting document, not one of title cannot be upset on second appeal. A. I. R. 1930 Lah. 691=125 Ind. Cas. 610. Finding if stipulation regarding further security is condition precedent is one of fact. A. I. R. 1929 P. C. 63=31 Bom. L. R. 700=33 C. W. N. 675=115 Ind. Cas. 722. Even gross misinterpretation of obscure settlement record was held to be no ground for second appeal. 124 Ind. Cas. 26. Question whether vendees under one sale deed are jointly or severally liable for the price is one of fact to be decided from the deed and circumstantial evidence of parties' intention. A. I. R. 1930 Lah. 806=57 P. L. R. 201=123 Ind. Cas. 283 ; A. I. R. 1928 Lah. 667=110 Ind. Cas. 428 ; A. I. R. 1927 All 689=103 Ind. Cas. 255.

Finding based upon the construction of or inferences drawn from documentary evidence cannot be interfered with in second appeal. A. I. R. 1927 Oudh 541=4 O. W. N. 165=100 Ind. Cas. 631 ; 59 Ind. Cas. 183 ; A. I. R. 1928 Oudh 18=104 Ind. Cas. 760 ; A. I. R. 1926 All. 542=48 A. 588=24 A. L. J. 705=95 Ind. Cas. 582. Whether personal liability has been taken by the executant of a pro-note having regard to its terms is a question of law to be decided with reference to those terms. A. I. R. 1928 Cal. 123=46 C. L. J. 566=32 C. W. N. 125=106 Ind. Cas. 848. The question as to the proper construction to be put upon the entries in a *jama wasil baki* though the meaning of some of the entries is found to be a matter of some difficulty is not a question of law. A. I. R. 1928 P. C. 243=55 I. A. 380=56 M. L. J. 1=48 C. L. J. 557=111 Ind. Cas. 288. Finding of fact based on misconstruction of document is not purely one of fact. A. I. R. 1930 Lah. 139=123 Ind. Cas. 533. The meaning of the words in a document is a question of fact in all cases ; the effect of the words, the inference to be drawn from the words in a document is a question of law. 7 Luck. 116=8 O. W. N. 800=134 Ind. Cas. 411=A. I. R. 1932 Oudh 283 ; A. I. R. 1932 All. 289. But construction of a title-deed is a question of law. 135 Ind. Cas. 693=A. I. R. 1932 Oudh 51. Unless there has been misconstruction a mistaken inference from document is an error, not of law, but of fact. 60 I. A. 231=143 Ind. Cas. 437=57 C. L. J. 519=35 Bom. L. R. 816=29 N. L. R. 210=A. I. R. 1933 P. C. 171=65 M. L. J. 154 (P. C.) ; see also A. I. R. 1931 Lah. 594=131 Ind. Cas. 126 ; 32 P. L. R. 508=A. I. R. 1931 Lah. 605 ; 34 Bom. L. R. 372=A. I. R. 1932 Bom. 230. No second appeal lies on ground of misinterpretation of documents where there is no error of law. A. I. R. 1934 Lah. 291 ; A. I. R. 1934 Cal. 461. The question of interpretation of decree is a pure question of fact, the decree not being a document of title. A. I. R. 1935 Lah. 115.

**Concurrent finding.**—Concurrent finding cannot be challenged in second appeal. 96 Ind. Cas. 283 ; A. I. R. 1929 Nag. 180 ; A. I. R. 1929 P. C. 205=50 C. L. J. 336=31 Bom. L. R. 1369=57 M. L. J. 594=118 Ind. Cas. 263 ; 38 C. W. N. 763=A. I. R. 1934 Cal. 707. Concurrent findings of Indian Courts that certain persons were managers of certain properties under power of attorney were not disturbed by the Judicial Committee when justified by ample evidence. A. I. R. 1930 P. C. 232=34 C. W. N. 849=59 M. L. J. 134=52 C. L. J. 54=32 Bom. L. R. 1516=127 Ind. Cas. 542 ; see also A. I. R. 1931 P. C. 48=33 Bom. L. R. 442=60 M. L. J. 386=53 C. L. J. 313=33 L. W. 439=35 C. W. N. 438=130 Ind. Cas. 673. Concurrent finding is no finding if based on error of law. A. I. R. 1929 P. C. 38=116 Ind. Cas. 593 ; see also A. I. R. 1928 Nag. 153=11 N. L. J. 21=111 Ind. Cas. 488 ; A. I. R. 1923 Rang. 196=1 Rang. 135=76 Ind. Cas. 449 ; 33 Ind. Cas. 666=(1915) U. B. R. 92. Where two Courts have come to the same conclusion on a question of fact, which goes to the foundation of the case it is not open to the High Court, on second appeal, to interfere. 17 C. 726 (F. B.). Findings supported by no evidence though concurrent, can be challenged in second appeal. A. I. R. 1931 Oudh 136=7 O. W. N. 1079=129 Ind. Cas. 331.

**Costs, question of.**—Second appeal is competent on a question of cost. 2 Lah. 310. But a question of costs cannot be taken up in second appeal against the concurrent finding of the two Courts. A. I. R. 1926 All. 419=93 Ind. Cas. 1008. If it involves principles an appeal is competent. A. I. R. 1921 Cal. 604=35 C. L. J. 156=68 Ind. Cas. 600 ; A. I. R. 1933 Oudh 455=10 O. W. N. 981 ; A. I. R. 1934 Lah. 739=35 P. L. R. 656 ; A. I. R. 1934 All. 434=1934 A. L. J. 803. Where the discretion of the lower Court has been interfered with by the lower appellate Court, the High Court can interfere in second appeal. 64 Ind. Cas. 962 ; see also A. I. R. 1928 Oudh 224=5 O. W. N. 35=107 Ind. Cas. 881 ; A. I. R. 1934 Oudh 259.

**Court-fee.**—In the absence of defect of jurisdiction, the question of Court-fee cannot be allowed to be raised for the first time in second appeal. A. I. R. 1927 Nag. 321=103 Ind. Cas. 337. In case of error in the calculation of Court-fee a second appeal lies, where Memorandum of Appeal was rejected for non-payment of deficit Court-fees. 51 Ind. Cas. 114; see also A. I. R. 1927 Nag. 100=98 Ind. Cas. 663; 7 A. 528.

**Dedication**—The question whether a dedication is real or nominal is a question of fact. A. I. R. 1931 Lah. 170=131 Ind. Cas. 283=32 P. L. R. 304; see also 33 P. L. R. 288=138 Ind. Cas. 215.

**Questions of Onus of proof.**—Question of onus of proof is one of law. A. I. R. 1924 Lah. 195=73 Ind. Cas. 216; see also 77 Ind. Cas. 246=A. I. R. 1921 Lah. 199=4 Lah. L. J. 199; see also 2 Lah. 249=A. I. R. 1921 Lah. 128=106 P. L. R. 1921=64 Ind. Cas. 901; see also 164 Ind. Cas. 740=A. I. R. 1936 Nag. 130; A. I. R. 1936 Rang. 362=163 Ind. Cas. 604; 19 N. L. J. 301. The question upon which party the onus of proving any particular point lies, is undoubtedly a question of law on which a second appeal lies. 65 Ind. Cas. 745; 4 O. L. J. 556=43 Ind. Cas. 478; 53 Ind. Cas. 982=1 Lah. 429; 76 Ind. Cas. 347=A. I. R. 1924 Pat. 310=2 Pat. 919=5 P. L. T. 315; A. I. R. 1926 All. 453=24 A. L. J. 513; A. I. R. 1932 Mad. 415; A. I. R. 1931 Cal. 668=53 C. L. J. 606; 64 Ind. Cas. 901=2 Lah. 249; A. I. R. 1921 Lah. 199=4 Lah. L. J. 199; 128 Ind. Cas. 108=51 C. L. J. 465=A. I. R. 1930 Cal. 591; 96 Ind. Cas. 820=A. I. R. 1926 Lah. 652 Even Privy Council can interfere with finding of fact if it is deduced from placing burden of proof on wrong party. A. I. R. 1929 P. C. 13=31 Bom. L. R. 264=33 C. W. N. 223=56 I. A. 6=56 M. L. J. 115=56 M. 83=114 Ind. Cas. 5; see also A. I. R. 1930 P. C. 170=34 C. W. N. 593=58 M. L. J. 626=32 Bom. L. R. 887=32 L. W. 51=123 Ind. Cas. 557. Where party is not prejudiced by wrong placing of burden of proof, there is no reason for interference by High Court. A. I. R. 1924 Lah. 335=69 Ind. Cas. 521; A. I. R. 1921 Lah. 162=3 Lah. L. J. 445. Finding of fact arrived at by appellate Court on correct appreciation of direction of lower Court as to burden of proof cannot be disturbed in second appeal. 12 L. W. 170=59 Ind. Cas. 973. Where a question of burden of proof clearly involves a question of custom, an appellant is not entitled to argue it on second appeal without a certificate. A. I. R. 1921 Lah. 77=2 Lah. 348=66 Ind. Cas. 492. Where evidence is given by both sides and one side is preferred by the lower Court, objection as to wrong shifting of burden of proof is groundless in second appeal. 1 P. L. W. 194=38 Ind. Cas. 817; see also 121 Ind. Cas. 377=A. I. R. 1930 Lah. 677. A finding of fact based not on positive evidence, but on the failure of a party to discharge the onus of proof is not such a finding as is final under section 100 of the C. P. Code when the onus is wrongly placed. 36 C. W. N. 221 P. C.=59 I. A. 29=59 C. 1012=136 Ind. Cas. 398=55 L. W. 112=55 C. L. J. 72=34 Bom. L. R. 481=A. I. R. 1932 P. C. 28=62 M. L. J. 336 (P. C.) It cannot be laid down as a proposition of universal application that an erroneous view of the burden of proof necessarily renders a Court incapable of weighing the evidence properly. When the lower appellate Court, notwithstanding its erroneous view as to the burden of proof weighed the evidence in the case *pro* and *con* and came to a determinate conclusion that the case set up by the plaintiff was true and that the defence was not, where it did not consider that the evidence was evenly balanced or find that the onus determined the matter, and where there was not the slightest ground for supposing that its conclusion was in no way influenced by its view of the incidence of burden of proof, *held* that its finding of facts was binding in the second appeal. 35 L. W. 511=1932 M. W. N. 345=A. I. R. 1932 Mad. 415; see also A. I. R. 1932 Cal. 351.

**Damages, question of.**—Finding that damage has been done is one of fact and no second appeal is maintainable against such finding. A. I. R. 1924 Pat. 240=1 Pat. L. R. 398=79 Ind. Cas. 183. Where the amount of damages has not been fixed arbitrarily it cannot be agitated in second appeal. 80 Ind. Cas. 297=A. I. R. 1923 All. 199; A. I. R. 1936 Nag. 70. Where the principle of assessment of damages is involved, the matter is open to question in second appeal. 28 N. L. R. 320; see also A. I. R. 1934 All. 749=A. I. R. 1934 All. 392. The finding as to the amount of damages is a question of fact. 28 N. L. R. 142=140 Ind. Cas. 68=A. I. R. 1932 Nag. 118.

**Discretion of lower court.**—The question as to the exercise of discretion is ordinarily one of fact. But such discretion must not be exercised arbitrarily but upon

sound legal principles governing the exercise of such discretion. A. I. R. 1926 Cal. 677=92 Ind. Cas. 1031. In cases of instalment decree High Court would not interfere in the absence of very strong grounds. A. I. R. 1922 Lah. 355=27 P. W. R. 1922=5 Lah. L. J. 135=66 Ind. Cas. 147. Discretion exercised by two Courts fully acquainted with case before which evidence could be but was not given cannot be interfered with in second appeal. 54 Ind. Cas. 731; see also A. I. R. 1924 Lah. 303=18 P. W. R. 1923=71 Ind. Cas. 568. The High Court should not interfere with the rate of interest fixed by the lower Court, if it is not arbitrary. 69 Ind. Cas. 758=A. I. R. 1922 All. 335; see also A. I. R. 1923 Lah. 513=77 Ind. Cas. 460. Where a decision of Court is found upon conclusion of fact which does not support it and in exercise of such discretion extension of time is granted for filing appeal, the High Court can interfere. 4 P. L. R. 381=52 Ind. Cas. 225. Relief for declaration in a declaratory suit being discretionary there can be no interference in second appeal. A. I. R. 1930 All. 620=129 Ind. Cas. 446. Where the lower appellate Court's reasons for declining to extend time under s. 5, Limitation Act, are untenable, the High Court can interfere in second appeal. 122 Ind. Cas. 575. Interference on the question of jurisdiction is discretionary with the High Court. A. I. R. 1927 Nag. 164=100 Ind. Cas. 37. Where the discretion under s. 5 of the Limitation Act is not exercised after appreciation and consideration of such facts as are relevant and after application of the right principles to those facts, the High Court can interfere in second appeal. A. I. R. 1926 Lah. 442=94 Ind. Cas. 396. Decision rejecting document beyond suspicion on ground of late production can be interfered with in second appeal. A. I. R. 1928 Pat. 537=110 Ind. Cas. 821. Where the lower appellate Court has not proceeded on the right principles in coming to conclusion the High Court can interfere. A. I. R. 1926 Mad. 57=49 M. L. J. 516=91 Ind. Cas. 525. The appellate Court is always reluctant to interfere with the decision in a matter of discretion. A. I. R. 1929 Rang. 221=121 Ind. Cas. 815; 34 Ind. Cas. 547; 101 Ind. Cas. 257=A. I. R. 1927 Lah. 424. Where in the exercise of discretion the lower appellate Court refused to allow a point not included in the Memorandum of Appeal, to be raised at hearing it cannot be challenged in second appeal unless improperly exercised. A. I. R. 1928 Lah. 536=107 Ind. Cas. 283. The lower appellate Court's refusal to exercise of discretionary powers under Order XLI, r. 33, is not an error of law. A. I. R. 1930 Mad. 709=123 Ind. Cas. 39.

Where the lower appellate Court in the exercise of proper discretion refuses to allow an amendment of pleading, the High Court should not interfere. A. I. R. 1933 Lah. 867. The discretion of the lower Court is not to be interfered with unless it has been exercised capriciously in an arbitrary manner and contrary to well-recognised judicial principles. 146 Ind. Cas. 613=34 P. L. R. 736=A. I. R. 1933 Lah. 892; see also 144 Ind. Cas. 133=1933 A. L. J. 561=A. I. R. 1933 All. 294. Second appeal lies where exercise of discretion is based on misapprehension of facts. A. L. R. 1933 All. 265. Wrong exercise of discretion in issuing commission cannot be questioned in second appeal. A. I. R. 1933 Pat. 542.

**Fraud**—Whether particular transaction is fraudulent or not is a question of fact. A. I. R. 1926 Oudh 501=94 Ind. Cas. 927; 107 Ind. Cas. 490. But where in determining whether there has or has not been any fraud, the lower Courts have gone outside the proper foundation for determination of such a question, the High Court will interfere in second appeal. A. I. R. 1926 Bom. 33=27 Bom. L. R. 1318=91 Ind. Cas. 426. Inference of fraud from facts found is a question of law. 17 C. L. J. 209; A. I. R. 1929 All. 861; 5 Ind. Cas. 398. Where inference of fraud drawn is based upon the facts so found and the first appellate Court refused to draw an inference of fraud upon the facts so found, the decision cannot be questioned in second appeal unless the facts found necessarily amounts to fraud. A. I. R. 1922 Pat. 507=3 P. L. T. 501=77 Ind. Cas. 957. Whether a debt is fictitious is a question of fact and finding cannot be questioned in second appeal. 110 Ind. Cas. 432. Question whether intention of transfer was to defeat or delay creditors is one of fact. 60 Ind. Cas. 527 (Lah); see also 63 Ind. Cas. 169. The finding that a decree was obtained by fraud is a finding of fact against which no second appeal lies. A. I. R. 1934 Lah. 50. A finding that a transaction is collusive and is intended to defeat and delay the creditors is a finding of fact and as such is conclusive in second appeal. 38 P. L. R. 577.

**Malice**.—Finding of malice in a suit for malicious prosecution is a question of fact. A. I. R. 1936 Pat. 185=17 Pat. L. T. 405; see also 37 Bom. L. R. 468=A. I. R. 1935 Bom. 355=158 Ind. Cas. 31.

**Consideration of evidence and second appeal.**—Finding of fact arrived at without considering the whole evidence or very important piece of evidence is not binding in second appeal. A. I. R. 1922 Pat. 503=70 Ind. Cas. 853; see also 68 Ind. Cas. 332; 65 Ind. Cas. 504; 65 Ind. Cas. 497; A. I. R. 1922 Pat. 562=3 P. L. T. 483; 79 Ind. Cas. 107=A. I. R. 1925 Lah. 87; 71 Ind. Cas. 992=A. I. R. 1930 All. 401; A. I. R. 1930 Lah. 150=124 Ind. Cas. 337; A. I. R. 1929 Lah. 145=112 Ind. Cas. 385; A. I. R. 1929 Rang. 257=7 Rang. 751; A. I. R. 1928 Mad. 826=54 M. L. J. 600=27 L. W. 827=110 Ind. Cas. 593; A. I. R. 1927 Mad. 493=110 Ind. Cas. 306. The findings of fact based on theories and assumptions can be questioned in second appeal. A. I. R. 1927 Nag. 392=99 Ind. Cas. 1046. A finding based on no evidence is not binding in second appeal and can be interfered with. 60 C. L. J. 288; 1934 M. W. N. 1082=40 L. W. 749. Neither erroneous finding of fact nor amount of evidence required to prove fact can be questioned in second appeal. A. I. R. 1931 Lah. 144=31 P. L. R. 381=132 Ind. Cas. 379; 87 Ind. Cas. 1040=A. I. R. 1925 Oudh 247; 88 Ind. Cas. 490=A. I. R. 1925 Oudh 691; 79 Ind. Cas. 440=A. I. R. 1923 Lah. 21. Decision as to market value and amount paid in pre-emption suit however erroneous, cannot be challenged in second appeal. 3 Lah. L. J. 108=64 Ind. Cas. 297. Finding based on inadmissible evidence or on no evidence can be interfered with in second appeal. 63 Ind. Cas. 811; 63 Ind. Cas. 954=25 C.W.N. 1022=35 C. L. J. 19; 62 Ind. Cas. 647=25 C. W. N. 881=A. I. R. 1921 Cal. 71; 61 Ind. Cas. 102=A. I. R. 1921 Pat. 18; 6 P. L. J. 72; 2 P. L. T. 17; 53 Ind. Cas. 308=10 L. W. 525=(1920) M. W. N. 163; 48 Ind. Cas. 742; 5 O. L. J. 179=46 Ind. Cas. 52; 42 Ind. Cas. 397=2 Pat. L. W. 183; A. I. R. 1924 Mad. 447=21 L. W. 227=86 Ind. Cas. 919; A. I. R. 1925 Oudh 384=12 O. L. J. 130=2 O. W. N. 10; A. I. R. 1922 Pat. 562=3 P. L. T. 483; 64 Ind. Cas. 929=A. I. R. 1929 Lah. 119=2 Lah. 271; 38 Ind. Cas. 586=17 P. W. R. 1917; 42 Ind. Cas. 282=100 P. L. R. 1917=89 P. W. R. 1917; 38 Ind. Cas. 561. Appellate Court in reversing finding of fact should consider whole evidence. 31 M. L. J. 311=(1916) M. W. N. 133=20 M. L. J. 228=35 Ind. Cas. 421. In second appeal, the High Court does not interfere with finding of facts, based on material facts and evidence. 112 P. R. 1916=38 Ind. Cas. 62; see also 35 P. R. 1919=78 P. L. R. 1919=51 Ind. Cas. 378; 3 Lah. L. J. 409. Every piece of relevant evidence must be considered but every portion of it need not be referred to. 52 Ind. Cas. 173; 43 Ind. Cas. 525; 43 Ind. Cas. 857=3 Pat. L. W. 213.

Failure of lower Court to appreciate document put in evidence affords no ground for second appeal. 38 Ind. Cas. 158. The lower appellate Court has power to attach such proper value to each piece of evidence documentary or otherwise and the High Court in second appeal cannot go into the weight to be attached to each. 19 C. W. N. 1015=31 Ind. Cas. 695; see also 32 Ind. Cas. 862; 46 C. 152=22 C. W. N. 822=46 Ind. Cas. 237; 47 Ind. Cas. 780; 53 Ind. Cas. 137; 52 Ind. Cas. 739; 1 P. L. T. 224=55 Ind. Cas. 922; A. I. R. 1921 Lah. 284=4 Lah. 426; A. I. R. 1931 Oudh 116=8 O. L. J. 202=61 Ind. Cas. 781. But the ignoring of an important piece of evidence by the lower appellate Court, affords a good ground for second appeal. 18 P. W. R. 1917=42 Ind. Cas. 76. The High Court has to accept the finding as to the importance of evidence as a question of fact, except where a special question *e. g.* credibility of witnesses apart from demeanour arises. 39 A. 426=15 A. L. J. 349=39 Ind. Cas. 666. Error of Judge in criticising evidence of one witness on a wrong idea that other two had not been examined, vitiates his finding. 41 Ind. Cas. 456.

Importance given to Thak and Revenue Survey Map is one of fact and decision on it cannot be questioned in second appeal. 79 Ind. Cas. 1033=A. I. R. 1924 Cal. 977. Findings of fact cannot be questioned on ground that unnecessary importance was given to certain facts. A. I. R. 1929 Nag. 270=119 Ind. Cas. 674; see also 123 Ind. Cas. 51=A. I. R. 1930 Oudh 330=7 O. W. N. 333; A. I. R. 1926 Cal. 822=43 C. L. J. 327=30 C. W. N. 826=95 Ind. Cas. 334; A. I. R. 1926 Mad. 173=22 L. W. 786=93 Ind. Cas. 670; A. I. R. 1925 Oudh 367=12 O. L. J. 134=86 Ind. Cas. 743. Where appellate Court believes in certain statements, which trial Court does not, it is not subject to second appeal. A. I. R. 1925 Oudh 537=85 Ind. Cas. 407. Finding of trial Court regarding untrustworthiness of witness cannot be interfered unless strong ground exists for it. A. I. R. 1929 Nag. 117=116 Ind. Cas. 432. But reverse finding of lower appellate Court due to misapprehension of evidence is not binding on High Court. A. I. R. 1926 Nag. 129=89 Ind. Cas. 663; A. I. R. 1923 Lah. 206=73 Ind. Cas. 756. Question of the weight to be attached to documentary

evidence is one of fact. Question whether a given document refers to a particular law is one of fact. A. I. R. 1923 All. 492=71 Ind. Cas. 762. Misconstruction of a document alleged to contain admission is not a question of law which can be raised in second appeal. 68 Ind. Cas. 1003=A. I. R. 1922 Cal. 185=36 C. L. J. 182.

The High Court can consider the effect of expert evidence given on both sides and found to be true by the lower Court. A. I. R. 1925 All. 24=47 A. 243=22 A. L. J. 1045=83 Ind. Cas. 27. Finding based on comparison of handwriting, proved by comparison of signatures cannot be set aside in second appeal. A. I. R. 1923 Lah. 695=5 Lah. L. J. 530=77 Ind. Cas. 872. Where High Court differs from the lower Courts not only in the estimate of the evidence, but also with regard to the inference desirable from documents produced in the case and other circumstances, the Judicial Committee is competent to deal with the case on its merits. A. I. R. 1922 P. C. 272=27 C. W. N. 925=45 M. L. J. 460=49 I. A. 399=36 C. L. J. 499=32 M. L. T. 1=71 Ind. Cas. 984. In an appeal under Letters Patent, onus is on person raising contention to show from record that evidence had been disregarded or misinterpreted. A. I. R. 1922 All. 312=44 A. 169=19 A. L. J. 964=65 Ind. Cas. 371. Findings of fact arrived at by the Court of first appeal cannot be interfered with in second appeal merely on the ground that on the evidence adduced in the case, it would have taken a different view from that taken by the Court of first appeal. 97 Ind. Cas. 853. Where some documentary evidence is excluded from consideration on the erroneous ground that it was inadmissible in evidence for want of registration vitiates the finding of fact and a second appeal lies. 29 P. L. R. 287=108 Ind. Cas. 191.

Finding of fact not based on legal evidence can be set aside even in second appeal. 24 P. W. R. 1916=33 Ind. Cas. 937; 42 Ind. Cas. 68=11 Bur. L. T. 229; A. I. R. 1924 Mad. 617=19 L. W. 560=83 Ind. Cas. 567; 51 Ind. Cas. 177=24 C. W. N. 81=47 C. 107=46 I. A. 140=37 M. L. J. 36=21 Bom. L. R. 220=17 A. L. J. 700 (P. C.); A. I. R. 1924 Lah. 465=6 Lah. L. J. 127=80 Ind. Cas. 329; A. I. R. 1925 Cal. 302=80 Ind. Cas. 903; A. I. R. 1925 Oudh 525=27 O. C. 331=85 Ind. Cas. 338; A. I. R. 1929 All. 481=(1923) A. L. J. 873=118 Ind. Cas. 372; A. I. R. 1926 Nag. 99=89 Ind. Cas. 752; 94 Ind. Cas. 929=A. I. R. 1926 Pat. 187=7 P. L. T. 547; 104 Ind. Cas. 781=A. I. R. 1927 Mad. 116=39 M. L. T. 633; A. I. R. 1927 P. C. 257=53 M. L. J. 703=32 C. W. N. 3=107 Ind. Cas. 449; A. I. R. 1928 Lah. 737=29 P. L. R. 410=112 Ind. Cas. 455; A. I. R. 1930 Lah. 677=121 Ind. Cas. 377=Ind. Rul. (1930) Lah. 217; A. I. R. 1930 Cal. 815=58 C. 585=35 C. W. N. 133; A. I. R. 1011 Lah. 213=12 Lah. L. J. 107=131 Ind. Cas. 391. But findings of facts based on legal and admissible evidence cannot be questioned in second appeal even when such finding is erroneous. A. I. R. 1928 All. 289=50 A. 754=26 A. L. J. 696=115 Ind. Cas. 448; see also 99 Ind. Cas. 183; 95 Ind. Cas. 925=A. I. R. 1927 Oudh 95=1 Lah. 458=29 O. C. 330; A. I. R. 1928 Mad. 377=109 Ind. Cas. 771; A. I. R. 1928 All. 289=50 A. 754=26 A. L. J. 696=115 Ind. Cas. 771; A. I. R. 1930 Lah. 999=32 P. L. R. 119=12 Lah. 224=129 Ind. Cas. 1; A. I. R. 1930 Lah. 911=11 Lah. 410=12 Lah. L. J. 161=133 Ind. Cas. 278; A. I. R. 1931 Lah. 220=31 P. L. R. 195=123 Ind. Cas. 81; 120 Ind. Cas. 56=34 C. W. N. 1=A. I. R. 1929 P. C. 286=56 I. A. 388=51 C. L. J. 1=57 M. L. J. 849=32 Bom. L. R. 114 (P. C.); A. I. R. 1929 Oudh 402=6 O. W. N. 652=119 Ind. Cas. 866; A. I. R. 1930 Nag. 11=119 Ind. Cas. 677; 90 Ind. Cas. 209=A. I. R. 1926 Nag. 192; A. I. R. 1925 Oudh 658=87 Ind. Cas. 208; 82 Ind. Cas. 822=A. I. R. 1925 Cal. 469; 74 Ind. Cas. 1004; 45 A. 53; 65 Ind. Cas. 475=A. I. R. 1922 Lah. 140; 68 Ind. Cas. 500=A. I. R. 1923 Cal. 279; 69 Ind. Cas. 807=A. I. R. 1922 All. 283; 70 Ind. Cas. 202=A. I. R. 1922 Lah. 356=6 Lah. L. J. 513; 37 Ind. Cas. 439=3 O. L. J. 644; 62 Ind. Cas. 1002=15 S. L. R. 84; A. I. R. 1921 Lah. 284=4 Lah. L. J. 426; 4 Lah. L. J. 311. Finding of fact based on evidence which has been misread or misunderstood is open to objection. A. I. R. 1921 All. 212=19 A. L. J. 149=61 Ind. Cas. 65. A finding of fact is not binding in second appeal where the lower Court ignores valuable evidence in arriving at that finding. A. I. R. 1926 Cal. 603=91 Ind. Cas. 1026; 112 Ind. Cas. 461. Question whether a fact is proved on evidence is one of fact while that of its admissibility is one of law. 131 Ind. Cas. 395=A. I. R. 1931 Oudh 142=8 O. W. N. 152=131 Ind. Cas. 395.

**Judgment from which second appeal lies.**—Where the lower appellate Court has proceeded on wrong assumptions the decree can be set aside in second appeal. A. I. R. 1927 Lah. 614=103 Ind. Cas. 235. Judgment based on wrong conception of law may also be set aside. 30 C. W. N. 520=A. I. R. 1930 Cal. 1169. Lower appellate Court is bound to state its findings clearly. A. I. R. 1923 Cal. 278=

67 Ind. Cas. 998 ; 23 C. W. N. 1048=53 Ind. Cas. 1007 ; 41 Ind. Cas. 385=2 Pat. L. W. 12 ; 75 Ind. Cas. 780 But although the judgment of the appellate Court is meagre and not in conformity with the rule unless a substantial error affecting the merits of the case is shown, High Court will not interfere. 20 M. L. T. 520=31 M. L. J. 870=(1917) M. W. N. 43=38 Ind. Cas. 26. Where rent suit is dismissed on the ground that the suit lands were not comprised in the tenancy, that being an irrelevant decision, an appeal would lie. A. I. R. 1927 Cal. 410=100 Ind. Cas. 525. Where only the pleas of parties were recorded but the parties were not examined on the points and hence real parties in dispute were ignored, such trial is vitiated and can be set aside in second appeal. A. I. R. 1927 Nag. 180=100 Ind. Cas. 855. Finding of fact on inadmissible evidence cannot be maintained. A. I. R. 1927 Lah. 448=8 Lah. L. J. 651=29 P. L. R. 74=103 Ind. Cas. 889. Appellate Court's *ex parte* decree against respondent not summoned is subject to second appeal on ground of illegality. 117 Ind. Cas. 229. The High Court in second appeal will reverse the decision of the lower appellate Court which is based on an inadmissible and unproved document. 18 N. L. J. 333 The discretion of the lower appellate Court cannot be interfered with in second appeal for calling of witness by it. 38 P. L. R. 449. A finding that the holder of a superior interest acquiring an inferior interest intends to keep the two interests separate and consequently there is no merger, is properly one of fact. 30 C. W. N. 694 It is not open in second appeal to interfere with a decision of fact in the absence of an error of law. A. I. R. 1935 Pat. 152=158 Ind. Cas. 51. The finding of the lower appellate Court as regards the meaning of a word as used in the agreement is final. A. I. R. 1935 Lah. 902. The finding that a certain document is not genuine is one of fact and cannot be agitated in second appeal. A. I. R. 1935 Pat. 349=16 Pat. L. T. 377=155 Ind. Cas. 827. The opinions of experts are relevant, but not conclusive as to the matters to which they relate ; their value and sufficiency cannot legitimately form the subject of consideration and scrutiny in second appeal. A. I. R. 1935 All. 501. A finding that a certain person is not the legitimate son and heir of another is a finding of fact and cannot be challenged in second appeal. A. I. R. 1935 Oudh 80=1935 O. W. N. 25=153 Ind. Cas. 349. Finding of fact of lower Court if there is no error of law is binding on Court of appeal. A. I. R. 1929 Pat. 127=10 P. L. T. 138=115 Ind. Cas. 890 ; see also 4 C. 1104=43 I. A. 172=20 C. W. N. 1245=18 Bom. L. R. 838=37 Ind. Cas. 223 (P.C.) ; 38 Ind. Cas. 161 ; A. I. R. 1921 Lah. 211=3 Lah. L. J. 231=60 Ind. Cas. 805 ; 57 Ind. Cas. 350=31 C. L. J. 501 ; 37 M. L. J. 199=52 Ind. Cas. 497=24 C. W. N. 201=22 Bom. L. R. 7=17 A. L. J. 1004 (P.C.) ; 3 Lah. L. J. 470 ; 61 Ind. Cas. 135=8 O. L. J. 4 ; 67 Ind. Cas. 803=A. I. R. 1922 Oudh 96 = 9 O. L. J. 127 ; 70 Ind. Cas. 299=A. I. R. 1923 Lah. 11 ; A. I. R. 1923 Oudh 26=9 O. L. J. 497=70 Ind. Cas. 74 ; A. I. R. 1925 Lah. 333=26 P. L. R. 451=7 Lah. L. J. 70=38 Ind. Cas. 588 ; A. I. R. 1925 Lah. 377=7 Lah. L. J. 129=26 P. L. R. 157=88 Ind. Cas. 1019 ; 95 Ind. Cas. 463=13 O. L. J. 146 ; 90 Ind. Cas. 976=A. I. R. 1926 All. 130 ; A. I. R. 1927 All. 377=100 Ind. Cas. 626 ; A. I. R. 1927 Lah. 845=99 Ind. Cas. 890 ; A. I. R. 1927 Mad. 33=52 M. L. J. 100=25 L. W. 76=99 Ind. Cas. 981 ; 66 Ind. Cas. 14=A. I. R. 1926 Oudh 522 ; 98 Ind. Cas. 876 ; A. I. R. 1928 Rang. 303=6 Rang. 586=114 Ind. Cas. 538 ; 124 Ind. Cas. 358=A. I. R. 1929 Oudh 447=5 Luck. 377=6 O. W. N. 859=124 Ind. Cas. 358 ; 111 Ind. Cas. 791 ; A. I. R. 1931 Mad. 206=1930 M. W. N. 1235=131 Ind. Cas. 121 ; A. I. R. 1930 Pat. 564=129 Ind. Cas. 133 ; A. I. R. 1931 Nag. 67=27 N. L. R. 8=131 Ind. Cas. 662 ; A. I. R. 1931 Nag. 95=13 N. L. J. 202 ; A. I. R. 1930 Lah. 1067=31 P. L. R. 214=123 Ind. Cas. 285 ; A. I. R. 1930 Lah. 1010=11 Lah. 393=31 P. L. R. 755=128 Ind. Cas. 293 ; A. I. R. 1930 Lah. 142=120 Ind. Cas. 170 ; A. I. R. 1929 Lah. 165=117 Ind. Cas. 813. Second appeal does not lie on ground of even grossly erroneous finding of fact or of mistake as its meaning of document containing evidence. A. I. R. 1931 Oudh 142=8 O. W. N. 152=131 Ind. Cas. 395. New question of fact cannot be raised in second appeal for first time. A. I. R. 1931 Mad. 284=33 L. W. 681. Finding legally proved, that compromise in good faith exists is one of fact and cannot be questioned in second appeal. 121 Ind. Cas. 291. Findings of fact arrived on pure conjectures, unjustifiable assumptions and unwarranted inferences are not final in second appeal. A. I. R. 1930 Lah. 238=122 Ind. Cas. 109. High Court can leave out of considerations findings of lower Court not definite and not necessary for the case. A. I. R. 1929 Lah. 653=120 Ind. Cas. 5. Findings based on whimsical reasoning must be set aside. A. I. R. 1925 Oudh 386=12 O. L. J. 105=86 Ind. Cas. 686 ; see also A. I. R. 1929 Oudh 453=6 O. W. N. 801=123 Ind. Cas. 63. Finding of fact contradicting other finding is open to second appeal. A. I. R. 1928 Lah. 690=108 Ind. Cas. 521.

Privy Council like the High Court is bound by a finding of fact by lower appellate Court. A. I. R. 1928 P. C. 219=28 L. W. 204=32 O. W. N. 1146=48 C. L. J. 415=111 Ind. Cas. 240 (P. C.); see also A. I. R. 1927 P. C. 117=54 C. 586=54 I. A. 196=31 C. W. N. 885=53 M. L. J. 117=39 M. L. T. 170=26 L. W. 642 (P. C.)=101 Ind. Cas. 359. Though finding of fact cannot be challenged in second appeal correctness of conclusion therefrom can be challenged. 24 O. C. 1=61 Ind. Cas. 144. The High Court should not interfere in second appeal with one of two possible inferences drawn by the lower Court. 46 Ind. Cas. 794. Finding of fact upon evidence cannot be questioned in second appeal. A. I. R. 1925 Pat. 384=6 P. L. T. 67=86 Ind. Cas. 141; see also 86 Ind. Cas. 847=A. I. R. 1925 Nag. 271=8 N. L. J. 29; A. I. R. 1924 Nag. 240=78 Ind. Cas. 887; A. I. R. 1923 Lah. 236=7 P. W. R. 1923=73 Ind. Cas. 232.

**Inference from facts.**—Drawing of legal inference from admitted facts is a question of law. A. I. R. 1930 Mad. 449=58 M. L. J. 581=53 M. 510=31 L. W. 769=127 Ind. Cas. 131; A. I. R. 1930 Lah. 824=31 P. L. R. 547=123 Ind. Cas. 536; A. I. R. 1929 Nag. 270=119 Ind. Cas. 674; A. I. R. 1929 All. 875=119 Ind. Cas. 111; A. I. R. 1928 All. 381=26 A. L. J. 887=116 Ind. Cas. 81; 113 Ind. Cas. 746; A. I. R. 1929 All. 872=118 Ind. Cas. 520; A. I. R. 1929 All. 767=122 Ind. Cas. 756; 112 Ind. Cas. 847; A. I. R. 1926 Nag. 332=9 N. L. J. 70=95 Ind. Cas. 553; 96 Ind. Cas. 356=A. I. R. 1926 Nag. 494; A. I. R. 1928 Lah. 722=111 Ind. Cas. 645; A. I. R. 1928 Nag. 153=11 N. L. J. 21=111 Ind. Cas. 488; 55 C. 355=32 C. W. N. 184=107 Ind. Cas. 81=1928 Cal. 315; A. I. R. 1929 All. 861=118 Ind. Cas. 381; A. I. R. 1928 All. 39=50 A. 180=25 A. L. J. 1014=108 Ind. Cas. 729; A. I. R. 1928 Lah. 774=10 Lah. 360=30 P. L. R. 547=112 Ind. Cas. 736; 103 Ind. Cas. 486=A. I. R. 1927 Nag. 166=10 N. L. J. 12; A. I. R. 1927 All. 601=106 Ind. Cas. 49; A. I. R. 1928 All. 39=50 A. 180=25 A. L. J. 1014; A. I. R. 1927 All. 811=28 P. L. R. 406=104 Ind. Cas. 702; 157 Ind. Cas. 638=1935 O. W. N. 899; A. I. R. 1935 Cal. 713; A. I. R. 1935 Lah. 765; A. I. R. 1935 Pat. 415=16 Pat. L. T. 363=158 Ind. Cas. 1134; A. I. R. 1935 Lah. 132; A. I. R. 1935 All. 1008=1935 P. L. J. 1251; A. I. R. 1935 Cal. 760. The status of public prostitutes is a question of law. A. I. R. 1926 Lah. 461=93 Ind. Cas. 827. Where only one inference from facts is legally possible, wrong inference is conclusion on question of law, but if alternative inferences are possible it is a finding of fact. A. I. R. 1930 Lah. 936=31 P. L. R. 662=128 Ind. Cas. 311; A. I. R. 1930 Nag. 200=122 Ind. Cas. 379; A. I. R. 1928 Lah. 930=110 Ind. Cas. 762; A. I. R. 1926 Nag. 192=90 Ind. Cas. 209; A. I. R. 1923 Lah. 239=79 Ind. Cas. 814; A. I. R. 1924 Nag. 160=78 Ind. Cas. 112.

**Soundness of the conclusions from facts** may involve matters of law and may be questioned by a Court of second appeal. A. I. R. 1923 Lah. 216=73 Ind. Cas. 795; see also 62 Ind. Cas. 534=A. I. R. 1921 Mad. 661=40 M. L. J. 301=13 L. W. 218=(1921) M. W. N. 233; A. I. R. 1921 Bom. 385=45 B. 1186=23 Bom. L. R. 514=63 Ind. Cas. 248; see also A. I. R. 1923 Mad. 54=43 M. L. J. 556=71 Ind. Cas. 330; 69 Ind. Cas. 781=A. I. R. 1922 Nag. 96; 71 Ind. Cas. 15=1924 Pat. 373=1 Pat. L. R. 32; A. I. R. 1923 Lah. 497=77 Ind. Cas. 473; 79 Ind. Cas. 884=A. I. R. 1924 Nag. 410=21 N. L. R. 12; 87 Ind. Cas. 64=A. I. R. 1925 All. 796; A. I. R. 1926 Nag. 197=90 Ind. Cas. 196; A. I. R. 1926 Mad. 511=50 M. L. J. 251=(1926) M. W. N. 344; 57 C. L. J. 509. In second appeal it is not for the High Court to decide whether the conclusions drawn by the lower appellate Court from facts are correct or not, but it has only to be satisfied if such conclusions are legally deducible from the evidence on record. 20 Ind. Cas. 523=7 S. L. R. 11; 62 Ind. Cas. 1002=A. I. R. 1921 Sind 25=15 S. L. R. 84; see also 39 C. W. N. 888.

**Inference from proved or admitted fact** is not necessarily question of law and where it is based on balance of evidence, the question is one of fact. A. I. R. 1930 All. 218=127 Ind. Cas. 586. Lower appellate Court's inference that previous order of cash deposit was varied from Court's acceptance of security is not question of fact. A. I. R. 1930 Lah. 567=31 P. L. R. 327=11 Lah. 531=127 Ind. Cas. 713. Where inference is drawn not from evidence given, it can be challenged in second appeal. A. I. R. 1929 Lah. 198=10 Lah. L. J. 455=116 Ind. Cas. 325. A wrong inference from facts does not entitle the High Court to interfere. 74 Ind. Cas. 818=A. I. R. 1924 Oudh 164; 74 Ind. Cas. 843=A. I. R. 1924 Pat. 305. The question whether a particular section of an Act does or does not apply is a question of law. A. I. R. 1923 All. 583=45 A. 520=21 A. L. J. 428=74 Ind. Cas. 307. Inferences from documents other than those of title are questions of facts. A. I. R. 1925 All. 39=78 Ind. Cas. 112; A. I. R. 1924 Oudh 185=74 Ind. Cas. 811. Inference from entries admitted, unless illegitimate, being one of fact cannot be reargued. A. I.



R. 1925 All. 353=85 Ind. Cas. 584 ; see also A. I. R. 1924 Lah. 719=6 Lah. L. J. 311=85 Ind. Cas. 89. Question regarding amount of care required to be taken by a bailer can be decided in second appeal. A. I. R. 1924 Cal. 92=27 C. W. N. 1017=80 Ind. Cas. 279. So also a Court of second appeal can decide whether a landlord has recognized a tenant. A. I. R. 1925 Cal. 761=85 Ind. Cas. 636. Nature of possession is a question of legal inference. A. I. R. 1926 Nag. 129=89 Ind. Cas. 663. It is competent for the second appellate Court to interfere with a finding as to the legal status of a party. A. I. R. 1927 Nag. 200=101 Ind. Cas. 252. Inferences as to jointness or disruption of joint Hindu family are findings of facts. 97 Ind. Cas. 817=A. I. R. 1926 Lah. 443=27 P. L. R. 223. The inference of knowledge on the part of a landlord or his local agent that a tenant of his is setting up a rent-free right based on certain facts is not an inference of law but an inference of fact. A. I. R. 1934 Pat. 167.

**Question of jurisdiction.**—Order passed without jurisdiction can be set aside in second appeal. A. I. R. 1931 Lah. 96=32 P. L. R. 293=131 Ind. Cas. 141 ; A. I. R. 1930 Lah. 1005=32 P. L. R. 90=121 Ind. Cas. 722 ; 29 C. L. J. 48=49 Ind. Cas. 135 ; 45 C. 926=27 C. L. J. 115=43 Ind. Cas. 758 ; 1933 A. L. J. 103=A. I. R. 1933 All. 403 ; but see A. I. R. 1934 Lah. 79=36 P. L. R. 142=150 Ind. Cas. 15. Question of jurisdiction can be taken in the second appeal for the first time. A. I. R. 1923 Lah. 551=77 Ind. Cas. 532 ; A. I. R. 1924 All. 83=75 Ind. Cas. 1053 ; A. I. R. 1923 Bom. 321=47 B. 843=25 Bom. L. R. 545=77 Ind. Cas. 654 ; but see A. I. R. 1930 Cal. 267=50 C. L. J. 543=126 Ind. Cas. 401. Plea requiring remand and taking of evidence cannot be raised for first time in second appeal. Objection to jurisdiction of Sub-Registrar on ground that fictitious plot of land had been entered in lease to give him jurisdiction can not be taken for first time in second appeal. 51 Ind. Cas. 862.

**Question of legal necessity.**—Whether there existed legal necessity or not can be gone into in second appeal. A. I. R. 1926 Nag. 486=96 Ind. Cas. 1006. Finding as to legal necessity for alienation of ancestral property by Hindu father is one of fact. A. I. R. 1921 Lah. 304=3 Lah. L. J. 491=63 Ind. Cas. 515 ; see also 66 Ind. Cas. 881=3 Lah. L. J. 137 ; A. L. R. 1932 Lah. 348 ; 32 P. L. R. 607 ; A. I. R. 1933 Lah. 343 ; A. I. R. 1922 Lah. 398=4 Lah. L. J. 243 ; A. I. R. 1923 All. 28=70 Ind. Cas. 815 ; A. I. R. 1935 Pat. 175. Question about necessity for transfer may be mixed question of fact and law but finding about necessity deduced from wrong principles is one of law. A. I. R. 1923 Lah. 41=79 Ind. Cas. 211 ; A. I. R. 1923 Lah. 660=79 Ind. Cas. 980 ; A. I. R. 1924 Lah. 685=6 Lah. L. J. 313=78 Ind. Cas. 148 ; A. I. R. 1923 Lah. 669=78 Ind. Cas. 11. The question as to the existence of necessity for alienation is a question of fact and whether a tenderer should see to the application of money is a question of law. A. I. R. 1925 Oudh 740=90 Ind. Cas. 345 ; see also 8 Ind. Cas. 489=A. I. R. 1925 Oudh 557=27 O. C. 329 ; A. I. R. 1924 Lah. 689=75 Ind. Cas. 674 ; 33 P. L. R. 607 ; see also 162 Ind. Cas. 797=17 Pat. L. T. 488=A. I. R. 1936 Pat. 275. Where lower appellate Court decided the question as to the existence of legal necessity on entirely wrong principles, the High Court is competent to go into the question. A. I. R. 1923 Lah. 600=75 Ind. Cas. 919 ; see also 47 Ind. Cas. 39=38 P. L. R. 1918=92 P. W. R. 1918. Failure to prove legal necessity for rate of interest cannot be raised for the first time in second appeal. A. I. R. 1922 Pat. 356=1 Pat. 612=3 Pat. L. T. 367=67 Ind. Cas. 790. Legal necessity for alienation is a finding of fact and is binding in second appeal. 33 P. L. R. 564=A. I. R. 1932 Lah. 473=33 P. L. R. 564.

**Question of Limitation.**—The question as regards limitation is a mixed question of law and fact. A. I. R. 1927 Cal. 30=79 Ind. Cas. 635. Where the facts are admitted, plea of limitation can be allowed for the first time in the second appeal. (1929) A. L. J. 229=A. I. R. 1928 All. 689=114 Ind. Cas. 734 ; see also 65 Ind. Cas. 580=A. I. R. 1922 Lah. 240. Plea of limitation, though one of law, cannot be argued on second appeal, if it involves investigation of facts and was not taken below or in Memorandum of second appeal. A. I. R. 1930 Cal. 385=57 C. 114=125 Ind. Cas. 607 ; 115 Ind. Cas. 680=10 P. L. T. 53 ; A. I. R. 1929 Lah. 432=11 Lah. L. J. 91=30 P. L. R. 296=115 Ind. Cas. 71 ; 72 Ind. Cas. 326=A. I. R. 1923 Bom. 254=25 Bom. L. R. 245 ; A. I. R. 1928 Cal. 870=32 C. W. N. 778=115 Ind. Cas. 606. It is only when the lower appellate Court exercises a judicial discretion that the High Court will not interfere in second appeal on a plea that the lower appellate Court was wrong in applying the provisions of s. 5. But such interference is justified

where the Court decided the point wholly upon an erroneous view of law. A. I. R. 1936 Lah. 742.

**Question of marriage.**—Sufficiency of evidence to prove marriage is a question of fact. A. I. R. 1921 Lah. 201=5 Lah. L. J. 117=84 Ind. Cas. 1039; 111 Ind. Cas. 712; A. I. R. 1924 Lah. 188=5 Lah. L. J. 505=73 Ind. Cas. 896. But the question as to the form of marriage is a question of law. 90 Ind. Cas. 358=A. I. R. 1926 All. 1=48 A. 126=23 A. L. J. 281.

**Question of adoption.**—The question of adoption is one of fact and as such cannot be interfered with in second appeal. A. I. R. 1934 Lah. 968.

**Question of minority.**—The finding that a person is a minor cannot be questioned in second appeal. A. I. R. 1925 Pat. 367=3 Pat. L. R. 16=86 Ind. Cas. 856.

**Question of misjoinder.**—A finding of misjoinder of parties cannot be questioned in the second appeal for the first time. A. I. R. 1928 Mad. 635=110 Ind. Cas. 548. A finding on misjoinder arrived at on evidence being one of fact cannot be gone into in second appeal. 33 Ind. Cas. 188=(1916) 1 M. W. N. 9.

**Misapprehension of evidence.**—Where a finding of fact is arrived at as a result of misreading of a document a second appeal is competent. 73 P. L. R. 1917=42 Ind. Cas. 218; see also 4 Lah. L. J. 307; 80 Ind. Cas. 25=A. I. R. 1924 Lah. 848=46A. 773=22 A. L. J. 739=L. R. 5 A. 533 Civ; 88 Ind. Cas. 820=A. I. R. 1926 Pat. 49; 88 Ind. Cas. 924=A. I. R. 1925 Mad. 1226; A. I. R. 1930 Pat. 71=10 P. L. T. 630; A. I. R. 1927 Mad. 1167=39 M. L. T. 633. High Court will interfere in cases where the lower Courts have misread evidence or overlooked important evidence or relied for their conclusion upon inadmissible evidence, or where they misdirected themselves as to any question of importance or where they relied upon personal knowledge or where they took a wrong view as to the onus of proof, or where they decided points not raised by the parties, or where they misconstrued important documents. Where a Court misconstrued a document it relies upon a construction which is not capable of bearing and such misconstruction leads not merely to a wrong view of the evidence but to relying upon what it considers to be an inference from the evidence which the evidence is not capable of bearing. The misconstruction of an important document, therefore, is a ground for interference. 93 Ind. Cas. 307=A. I. R. 1926 Mad. 652=24 L. W. 88; see also 42 Ind. Cas. 272=92 P. L. R. 1917; 76 Ind. Cas. 553=A. I. R. 1923 Lah. 585; A. I. R. 1925 Lah. 251=6 Lah. L. J. 508; A. I. R. 1926 All. 465=94 Ind. Cas. 190; A. I. R. 1926 Lah. 541=95 Ind. Cas. 240; A. I. R. 1930 Lah. 712=125 Ind. Cas. 623; but see 113 Ind. Cas. 575. Finding based on wrong view of pleading can be questioned in second appeal. A. I. R. 1926 Oudh 353=13 O. L. J. 536=3 O. W. N. 460=94 Ind. Cas. 779. Finding as to the amount of rent based on plaintiff's supposed admission where there was none can be questioned in second appeal as the Court is deemed to have made a mistake in law. A. I. R. 1928 Oudh 333=108 Ind. Cas. 102. Where that finding of the lower appellate Court is based on misreading of trial Court's judgment, that finding can be questioned in second appeal. 77 Ind. Cas. 475=A. I. R. 1923 Lah. 502. Where finding of fact is based upon inadmissible evidence a second appeal is competent. A. I. R. 1935 All. 662=1935 A. L. J. 664=155 Ind. Cas. 634; 1935 O. W. N. 894; A. I. R. 1935 Oudh 41=11 O. W. N. 1589=152 Ind. Cas. 1042; 39 C. W. N. 277; 69 M. L. J. 707=42 L. W. 658=1935 M. W. N. 1255; 150 Ind. Cas. 841=A. I. R. 1934 Pat. 55. A finding of fact arrived at by erroneous rejection of evidence is not binding in second appeal. 149 Ind. Cas. 660=A. I. R. 1934 Nag. 44; A. I. R. 1934 All. 103=149 Ind. Cas. 517. Finding opposed to weight of evidence can be interfered in second appeal. 1936 R. D. 119; A. I. R. 1936 Rang. 488. Finding based on wrong assumption can also be interfered. A. I. R. 1936 Lah. 1005. But mere omission to consider a piece of evidence will not alter the character of the finding. A. I. R. 1936 Pat. 243=162 Ind. Cas. 21.

A finding based on no evidence is not binding. A. I. R. 1935 Cal. 648=158 Ind. Cas. 512; see also A. I. R. 1935. Mere admission of inadmissible evidence does not vitiate a finding of fact where there are other evidence to support it. 39 C. W. N. 311. Interference in second appeal is proper in case of omission to consider important evidence. A. I. R. 1935 Oudh 86=1935 O. W. N. 11. Second appeal lies against finding wholly based upon surmise. A. I. R. 1935 Mad. 190=68 M. L. J. 648=

1935 M. W. N. 193=41 L. W. 318 ; 39 C. W. N. 1233 ; 159 Ind. Cas. 96=18 N. L. J. 104. Where the lower appellate Court rejects the oral evidence of possession adduced by one of the parties by applying an erroneous presumption of law, its finding on the question of possession is vitiated by an error of law and as such its finding can be reversed by the High Court. A. I. R. 1935 Oudh 394=1935 O. W. N. 674=155 Ind. Cas. 1087.

**Mixed question of law and fact.**—Whether a custom exists or not is a mixed question of law and fact and as such a second appeal is competent. A. I. R. 1931 Bom. 167=32 Bom. L. R. 1679=129 Ind. Cas. 881. The question of agency is a mixed question of law and fact. 128 Ind. Cas. 455=(1930) M. W. N. 729=32 L. W. 615 ; A. I. R. 1925 Mad. 768=48 M. L. J. 518=21 L. W. 541=87 Ind. Cas. 663. Whether a Hindu family is joint or not is both a question of fact as well as of law. A. I. R. 1925 Nag. 284=86 Ind. Cas. 505 ; 95 Ind. Cas. 183=A. I. R. 1926 Nag. 389. Where the communal character of land was arrived at by applying wrong principles it can be interfered in second appeal as it is a question of fact as well as of law, 129 Ind. Cas. 630=59 M. L. J. 844=32 L. W. 978=A. I. R. 1931 Mad. 213 ; see also 98 Ind. Cas. 211=A. I. R. 1927 Cal. 136. Whether the nature of the tenancy is permanent or not is a mixed question of law and fact. A. I. R. 1924 Cal. 465=73 Ind. Cas. 2. If the facts found attracted the operation of s. 14, Limitation Act is a mixed question of law and fact. A. I. R. 1927 Pat. 256=8 P. L. T. 561=101 Ind. Cas. 674. Whether a particular transfer is fraudulent or not is a mixed question of fact and law. A. I. R. 1923 Nag. 124=69 Ind. Cas. 193. Whether the alterations made in the deed are material or not also falls under the same category. A. I. R. 1925 Nag. 243=8 N. L. J. 1=86 Ind. Cas. 185. What can be classed as necessities is a mixed question of law and fact. A. I. R. 1924 Nag. 360=78 Ind. Cas. 380. Whether the right to collect offerings made to a deity can be transferred or not is a mixed question of law and fact as it depends in every case on a variety of circumstances which must be proved by evidence. A. I. R. 1928 All. 721=50 A. 394=26 A. L. J. 185=113 Ind. Cas. 242. In suit for malicious prosecution the existence of reasonable and probable cause is a mixed question of law and fact and can be interfered in second appeal. A. I. R. 1930 Cal. 392=57 C. 25=125 Ind. Cas. 667. What a purchaser at auction sale gets under a sale certificate is a mixed question of law and fact. A. I. R. 1927 Mad. 311=52 M. L. J. 68=99 Ind. Cas. 838 ; 94 Ind. Cas. 68=A. I. R. 1926 Mad. 851=23 L. W. 349. Question if rent dues have accrued for default of any usufructuary mortgagee is one of fact and law. A. I. R. 1924 All. 877=L. R. 5 A. Rev. ; 84 Ind. Cas. 26. Amount of dower is mixed question of fact and law. A. I. R. 1926 Oudh 128=89 Ind. Cas. 672. Whether a certain provision in a lease is penal or not is a mixed question of law and fact but when investigation is waived in the lower Court the question cannot be raised in the appellate Court. A. I. R. 1929 Pat. 717=10 P. L. T. 669=9 Pat. 487=124 Ind. Cas. 625. Finding regarding deed based on its interpretation and also on other facts cannot be set aside. A. I. R. 1925 Lah. 344=7 Lah. L. J. 74=26 P. L. R. 110=86 Ind. Cas. 595. Whether the vendee has acted with reasonable care under s. 41, T. P. Act, is a mixed question of law and fact and High Court will interfere only in such a case where strong reasons exist. A. I. R. 1927 All. 158=99 Ind. Cas. 1. Whether certain property is *sulka stridhan* or not is a mixed question of law and fact. A. I. R. 1929 All. 25=26 A. L. J. 1203=111 Ind. Cas. 165. Whether certain property is a private or public property is a mixed question of law and fact. If the Court of first appeal has drawn wrong inferences from the facts established in the case, or has applied the law wrongly, the High Court will interfere. A. I. R. 1926 Oudh 578=13 O. L. J. 696=3 O. W. N. 645=1 Luck. 489=97 Ind. Cas. 853. The existence of a usage having the force of law is a mixed question of fact and law. 143 Ind. Cas. 880=37 L. W. 272=A. I. R. 1933 Mad. 350. So also the question of family settlement. 55 A. 554=1933 A. L. J. 1185=A. I. R. 1933 All. 493=144 Ind. Cas. 293. The question as to whether there has been an abandonment of land by a *raiya* is largely and principally a question of fact. But the inference from the fact found, as to whether there was abandonment or not is a question of law. 61 C. 937.

**Tenancy, nature of.**—The question whether on given facts a tenancy is at will or permanent is a mixed question of law and fact. 35 Ind. Cas. 605=44 C. 119=24 C. L. J. 350=21 C. W. N. 530 ; see also 35 Ind. Cas. 544=1 Pat. L. J. 157 ; 123 Ind. Cas. 492=A. I. R. 1930 Bom. 39=31 Bom. L. R. 1279 ; A. I. R. 1927 P. C. 102=8 Lah. 573=51 A. 178=52 M. L. J. 663=29 Bom. L. R. 870=31 C. W. N. 677=39 M. L. J. 870=25 A. L. J. 959=28 P. L. R. 658=101 Ind. Cas. 355 ; 33 C.

W. N. 211=56 C. 738=A. I. R. 1929 Cal. 37=116 Ind. Cas. 378 ; A. I. R. 1928 Cal. 597=32 C. W. N. 771=112 Ind. Cas. 180 ; 111 Ind. Cas. 76=A. I. R. 1928 Lah. 720=10 Lah. L. J. 251 ; 87 Ind. Cas. 368=A. I. R. 1926 All. 83 ; A. I. R. 1922 Lah. 329=29 P. W. R. 1922=72 Ind. Cas. 177 ; 21 C. W. N. 809=40 Ind. Cas. 513 ; 46 Ind. Cas. 351 ; 54 C. L. J. 353=A. I. R. 1932 Cal. 398=137 Ind. Cas. 658. So also the question whether relation of landlord and tenant exists is one of law. A. I. R. 1925 Cal. 1238=85 Ind. Cas. 757. Finding as regards jointness of holding is a question of fact. A. I. R. 1924 All. 231=21 A. L. J. 899=72 Ind. Cas. 367 ; see also A. I. R. 1926 Mad. 33=49 M. L. J. 358=22 L. W. 511=90 Ind. Cas. 880. Though a substantial question of law arises in determining whether a tenant is a *raiya* or a tenure-holder, the point depends ultimately on questions of fact. A. I. R. 1926 Pat. 9=6 P. L. T. 787=90 Ind. Cas. 895. The question whether the tenants are *raiya*s depends on the question of law and Court should look to the attendant circumstances. 100 Ind. Cas. 466=A. I. R. 1927 Cal. 413.

**Notice.**—Question whether notice is reasonable and sufficient is a question of fact. A. I. R. 1922 Mad. 617=30 L. W. 583=118 Ind. Cas. 279 ; A. I. R. 1931 All. 338=130 Ind. Cas. 292. So also the question whether a notice was duly served is a question of fact. A. I. R. 1927 All. 215=99 Ind. Cas. 622. But the question whether from certain facts, giving of notice can be proved is one of law. A. I. R. 1926 Pat. 95=(1926) Pat. 258=8 P. L. T. 221=98 Ind. Cas. 991.

**Nuisance.**—Whether nuisance exists or not is a question of fact. A. I. R. 1926 Nag. 50=89 Ind. Cas. 929 ; 90 Ind. Cas. 227=A. I. R. 1927 Lah. 424=7 Lah. L. J. 192 ; 64 Ind. Cas. 169 (Lah.) ; A. I. R. 1929 All. 504=118 Ind. Cas. 520.

**Questions of presumption.**—A finding based on mere conjecture and presumption can be considered in second appeal. 44 Ind. Cas. 433=55 P. W. R. 1918=33 P. L. R. 1918 ; 27 C. L. J. 563=22 C. W. N. 826 ; 102 P. W. R. 1918=45 Ind. Cas. 800 ; 5 Lah. 106=79 Ind. Cas. 970 ; A. I. R. 1930 Oudh 17=118 Ind. Cas. 808 ; 25 Ind. Cas. 278.

Ignoring presumption under s. 114, Evidence Act is a ground for second appeal. A. I. R. 1930 Lah. 443=12 Lah. L. J. 21=121 Ind. Cas. 730 ; 17 N. L. R. 25=A. I. R. 1921 Nag. 116. Finding of fact where presumption of possession by entry in Record of Rights is disregarded, can be set aside in second appeal. A. I. R. 1928 Cal. 751=110 Ind. Cas. 445. Finding of fact based purely on presumption arising out of rule of Muhammadan law is subject to appeal on ground that rule does not apply. A. I. R. 1930 Lah. 97=120 Ind. Cas. 495 ; see also A. I. R. 1936 Pat. 185=17 Pat. L. T. 405. A finding of fact based upon unwarranted assumptions and wrong principles can be challenged in second appeal. 27 P. W. R. 1918=46 Ind. Cas. 511. But a presumption based on probabilities deduced from the evidence is presumption of fact and not one of law. 125 Ind. Cas. 327=A. I. R. 1930 Lah. 557. Whether evidence has rebutted statutory presumption is a question of fact. A. I. R. 1930 P. C. 91=(1930) A. L. J. 292=32 Bom. L. R. 380=57 I. A. 86=31 P. L. R. 145=31 L. W. 321=11. Lah. 199=51 C. L. J. 518=59 M. L. J. 53=122 Ind. Cas. 316.

Question whether presumption of correctness attached to entry in record of rights is rebutted or not is not reviewable in second appeal. 22 C. W. N. 449=45 Ind. Cas. 65 ; 65 Ind. Cas. 527 ; 63 Ind. Cas. 226 ; 64 Ind. Cas. 190. Finding on question of legitimacy though one of fact can be disturbed in second appeal if important pieces of evidence and strong presumption in favour of legitimacy is ignored. 60 Ind. Cas. 375. It is a mistake of law not to presume 20 years' undisturbed user to have been as of right. A. I. R. 1925 Nag. 270=85 Ind. Cas. 81. Where a suit had been brought on almost the last day allowed by the law of limitation, and from this the Court inferred that the plaintiff must all along have been receiving interest at the stipulated rate and on that calculation the mortgage debt had been fully satisfied : *Held* that the Court had erred in law in drawing the inference as to the payment of interest from matters not in evidence before it, and that therefore, there had been no proper trial of the suit. 45 Ind. Cas. 555=42 B. 352=20 Bom. L. R. 354. Ownership of blind alley may be presumed to rest in owners of adjacent house but the presumption is not one of law. A. I. R. 1928 Lah. 709=108 Ind. Cas. 610. High Court can interfere where the lower appellate Court failed to draw a presumption of the nature illustrated in s. 114, Evidence Act. A. I. R. 1928 All. 16=50 A. 145=25 A. L. J. 833=105 Ind. Cas. 250. The presumption of intention is a question of fact and cannot be raised in second appeal. A. I. R. 1925 Mad. 1217=49 M. L. J. 361=(1925) M. W. N. 608=90 Ind. Cas. 767. The question whether a presumption is

rebutted or not is a question of fact to be determined according to the circumstances of each case. 136 Ind. Cas. 783=A. I. R. 1932 Mad. 173.

**Easement.**—Finding that right of way was not granted is one of fact. A. I. R. 1924 Lah. 488=6 Lah. L. J. 176. The question as to the existence of an implied grant is a question of fact. A. I. R. 1925 Pat. 748=7 P. L. T. 260=1925 Pat. 250=90 Ind. Cas. 356. Finding regarding diminution of light not putting the user to inconvenience so as to entitle him to injunction is a finding of fact. A. I. R. 1928 Lah. 980=114 Ind. Cas. 698. Whether the right of privacy in respect of a house has or has not been interfered with by neighbour, is a question of fact and cannot be disturbed in second appeal. A. I. R. 1929 Oudh 535=6 O. W. N. 940=123 Ind. Cas. 222. Whether a particular user of passage imposes additional burden on servient heritage under s. 23, Easement Act, is a question of fact. A. I. R. 1931 Mad. 128=(1931) M. W. N. 631=130 Ind. Cas. 651. Question of enjoyment of easement as of right, peacefully and without interruption is a question of law. A. I. R. 1931 Lah. 395. Whether any particular user of the passage by the dominant owner does or does not impose additional burden upon the servient heritage is essentially a question of fact. 130 Ind. Cas. 661=1931 Mad. 631=34 L. W. 369=A. I. R. 1931 Mad. 128=61 M. L. J. 58. The finding as to the length of user is one of fact, and is conclusive. 158 Ind. Cas. 361=A. I. R. 1935 Lah. 346.

**Question of intention.**—Question of intention is not a matter of law but of fact. A. I. R. 1928 All. 61=50 A. 208=25 A. L. J. 970=107 Ind. Cas. 33; 69 Ind. Cas. 415=A. I. R. 1924 Lah. 382; 68 Ind. Cas. 664=A. I. R. 1923 Nag. 7; 45 Ind. Cas. 303; 63 Ind. Cas. 746=A. I. R. 1921 Lah. 263=3 Lah. 569; A. I. R. 1926 Oudh 614=96 Ind. Cas. 357; A. I. R. 1931 Lah. 220=31 P. L. R. 195=123 Ind. Cas. 81; A. I. R. 1931 Pat. 72=130 Ind. Cas. 165; A. I. R. 1931 Lah. 170=32 P. L. R. 304=131 Ind. Cas. 283; A. I. R. 1930 Mad. 590=32 L. W. 160. Exclusion of lands from the assets in calculating *peishcush* is a question of fact. A. I. R. 1924 Mad. 117=18 L. W. 324=(1923) M. W. N. 732=75 Ind. Cas. 465. Question if dedication is real or nominal is of fact and is of great difficulty but can be decided by noting the conduct of founder or his successors. A. I. R. 1931 Lah. 170=32 P. L. R. 304=131 Ind. Cas. 283; see also 49 Ind. Cas. 138=1 P. R. 1919; A. I. R. 1930 Lah. 1056=12 Lah. L. J. 199. Whether transfer of his property was made a few days before the application for adjudication with intent to defeat or delay creditors is merely question of fact. 107 Ind. Cas. 490. Where question is one of intention of executant of power of attorney, to be ascertained from terms of the document, and where interpretation does not depend on legal phraseology or legal effect the question is one of fact. A. I. R. 1929 Lah. 90=30 P. L. R. 168=109 Ind. Cas. 380.

**Finding as to Limitation.**—Finding that the time between date when copies are ready for delivery and the date of actual delivery cannot be excluded is a question of fact. A. I. R. 1923 Lah. 696=73 Ind. Cas. 447. Similarly finding as to time required for obtaining copies is one of fact and cannot be questioned in second appeal. 67 Ind. Cas. 478.

**Market value.**—Finding as regards the market value of a property, in the absence of legal mistake, is a question of fact and cannot be agitated in second appeal. A. I. R. 1926 Oudh 68=90 Ind. Cas. 679; A. I. R. 1929 Lah. 137=111 Ind. Cas. 814; 118 Ind. Cas. 85=A. I. R. 1929 Oudh 244=6 O. W. N. 264=4 Luck. 683; 124 Ind. Cas. 30=A. I. R. 1930 All. 363=52 A. 532=(1930) A. L. J. 561=127 Ind. Cas. 589.

**Meaning of words.**—A finding that a particular word is used in a particular sense is one of fact and is binding on the High Court. A. I. R. 1925 Cal. 1209=88 Ind. Cas. 77; 20 C. W. N. 584=32 Ind. Cas. 240.

**Nature of property.**—Finding as regards character and nature of property is one of fact and as such cannot be considered in second appeal. A. I. R. 1923 Lah. 532=79 Ind. Cas. 543; A. I. R. 1921 Lah. 843=3 Lah. L. J. 514. Whether a certain place is a town or a village is a question of fact and cannot be questioned in second appeal. A. I. R. 1926 Lah. 542=8 Lah. L. J. 66=27 P. L. R. 73=94 Ind. Cas. 127; see also 112 Ind. Cas. 402=10 Lah. L. J. 360. The finding of the lower appellate Court that the lands in question are included in the permanent settlement of 1793 cannot be questioned in second appeal. A. I. R. 1927 Cal. 457=100 Ind. Cas. 507. The question whether certain property has been thrown into the assets of partnership, is purely one of fact. A. I. R. 1928 (P. C.) 135=47 C. L. J. 292=30 Bom. L. R. 762 (P. C.)=107 Ind. Cas. 453.

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**Nature of transaction.**—Whether a certain transaction amounts to sale or mortgage is a question of fact. 26 P. L. R. 799=92 Ind. Cas. 42 ; see also A. I. R. 1929 Lah. 530=11 Lah. L. J. 151=119 Ind. Cas. 767 ; but see A. I. R. 1925 Mad. 37=47 M. L. J. 385=84 Ind. Cas. 505. In a case that mortgage has been extinguished by subsequent sale, the question whether there was sale is one of fact. A. I. R. 1930 P. C. 91=(1930) A. L. J. 292=32 Bom. L. R. 380=31 P. L. R. 145=11 Lah. 199=57 I. A. 86=51 C. L. J. 518=122 Ind. Cas. 316. Whether a particular transaction carries with it a share in the *Shamilat* is a question of fact but disregard of law in such finding entitles the High Court to interfere. 38 Ind. Cas. 120.

**Question of negligence.**—The question of negligence is one of fact. A. I. R. 1922 Cal. 317=71 Ind. Cas. 346 ; A. I. R. 1924 Lah. 591=6 Lah. L. J. 237=79 Ind. Cas. 428 ; 94 Ind. Cas. 348 ; A. I. R. 1927 Oudh 478=1 Luck. 498=105 Ind. Cas. 565 ; A. I. R. 1927 Mad. 443=(1927) M. W. N. 213=53 M. L. J. 375=39 M. L. J. 15=103 Ind. Cas. 31 ; 45 Ind. Cas. 197=4 Pat. L. W. 369=(1918) Pat. 178 ; A. I. R. 1928 Lah. 774=10 Lah. 360=30 P. L. R. 541=112 Ind. Cas. 736. The question whether particular facts found constitute gross negligence is a question of law. A. I. R. 1926 Mad. 905=(1926) M. W. N. 350=95 Ind. Cas. 707 ; A. I. R. 1924 All. 613=77 Ind. Cas. 1032 ; A. I. R. 1925 Mad. 258=47 M. L. J. 700=(1925) M. W. N. 75=85 Ind. Cas. 812 ; 75 Ind. Cas. 591=A. I. R. 1922 All. 421. Whether particular facts justify inference of wilful neglect is a question of law. A. I. R. 1926 Nag. 399=9 N. L. J. 111=97 Ind. Cas. 195 ; A. I. R. 1928 Lah. 774=10 Lah. 360=30 P. L. R. 541=112 Ind. Cas. 736 ; A. I. R. 1928 Lah. 837=10 Lah. 329=111 Ind. Cas. 523. The finding that there was no negligence is a finding of fact. A. I. R. 1928 All. 166 = L. R. 9 A. 23 Rev.=107 Ind. Cas. 702. Negligence is at least a mixed question of law and fact and unless it is shown that the Court has approached the question from a wrong stand point or that the evidence is such that there was no option but to draw the converse conclusion or unless the finding is vitiated by some other legal defect it may be difficult to upset such a finding in second appeal. A. I. R. 1936 All. 771=1936 P. L. J. 262. Wilful neglect is not a pure question of law and therefore, an appellate Court's finding of fact based on certain evidence and circumstances cannot be questioned in second appeal. A. I. R. 1926 All. 394=48 A. 766=96 Ind. Cas. 1046. The finding of negligence derived through wrong principles can be questioned in second appeal. A. I. R. 1929 Lah. 314=30 P. L. R. 128=11 Lah. L. J. 82=118 Ind. Cas. 655 ; see also A. I. R. 1929 Rang. 17=6 Rang. 643=116 Ind. Cas. 470. Omission on the part of the lower Court to consider certain evidence does not render the judgment bad in law. 11 Lah. L. J. 381. Whether a party offering a secondary evidence of document, not lost or destroyed, has sufficient reason for not producing it in reasonable time is a question of fact. A. I. R. 1930 All. 550=(1930) A. L. J. 1003=125 Ind. Cas. 460. The question of *lambardar's* misconduct or negligence under s. 164 of the Agra Tenancy Act is a mixed question of law and fact. A. I. R. 1921 All. 314=43 A. 23=60 Ind. Cas. 643. The finding that a guardian has been negligent is one of fact. A. I. R. 1933 Lah. 337=142 Ind. Cas. 629=34 P. L. R. 110.

**Transaction, notice of.**—The question of notice of a transaction is one of fact. 3 Lah. L. J. 447 ; see also A. I. R. 1926 Oudh 257=13 O. L. J. 176=91 Ind. Cas. 1046 ; A. I. R. 1929 Oudh 316=6 O. W. N. 493=117 Ind. Cas. 405 ; see also 54 A. 557=138 Ind. Cas. 439=1932 A. L. J. 526=A. I. R. 1932 All. 540.

**Ownership and Possession.**—The question of ownership of a particular property is a question of fact. 96 Ind. Cas. 915=A. I. R. 1926 Mad. 1052 ; 113 Ind. Cas. 886 ; A. I. R. 1921 Lah. 117=62 Ind. Cas. 809. The finding that a person is in possession of a property either of his own right or in a certain capacity is also a question of fact. A. I. R. 1925 Oudh 170=81 Ind. Cas. 588 ; 67 Ind. Cas. 152 ; 14 A. L. J. 1066=36 Ind. Cas. 427.

**Partnership, dissolution of.**—A finding from circumstantial evidence that a partnership has been dissolved is one of fact and cannot be questioned in second appeal. 144 Ind. Cas. 573=1933 M. W. N. 619=A. I. R. 1933 Mad. 353 ; 35 P. L. R. 557=A. I. R. 1934 Lah. 557.

**Reasonable and probable cause.**—A finding as regards the absence and presence of reasonable and probable cause or reasonable care and good faith is a finding of fact and cannot be interfered in second appeal. A. I. R. 1919 All. 429=117 Ind. Cas. 619 ; A. I. R. 1927 Nag. 41=97 Ind. Cas. 988 ; 86 Ind. Cas. 596=A. I. R. 1925 Oudh 359=12 O. L. J. 88=2 O. W. N. 62=28 O. C. 387 ; 91 Ind. Cas. 112 ;

60 Ind. Cas. 96 ; I. R. 1932 Lah. 663. It is a mixed question of law and fact. A. I. R. 1932 All. 386=138 Ind. Cas. 282 ; 137 Ind. Cas. 829=35 L. W. 495=A. I. R. 1932 Mad. 601 ; 28 N. L. R. 312.

**Rate of rent**—Question as regards rent or rate of rent is one of fact. A. I. R. 1926 Cal. 359=90 Ind. Cas. 564 ; 86 Ind. Cas. 316=A. I. R. 1925 Cal. 632=29 C. W. N. 500=41 C. L. J. 135 ; 23 C. W. N. 345=51 Ind. Cas. 760=46 C. 189.

**Representation.**—Finding as to representation, mis-representation or conduct is one of fact. A. I. R. 1921 Mad. 198=13 L. W. 525=62 Ind. Cas. 764 ; 68 Ind. Cas. 203=A. I. R. 1923 Cal. 165 ; A. I. R. 1926 Mad. 39=49 M. L. J. 396=90 Ind. Cas. 875.

**Representation of a deceased.**—Whether one heir of deceased tenant represents the whole tenancy is a question of fact. A. I. R. 1926 Cal. 517=91 Ind. Cas. 748. Finding if tenancy is correctly represented is one of fact and cannot be made ground of second appeal. A. I. R. 1929 Cal. 28=49 C. L. J. 83=115 Ind. Cas. 180. Whether certain persons are representatives of another tenant is a question of fact. A. I. R. 1927 Cal. 81.

**Status, question of.**—The question whether certain persons acted as heirs or administrators in contracting a certain debt is a question of fact. A. I. R. 1927 Mad. 185=24 L. W. 842=97 Ind. Cas. 570. Finding on the question of plaintiff's status is a finding of fact which cannot be challenged in second appeal. 29 P. L. R. 162=109 Ind. Cas. 458 ; see also A. I. R. 1928 Nag. 150=107 Ind. Cas. 911 ; A. I. R. 1929 Mad. 250=116 Ind. Cas. 133 ; A. I. R. 1923 Lah. 626=80 Ind. Cas. 264 ; A. I. R. 1923 Lah. 611 ; A. I. R. 1921 Lah. 267=3 Lah. L. J. 552=67 Ind. Cas. 789. Whether or not a caste was split up is a question of fact. A. I. R. 1929 Bom. 69=50 B. 124=27 Bom. L. R. 1503=92 Ind. Cas. 549. Whether the parties to a suit follow custom or Mahammadan law cannot be discussed in second appeal. 106 P. W. R. 1916=60 P. L. R. 1917=34 Ind. Cas. 219.

**Question of Wakf.**—Finding of lower appellate Court as to character and dedication of property as *wakf* is formal even when erroneous. A. I. R. 1930 Lah. 743=31 P. L. R. 372=126 Ind. Cas. 17 ; 34 P. L. R. 763=A. I. R. 1933 Lah. 342=144 Ind. Cas. 467.

**Pardanashin lady.**—A finding that a certain lady is not *pardanashin* lady is one of fact and cannot be questioned in second appeal. A. I. R. 1933 Lah. 451=34 P. L. R. 304=144 Ind. Cas. 720.

**Copyright, infringement of.**—The question of infringement of copyright or breach of confidence is one of fact. 142 Ind. Cas. 115=1933 A. L. J. 393=37 L. W. 14=64 M. L. J. 193 P. C.=A. I. R. 1933 P. C. 26.

**Question of proof of fact.**—Question of proof of fact where evidence for and against has been properly admitted is one of fact. 135 Ind. Cas. 693=A. I. R. 1932 Oudh 51 ; 7 Luck. 116=8 O. W. N. 800=134 Ind. Cas. 411=A. I. R. 1932 Oudh 288. But proper effect of proved fact is a question of law. 7 Luck. 116=A. I. R. 1932 Oudh 283 ; 6 Luck. 403=129 Ind. Cas. 335=A. I. R. 1931 Oudh 19 ; 135 Ind. Cas. 693=A. I. R. 1932 Oudh 51 ; 28 N. L. R. 312.

**Acknowledgment.**—Acknowledgment of liability contained in settlement record is a question of fact. A. I. R. 1934 Lah. 53=14 Lah. 583.

**Account.**—Decision of lower appellate Court as regards books of account is final. 9 O. W. N. 532=138 Ind. Cas. 716=A. I. R. 1932 Oudh 225=A. L. R. 1932 Oudh 470 ; 138 Ind. Cas. 716=9 O. W. N. 532=A. I. R. 1932 Oudh 225. The High Court should not interfere with finding against proof of loss on the ground that the Criminal Court had subsequently found the persons alleged to have robbed the books guilty and convicted them. A. L. R. 1932 Lah. 581=32 P. L. R. 628.

**Finding of fact.**—The word "fact" in s. 100, C. P. Code, must bear the meaning given to it in s. 3, Evidence Act. A. I. R. 1936 Nag. 186=165 Ind. Cas. 217. Where there is no error or defect in the procedure, the finding of the first appellate Court upon a question of fact is final and it is final "however gross or inexcusable the error may seem to be." A. I. R. 1935 Pat. 351=16 Pat. L. T. 666 ; see also 37 P. L. R. 379 ; A. I. R. 1935 Nag. 111=31 N. L. R. 250=155 Ind. Cas. 778. The High Court has no jurisdiction under this section to reverse the findings of fact arrived at by the lower appellate Court however erroneous, unless they are vitiated by some error of law. The rule is equally applicable to cases in which the findings of the lower appellate Court are based on inferences drawn from documents

exhibited in evidence. 61 I. A. 163=57 M. 652=11 O. W. N. 775=36 Bom. L. R. 539=36 P. L. R. 93=59 L. L. J. 262=38 C. W. N. 533=A. I. R. 1934 P. C. 112=66 M. L. J. 595 (P. C.) ; see also 40 L. W. 755=A. L. R. 1934 Mad. 569 ; A. I. R. 1936 Pat. 140 ; 13 Pat. 254=61 I. A. 93=1934 M. W. N. 363=15 Pat. L. T. 115=147 Ind. Cas. 977=38 C. W. N. 365=59 C. L. J. 147=A. I. R. 1934 P. C. 5=66 M. L. J. 298 (P. C.) ; A. I. R. 1934 Lah. 662 ; 35 P. L. R. 608 ; A. I. R. 1934 Lah. 291=36 P. L. R. 261 ; 11 O. W. N. 1359=152 Ind. Cas. 419 ; A. I. R. 1934 Oudh 261=11 O. W. N. 276 ; 147 Ind. Cas. 871. That there is a full accord and satisfaction is a finding of fact. A. I. R. 1934 Nag. 226. Finding that allegation of fraud is not proved is a finding of fact. 35 P. L. R. 578=A. I. R. 1934 Lah. 662. The finding of the Courts below that a particular alienation was a gift and not a sale is a finding of fact. 15 Pat. L. T. 596. But a finding of fact arrived at by the lower appellate Court without applying its mind to the facts and circumstances on which the trial Court based its decision cannot be accepted in second appeal. 40 C. W. N. 769. A finding on a question of title is one of fact and cannot be challenged in second appeal. A. I. R. 1936 Cal. 245=40 C. W. N. 758=63 C. L. J. 591. The question of what weight has to be attached to document admitted and proved is a question of fact and cannot be gone into in second appeal. A. I. R. 1935 Cal. 367=60 L. L. J. 569. So also is a question as to whether an instrument was obtained from a person by undue influence or misrepresentation. 59 B. 502=37 Bom. L. R. 471=A. I. R. 1935 Bom. 326. But the question whether in particular circumstances a donee takes a limited estate or an absolute estate cannot be said to be a question of fact. 1935 M. W. N. 829=42 L. W. 336=69 M. L. J. 320. A finding of fact arrived at by the lower Courts on proper consideration of evidence cannot be questioned in second appeal. A. I. R. 1933 Lah. 172=145 Ind. Cas. 155 ; A. I. R. 1933 Lah. 141=145 Ind. Cas. 122 ; A. I. R. 1933 Rang. 91=144 Ind. Cas. 315 ; A. I. R. 1933 Oudh 115=142 Ind. Cas. 696 ; A. I. R. 1933 Rang. 174=146 Ind. Cas. 445=61 R. (Rang) 100 ; A. I. R. 1933 Oudh 259=10 O. W. N. 316=145 Ind. Cas. 233 ; A. I. R. 1933 Mad. 418=144 Ind. Cas. 513=A. I. R. 1933 Mad. 565 ; A. I. R. 1933 Pat. 708 ; 10 O. W. N. 380=145 Ind. Cas. 652 ; see also A. I. R. 1935 Lah. 172 ; A. I. R. 1935 All. 174=153 Ind. Cas. 73 ; A. I. R. 1935 Lah. 389=156 Ind. Cas. 1028 ; A. I. R. 1935 Lah. 641 ; A. I. R. 1935 Pat. 42. But where material or relevant evidence was excluded in coming to the finding, it is not binding on the appellate Court. 142 Ind. Cas. 673=33 P. L. R. 1013 ; 16 N. L. R. 232 ; 34 P. L. R. 283=146 Ind. Cas. 292 ; 14 Pat. L. T. 699 ; A. I. R. 1933 Lah. 345=34 P. L. R. 862=14 Lah. 587 ; A. I. R. 1933 Mad. 163=145 Ind. Cas. 407. Where the findings are based upon evidence and are not vitiated by misapplication of substantive law or of any rule of procedure affecting the merits, this cannot be questioned in second appeal. 1932 A. L. J. 437=A. I. R. 1932 All. 293 (F. B.)=138 Ind. Cas. 465 ; see also 9 O. W. N. 1015 ; 9 O. W. N. 568=A. I. R. 1932 Oudh 264=139 Ind. Cas. 365 ; I. R. 1932 Lah. 623 ; 136 Ind. Cas. 719=33 P. L. R. 161 ; 9 O. W. N. 1063 ; I. R. 1932 Lah. 666. Erroneous finding of fact is not same as defect in procedure and hence wrongful finding of fact, if there is sufficient evidence cannot be interfered with. A. I. R. 1929 P. C. 190=25 N. L. R. 121=50 C. L. J. 197=57 M. L. J. 205=31 Bom. L. R. 883=56 I. A. 280=33 C. W. N. 893=(1929) P. C. 233=117 Ind. Cas. 1 ; A. I. R. 1929 P. C. 152=(1929) A. L. J. 702=33 C. W. N. 725=31 Bom. L. R. 856=(1929) M. W. N. 442=50 C. L. J. 30=57 M. L. J. 64=117 Ind. Cas. 481 ; see also A. I. R. 1928 Nag. 329=114 Ind. Cas. 454 ; 111 Ind. Cas. 376 ; A. I. R. 1928 Oudh 354=5 O. W. N. 510=100 Ind. Cas. 531 ; A. I. R. 1927 Lah. 574=103 Ind. Cas. 215 ; 100 Ind. Cas. 792=13 O. L. J. 520 ; 99 Ind. Cas. 255 ; A. I. R. 1927 Oudh 89=99 Ind. Cas. 199 ; 98 Ind. Cas. 1035 ; 98 Ind. Cas. 869 ; 92 Ind. Cas. 327=A. I. R. 1924 Nag. 91=20 N. L. R. 17 ; 91 Ind. Cas. 1046=A. I. R. 1926 Oudh 257=13 O. L. J. 176 ; A. I. R. 1926 Pat. 9=6 P. L. T. 787=90 Ind. Cas. 895 ; 19 C. W. N. 270 ; 88 Ind. Cas. 958=A. I. R. 1925 Mad. 823=48 M. L. J. 467=22 L. W. 73 ; 80 Ind. Cas. 290=A. I. R. 1925 Cal. 169 ; 78 Ind. Cas. 36 ; 3 Lah. L. J. 409=67 Ind. Cas. 436 ; 4 Lah. L. J. 464 ; 3 Lah. L. J. 103=64 Ind. Cas. 297. The question whether the defendant was of unsound mind at the time of the execution of the *dahi* entry is one of fact. 34 P. L. R. 297=A. I. R. 1933 Lah. 458=144 Ind. Cas. 741. Whether the bailee used all reasonable diligence in the main is a question of fact. A. I. R. 1933 All. 158=142 Ind. Cas. 691. Question of ownership of certain property is also a question of fact. A. I. R. 1933 All. 603 ; see also 39 C. W. N. 303=60 C. L. J. 556. A finding as to the existence or non-existence of a custom in so far as it is a finding that a certain practice does or does not prevail, is a finding of fact. 141 Ind. Cas. 668=A. I. R. 1933 All. 306. Whether a promissory note is for a cash



consideration is a finding of fact which is not open to challenge in second appeal. A. I. R. 1932 Lah. 30.

**Question of Fact—what is.**—That a woman has taken a life of immorality is a question of fact. 150 P. W. R. 1915=31 Ind. Cas. 797. In action for libel such questions as whether writing was defamatory of plaintiff questions of fair comment, justification, *bona fides* and *quantum* of damages are questions of fact. 32 M. L. J. 392=5 L. W. 598=21 M. L. T. 324=40 Ind. Cas. 126. Whether or not a particular illness constitutes *marz-ul-maut* is primarily a question of fact. A. I. R. 1927 Cal. 429=49 C. 477=26 C. W. N. 749=34 C. L. J. 444=67 Ind. Cas. 77. That a *Dharmasala* was always treated as private property is a question of fact and is binding in second appeal. 3 Lah. L. J. 514. Finding of undue influence is a finding on merits. 40 Ind. Cas. 215. A finding on the question whether there was forfeiture of tenancy by denial of relationship of landlord and tenant is a finding of fact and no second appeal is competent from that finding. 34 P. L. R. 884=A. I. R. 1933 Lah. 377=145 Ind. Cas. 992. Whether there has been disruption of joint Hindu family or not is not a finding of fact. 144 Ind. Cas. 919. Whether the amount of rent is fair and equitable is a question of fact. 146 Ind. Cas. 811. What is reasonable compensation under s. 74 of the Contract Act is a question of fact and not of law. A. I. R. 1934 Pat. 16. Where different suits from which appeals were filed were connected with each other and where the evidence on the record was complete in regard to all cases and where the lower appellate Court being of opinion that no useful purpose could be served by directing a remand, arrives at some findings and bases his conclusions thereon, the conclusions are unimpeachable in second appeal. A. L. R. 1934 Cal 57.

The finding that the relationship of the parties were sufficiently near to support the conclusion that the consideration was the love and affection of the parties is one of fact and though wrong it cannot be interfered with in second appeal. A. I. R. 1934 Pat. 44. Whether three brothers are joint or separate is a question of fact. A. I. R. 1934 Pat. 48. Under this section the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate Court, however erroneous. 38 C. W. N. 533 P. C.; 6 R. D. 377. Finding of lower Court, that plaintiff could claim share in specified trees in plots other than grove admitted to be joint is one of fact. A. I. R. 1934 Oudh 177. Where it had been already decided by the lower Court that a certain wall and a door did not encroach on the point in suit: *Held* that it was not open to the High Court in second appeal to direct the lower Court to hold an enquiry as to the same matter. 40 C. W. N. 449=17 Pat. L. T. 177=38 P. L. R. 182=1936 P. L. J. 480=43 L. W. 685=1936 O. W. N. 153=A. I. R. 1936 P. C. 83=70 M. L. J. 455 (P. C.). In a suit for enhancement of rent where the lower Courts come to the conclusion that there was no prevailing rate of rent, the High Court in second appeal cannot interfere with that finding. A. I. R. 1936 Pat. 54. Second appellate Court can adjudicate as matter of law upon conclusions derived from findings by lower Courts. A. I. R. 1937 Oudh 47.

Second appeal on no other grounds. 101. [S. 585.] No second appeal shall lie except on the grounds mentioned in section 100.

102. [S. 586.] No second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees.

**Scope.**—The test in deciding whether second appeal lies or not is to be found in the nature of the suit and not in the powers of the Court which tried the suit. Thus where the Munsiff having Small Cause Court powers to try suits up to Rs. 250 tries the suit for Rs. 500 which was cognizable by a Court of Small Causes as Munsiff, still no second appeal lies. A. I. R. 1931 Oudh 49=7 O. W. N. 1112=129 Ind. Cas. 174; see also A. I. R. 1935 All. 574=1935 P. L. J. 426=155 Ind. Cas. 95. No second appeal lies against order in execution in Small Cause nature suit. A. I. R. 1925 Mad. 742=48 M. L. J. 499=90 Ind. Cas. 794; 46 A. 73=21 A. L. J. 861=79 Ind. Cas. 605; 45 M. L. J. 651=18 L. W. 739=76 Ind. Cas. 750; 45 M. L. J. 210=18 L. W. 17=A. I. R. 1924 Mad. 32=73 Ind. Cas. 956. This section

relates to appeals from appellate decrees, not to appeals from orders. The terms of this section do not refer to the amount in dispute at the time the appeal is preferred, but the amount or value of the subject-matter of the original suit. 11 C. 169. The applicability of this section depends on the nature of the suit and not on the Court in which it is instituted. The section will apply to a case in which the Court which entertains the suit had no jurisdiction to take cognizance of it. 26 A. 358. An extra prayer in the plaint does not prevent the suit from being in the nature of a suit cognizable in the Small Cause Court. 1 M. L. T. 314 (F. B.)=16 M. L. J. 477=30 M. 101. This section contemplates rather the original character of the suit than the character it may subsequently assume by operation of findings of Court. 6 Bom. L. R. 731. No revision or second appeal lies in small cause nature suit tried on regular side. A. I. R. 1922 Mad. 352=42 M. L. J. 118=14 L. W. 349=66 Ind. Cas. 207. S. 102 must be construed to apply to all suits of a civil nature of which the value does not exceed Rs. 500 except those which are contained in Sch. II of the Provincial Small Cause Courts Act. 129 Ind. Cas. 174=7 O. W. N. 1112=A. I. R. 1931 Oudh 49. Though Court executing the decree would be supposed to have passed the decree second appeal would not lie on order in execution in case where Small Cause Court decree is transferred to regular Court for execution. A. I. R. 1928 Bom. 534=53 B. 646=30 Bom. L. R. 1447=114 Ind. Cas. 861; see also A. I. R. 1927 All. 740=103 Ind. Cas. 349; 34 C. L. J. 477=67 Ind. Cas. 6. Nature of suit is not altered by an unnecessary prayer for declaration. 41 Ind. Cas. 627. Nature of the suit has nothing to do with the pecuniary small cause jurisdiction of the Court which tried it. 41 B. 367=19 Bom. L. R. 83=38 Ind. Cas. 881. Order of remand passed by appellate Court in a suit for small cause nature is not appealable. 36 Ind. Cas. 396. Small Cause Court decree passed in review is appealable only on point of granting review and not on merits. A. I. R. 1921 Lah. 124=3 Lah. L. J. 166=60 Ind. Cas. 259. Amount claimed in plaint and character disclosed in plaint determines whether suit is of the nature of Small Cause Court. A. I. R. 1924 Cal. 405=51 C. 62=28 C. W. N. 6=80 Ind. Cas. 317.

To determine the nature of the suit the plaint should be looked at and not the defence. 12 N. L. R. 47=32 Ind. Cas. 998. Nature of the order in execution proceedings depends upon nature of the original suit. 54 Ind. Cas. 429; see also 46 Ind. Cas. 82=5 O. L. J. 187; 22 Ind. Cas. 712. The nature of a suit for s. 102 is not affected by the findings or by a question of title arising therein. 50 Ind. Cas. 629. Where a suit cognizable by a Small Cause Court has been tried against the provisions of s. 16 as an ordinary suit by a Judge who is not invested with Small Cause Court powers, the parties to the suit having raised no objection to the trial, it should not be considered as a Small Cause Court suit, and an appeal would lie from the decision. A. I. R. 1934 Nag. 121=30 N. L. R. 252=149 Ind. Cas. 886. Section 102 contemplates a suit of the nature cognizable by Courts of Small Causes irrespective of what defence is put up in the case. A. I. R. 1935 Oudh 413=155 Ind. Cas. 240=1935 O. W. N. 503. The words 'any suit of the nature, cognizable by Courts of Small Causes' in s. 102 indicate and mean 'any suit in which the claim is cognizable by Courts of Small Cause as such'. A. I. R. 1935 Rang. 386=13 Rang. 633 (F. B.)=158 Ind. Cas. 804. A suit to recover the rate of agricultural land is not a suit of the nature cognizable by Courts of Small Causes and a second appeal lies even if the amount is less than Rs. 500. *Ibid.*

**Original nature of the suit is the criterion.**—Suit does not cease to be a Small Cause Suit and no second appeal lies though incidentally a question of title was raised by the defendant and thence suit tried on the original side. A. I. R. 1926 Mad. 389=30 L. W. 365=116 Ind. Cas. 114; see also 13 Ind. Cas. 493; 24 M. 508; 32 B. 356. The course of appeal is determined by the character of the plaint as originally made and is not affected by the plaintiff subsequently dropping or being unable to seek relief with regard to a part of his claim. A. I. R. 1928 Lah. 764=115 Ind. Cas. 858; 89 Ind. Cas. 59=A. I. R. 1925 Bom. 440=49 B. 596=27 Bom. L. R. 637. Cognizable in s. 102 refers to the nature of proceedings prior to the decree and not at the stage of filing the second appeal 45 Ind. Cas. 11=35 M. L. J. 377=23 M. L. T. 255. Amount claimed in plaint and character disclosed in it determines whether a suit is of the nature of Small Cause Court. A. I. R. 1924 Cal. 405=51 C. 62=28 C. W. N. 6=80 Ind. Cas. 317; see also A. I. R. 1928 Nag. 136=107 Ind. Cas. 193. The transfer of a suit under s. 23 does not and cannot change its nature which is the test under this section and a second appeal is barred. A. I. R. 1926 Mad. 622=23 L. W. 518=94 Ind. Cas. 77; see also 15 M. 98; 24 C. 557; 65

Ind. Cas. 7=8 O. L. J. 391 ; 15 M. 98 ; 120 Ind. Cas. 370=A. I. R. 1929 Mad. 781 ; 134 Ind. Cas. 967=1931 A. L. J. 957 ; 57 Ind. Cas. 557=23 O. C. 117.

**Value of the suit does not exceed Rs. 500.**—Second appeal is barred in suit where value is Rs. 500 and plaint discloses Small Causes Court nature. 5 O. W. N. 240=108 Ind. Cas. 898. No second appeal lies from execution proceedings of Small Cause decree for less than Rs. 500. A. I. R. 1926 All. 345=95 Ind. Cas. 292. A suit to recover less than five hundred rupees as grazing fee is not one for rent and no second appeal lies in it. 32 C. L. J. 93=59 Ind. Cas. 595 ; see also A. I. R. 1921 Bom. 229=45 B. 223=22 Bom. L. R. 1193=59 Ind. Cas. 192 ; 51 Ind. Cas. 435. In the case of execution proceedings the test of maintainability of second appeal is the value of the suit and not the amount sought to be recovered. A. I. R. 1922 Lah. 290=3 Lah. 141=28 P. W. R. 1922=67 Ind. Cas. 718.

**Accounts.**—Suit for produce or value wrongfully raised by defendant is not for accounts and therefore is of a Small Cause nature. A. I. R. 1927 Rang. 262=5 Rang. 388=104 Ind. Cas. 818. Suit for recovery of account papers where in a prayer for damages is made in the alternative is not one cognizable by a Small Cause Court. 59 C. 352=138 Ind. Cas. 640=A. I. R. 1932 Cal. 481.

**Award.**—A suit for a declaration that an award made by arbitrators for re-payment of certain amount is void and for recovery of the amount is not a suit of a Small Cause nature. 6 Rang. 238=111 Ind. Cas. 21=A. I. R. 1928 Rang. 173. A Suit to enforce an award is not of a Small Cause nature. A. L. R. 1924 Rang. 192=1 Rang. 700=79 Ind. Cas. 718.

**Contribution.**—Second appeal lies in an alternative suit for contribution to recover the whole or proportionate part of the amount under Art. 41, Provincial Small Cause Courts Act. 23 C. L. J. 125=32 Ind. Cas. 200 ; see also 20 C. L. J. 200 ; 23 C. 189 ; 16 C. W. N. 975 ; 94 Ind. Cas. 949=A. I. R. 1926 All. 456 ; 36 C. W. N. 589.

**Damages.**—In a suit for damages between two sets of *raiya*s, the plaintiff alleging that the defendant had wrongfully come and cut away the crop on his land, the Courts below found that the defendant had no possession or title in the land and was, therefore, liable to damages : *Held* that although a question of title to land has been tried, it was tried incidentally, and, therefore, the second appeal was incompetent. 6 Ind. Cas. 415 ; see also 10 Bom. L. R. 733=32 B. 560 ; 3 Bom. L. R. 239=25 B. 625. Where in a suit for damages for trespass, the damages claimed were less than Rs. 500, no second appeal lay from the decree in the suit in as much as the suit was not exempted from the cognizance of a Court of Small Causes. 12 M. L. J. 349 ; see also 24 C. 557 ; 6 A. 10 ; 18 W. R. 283 ; 10 C. L. J. 198 ; 24 C. 557. A suit for damages for wrongfully cutting and carrying off trees, is involving a question of title and tried on the regular side remains a Small Cause suit for s. 102. 22 M. L. T. 381=(1916) 2 M. W. N. 215=4 L. W. 245=36 Ind. Cas. 202. Suit for damages for cutting fruit trees and for removing fruits is a Small Cause suit. 130 Ind. Cas. 481=(1930) A. L. J. 1247 ; see also A. I. R. 1936 Nag. 276. Suit for rent for damages for use and occupation even if tried in original side as question of title was raised, is one of a Small Cause nature. A. I. R. 1929 Mad. 525=119 Ind. Cas. 386 ; see also A. I. R. 1928 Nag. 136=107 Ind. Cas. 193. A suit by a landlord for damages for use and occupation against tenants holding over is cognizance by a Small Cause Court, and a second appeal does not lie. A. I. R. 1925 Mad. 890=48 M. L. J. 701=22 L. W. 528=90 Ind. Cas. 401. No second appeal lies in suit against President of District Board for damages. A. I. R. 1923 Mad. 689=46 M. 808=45 M. L. J. 125=18 L. W. 82=32 M. L. T. (H. C.) 378=74 Ind. Cas. 223. No second appeal lies in suit for damages for infringement of monopoly. A. I. R. 1923 Lah. 244=69 Ind. Cas. 431. A suit for declaration of title to fish and for damages is a Small Cause Suit. 68 Ind. Cas. 626=A. I. R. 1923 Cal. 321. If in an ejectment suit against a trespasser, the Court awards damages only, a second appeal will not be barred, simply because the decree was for money. 13 Ind. Cas. 493. A suit for damages for trespass is a suit cognizable by a Small Cause Court, even though questions of title are often raised in such suits. (1912) M. W. N. 810=23 M. L. J. 193=16 Ind. Cas. 201. A suit for damages for cutting fruit trees is a suit of a Small Cause nature. 130 Ind. Cas. 481=1930 A. L. J. 1247 ; see also A. I. R. 1931 Oudh 411=8 O. W. N. 1019. In all cases where it is suggested that the suit is one for damages or loss due to an offence, the decision must vary according to the particular circumstance, set out in the plaint and if it is decided that the suit is of a Small Cause nature and the value is less than Rs. 500 no

second appeal lies. A. I. R. 1931 All. 595—132 Ind. Cas. 564. A Small Cause Court has no jurisdiction to try a suit for damages for wrongful attachment and negligence and as such a second appeal in such a case is not barred. A. I. R. 1936 Nag. 257. A suit for recovery or money value of *bhoali* produce of some *moheua* trees standing on a plot of land, is a suit for money. A. I. R. 1936 Pat. 102—17 Pat. L. T. 88—160 Ind. Cas. 186.

In the case of a suit for cancellation of a document as well as damages if the case regarding cancellation is withdrawn in second appeal, no second appeal lies. 34 Ind. Cas. 909. A suit based on a registered lease deed by the lessee for damages below Rs. 500 for his ejection through Revenue Court is, if treated as one for damages, cognizable by Small Cause Court, but not so if the contract amounted to mortgage. In the latter case second appeal lies but not in the former. 15 A. L. J. 534—40 Ind. Cas. 578.

**Suit for immovable property.**—A hut is immovable property and a suit for a declaration in respect of a hut is not cognizable by the Small Cause Court. 9 Ind. Cas. 1. Standing trees are movable property for the purposes of the Provincial Small Cause Courts Act. 9 Ind. Cas. 133. Absurd and fictitious prayer for injunction to restrain transfer of immovable property does not oust Small Cause Court's jurisdiction in suit on simple money-bond. A. I. R. 1930 All. 702=(1930) A. L. J. 1043—132 Ind. Cas. 33. But prayer of mandatory injunction changes the nature of the Small Cause suit. A. I. R. 1922 All. 241=66 Ind. Cas. 613. Allegation in plaint that the defendant was wrongfully receiving profits of immovable property ousts the Small Cause nature of the suit but that of wrongful appropriation of share due to plaintiff does not. 31 Ind. Cas. 797.

**Marriage Contract**—Where the basis of the claim is a breach of promise of marriage, the suit is excluded from the cognizance of a Small Cause Court, 14 Ind. Cas. 837.

**Maintenance.**—A suit to recover arrears of maintenance under an agreement is excepted from the cognizance of the Small Cause Court, and a second appeal will lie in such a suit even where the value is less than Rs. 500. 33 Bom. L. R. 10=A. I. R. 1931 Bom. 286; see also 16 B. 267; 15 C. 164; 20 M. 29.

**Mesne profits suit for.**—No second appeal lies from a suit for *mesne* profits, where the value of the subject-matter in dispute is less than Rs. 500. 23 C. 884 (F. B.); *contra*; 25 M. 103 (F.B.) and 26 B. 85. A suit for profits between co-tenants is not exempted from the cognizance of a Court of Small Causes and where the value is less than Rs. 500 no second appeal lies. 132 Ind. Cas. 201=A. I. R. 1931 All. 551; see also 129 Ind. Cas. 124=A. I. R. 1930 Lah. 613—31 P. L. R. 698; but see 158 Ind. Cas. 1119=A. L. R. 1935 Nag. 29=18 N. L. J. 76.

**Rent.**—The agreement to pay rent having been pleaded the mere omission to raise it in the grounds of appeal cannot alter the nature of the suit which remains a suit for rent and ejection. 137 Ind. Cas. 253=33 P. L. R. 956=A. I. R. 1932 Lah. 388. A Small Cause Court has no jurisdiction over a suit for rent by a land-holder against his *rasyat*. A. I. R. 1922 Mad. 119=15 L. W. 150=44 M. 697=40 M. L. J. 466=(1921) M. W. N. 565=63 Ind. Cas. 8. A second appeal lies in a suit for rent other than house-rent. A. I. R. 1922 Pat. 184=37 Ind. Cas. 980. Alternative relief for rent cannot evade the bar of s. 102 for second appeal. 22 C. L. J. 564=33 Ind. Cas. 346. Relief for recovery of rent cannot be joined to that for damages to evade the bar of s. 102. 23 C. L. J. 557=34 Ind. Cas. 697. A suit for rent of *malik mak tara* fields is not tenable by a Small Cause Court but is still one of the nature cognizable by Courts of Small Causes as mentioned in s. 102. 56 Ind. Cas. 845. *Thunda waran* payable to the *mirasdar* is not rent but is dues mentioned under Art. 13 of the Provincial Small Cause Court Act and second appeal lies in a suit for the same. 34 M. L. J. 104=23 M. L. T. 41=41 M. 254 (F. B.)=44 Ind. Cas. 699. A suit to recover a certain sum less than Rs. 500 as rent due including *gallipatti* and local cess is of the nature cognizable by a Small Cause Court and that being so no second appeal is competent. A. I. R. 1935 Bom. 254=37 Bom. L. R. 355.

**Miscellaneous cases.**—Suit for declaration and refund of professional taxes is a suit of Small Cause nature. (1931) M. W. N. 1107; 1932 M. W. N. 142=A. I. R. 1932 Mad. 226. But where injunction is prayed for in that case it is exempt from the jurisdiction of Small Cause Court. 140 Ind. Cas. 273=1932 M. W. N. 1248=36 L. W. 659. A suit to enforce the liability of the shareholder for the balance due on

his share is not cognizable by a Small Cause Court. 59 C. 1186=36 C. W. N. 589=140 Ind. Cas. 252=A. I. R. 1932 Cal. 716. Second appeal lies against suit for excess amount paid in a decree through fraud and cheating. A. I. R. 1928 Cal. 776=115 Ind. Cas. 581. Removal of logs of timber from custody of Court by order of Court is not criminal offence and a suit for the recovery of the logs or their value is triable by a Court of Small Causes. 155 Ind. Cas. 888=A. I. R. 1933 Mad. 636. Suit for compensation for loss suffered on account of percolation of drain water is cognizable by a Small Cause Court. 143 Ind. Cas. 493=34 P. L. R. 583=A. I. R. 1933 Lah. 363. No second appeal in suit to recover *choutarji* dues. A. I. R. 1927 Mad. 670=52 M. L. J. 706=38 M. L. T. 385=103 Ind. Cas. 120. A claim for *jodi russums* and road cess which is not of the nature of the cesses mentioned in cl. 13 no second appeal lies. A. I. R. 1925 Mad. 1196=49 M. L. J. 185. Suit for wrongful removal of trees without criminal intention is not excepted by Art. 35 and therefore no second appeal lies. A. I. R. 1923 Cal. 568=27 C. W. N. 469=77 Ind. Cas. 77. Suit to recover offerings to shrine wrongfully misappropriated refers to trust and is not a Small Cause Court suit. A. I. R. 1926 Lah. 228=92 Ind. Cas. 731.

No second appeal lies in suit for money wrongly distributed under s. 93, C. P. Code. A. I. R. 1923 All 310=21 A. L. J. 248=45 A. 359=74 Ind. Cas. 836. No second appeal is maintainable in suit for interest only on mortgage-money due. 66 Ind. Cas. 285. A suit for price of coal supplied under an agreement is in the nature of a Small Cause suit. 59 Ind. Cas. 188. A suit to recover money forcibly taken is cognizable by a Court of Small Causes. 2 U. P. L. R. 212=57 Ind. Cas. 505. A suit for *Neervaram* or water-cess is not a suit of Small Cause nature. A. I. R. 1934 Mad. 683=1934 M. W. N. 1063.

**103. [New.]** In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue of fact necessary for the disposal of the appeal [which has not been determined by the lower appellate Court or which has been wrongly determined by such Court by reason of any illegality, omission, error or defect such as is referred to in sub-section (1) of section 100].\*

**Scope**—The High Court under this section can consider the evidence on any point which was taken in the grounds of appeal but which was not referred to by the lower, appellate Court. 5 M. L. T. 288; see also 128 Ind. Cas. 366=A. I. R. 1931 Rang. 29=8 Rang. 425; A. I. R. 1936 Lah. 788. Where fresh finding is called for by it but is not given by the lower appellate Court, the High Court is perfectly entitled to determine the issue as one of fact. A. I. R. 1930 Mad. 489=127 Ind. Cas. 142. High Court in second appeal has power to determine small question of fact and avail remand. A. I. R. 1931 Cal. 129=34 C. W. N. 951=130 Ind. Cas. 140; see also 7 Pat. 260=107 Ind. Cas. 821=A. I. R. 1928 Pat. 318; 62 M. L. J. 573=36 L. W. 687=1932 M. W. N. 506=A. I. R. 1932 Mad. 545. When the appropriate issue is not framed by Court below the second appellate Court may raise and decide it if evidence on record for deciding is sufficient. 47 C 107=46 I. R. 140=17 A. L. J. 700=15 N. L. R. 97=37 M. L. J. 36=21 Bom. L. R. 920=10 L. W. 310=24 C. W. N. 81 (P. C.)=51 Ind. Cas. 177; see also A. I. R. 1922 Pat. 417=3 P. L. T. 303=65 Ind. Cas. 536; 47 Ind. Cas. 950=5 O. L. J. 464; A. I. R. 1922 Pat. 575=1 Pat. 639=67 Ind. Cas. 404; A. I. R. 1922 P. C. 292=45 M. 586=43 M. L. J. 640=(1922) M. W. N. 749=16 L. W. 102=49 Ind. Cas. 286=37 C. L. J. 199=27 C. W. N. 245 (P. C.)=68 Ind. Cas. 538; A. I. R. 1927 Pat. 157=81 P. L. T. 74=102 Ind. Cas. 391; 31 C. W. N. 32=99 Ind. Cas. 189=A. I. R. 1927 Cal. 1; 28 Ind. Cas. 673.

New plea argued for the first time in lower appellate Court, will be allowed to be argued in High Court if it requires no fresh evidence. A. I. R. 1930 Lah. 1010=31 P. L. R. 755=128 Ind. Cas. 293. The High Court will examine the finding if lower appellate Court arrived at by misplacing onus of proof. A. I. R. 1930 Cal. 591=51 C. L. J. 465=128 Ind. Cas. 108. Where in a pre-emption suit question of acquiescence is not decided by lower Court the High Court in second appeal can decide the question on facts proved. 16 A. L. J. 779=47 Ind. Cas. 400. Where the judgment of an Appellate Court is reversed on a preliminary point of custom the High Court should not itself examine the evidence as to the custom but should remand the case

\* The words within brackets have been substituted for the words "but not determined by the lower appellate Court" by Act 6 of 1926.

for disposal on the merits by the lower appellate Court. 40 M. 1108=5 L. W. 346=32 M. L. J. 237=21 M. L. T. 411=40 Ind. Cas. 516. Where the trial Court did not decide a question of fact and the evidence on record was sufficient for the purpose the High Court decided the fact itself. A. I. R. 1923 All. 134=21 A. L. J. 33=45 A. 191=76 Ind. Cas. 12. Where a satisfactory return of revised finding on one issue called for by the High Court is not made by the lower Court, the former can on examining the evidence and deciding the issue make a decree accordingly. 43 M. 567=(1920) M. W. N. 61=25 C. W. N. 485=38 M. L. J. 476=22 Bom. L. R. 578=18 A. L. J. 707=56 Ind. Cas. 117 (P. C.). Question of title whether of fact or of law if left undetermined by the lower Court can be decided by Court of second appeal. A. I. R. 1924 Oudh 266=10 O. L. J. 646=27 O. C. 77=78 Ind. Cas. 895; see also 82 Ind. Cas. 772; A. I. R. 1930 Mad. 65=57 M. L. J. 789=30 L. W. 1045=124 Ind. Cas. 301; A. I. R. 1929 Pat. 728=118 Ind. Cas. 312; A. I. R. 1927 All. 694=103 Ind. Cas. 340. Where the lower appellate Court approaches the case from a wrong stand point of burden of proof and facts to appreciate the value or importance of certain documents, and under-estimates their bearing on the question in issue, the Court of second appeal may come to an independent finding on the question. A. I. R. 1926 Nag. 489=9 N. L. J. 152=98 Ind. Cas. 236; see also 97 Ind. Cas. 785=A. I. R. 1926 Mad. 1003=24 L. W. 227; 98 Ind. Cas. 129=A. I. R. 1927 Cal. 140. Under this section the High Court has power to decide issues of fact on a consideration of the documents exhibited in the case, when that issue which is material to the decision is left undecided by the lower Court. A. L. R. 1933 Lah. 179.

#### APPEALS FROM ORDERS.

**104. [S. 588]** (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the Order from which appeal lies, body of this Code or by any law for the time being in force from no other orders—

(a) an order superseding an arbitration where the award has not been completed within the period allowed by the Court;

(b) an order on an award stated in the form of a special case;

(c) an order modifying or correcting an award;

(d) an order filing or refusing to file an agreement to refer to arbitration;

(e) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(f) an order filing or refusing to file an award in an arbitration without the intervention of the Court;

\*[(g) and order under section 35 A;]

(g) an order under section 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules:

\* [Provided that no appeal shall lie against any order specified in clause (f) save on the ground that no order, or an order for the payment of a less amount, ought to have been made].

(2) No appeal shall lie from any order passed in appeal under this section.

**Save as otherwise expressly provided.**—The effect of s. 104 of the Civil Procedure Code which is materially different from s. 588 of the Code of 1882 is not to take away a right of appeal given by cl. 15 of the Letters Patent but to create a right of appeal in cases even where cl. 15 of the Letters Patent is not applicable. 20 C. W. N. 594=23 C. L. J. 443=43 C. 857=34 Ind. Cas. 634. The Civil Procedure Code does not control the provisions of the Letters Patent. The judgment of a single

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\* Clause (f) and proviso to clause (i) were inserted by s. 3 of the Civil Procedure (Amendment) Act, 1923 (9 of 1923), which under section 1 (2) thereof may with the previous sanction of the Governor-General in Council be brought into force in any Province by the Local Government on any specified date.

Judge of the High Court in an appeal under O 43, rule 1 is appealable under cl. 15 of the Letters Patent. 56 M. 915=145 Ind. Cas. 449=1933 M. W. N. 850=65 M. L. J. 222 (F.B.); see also 22 M. 68; 13 M. L. J. 497 (F.B.).

**Scope.**—A non-appealable order does not become appealable decree because the order is drawn up in the form of a decree. 151 Ind. Cas. 947=A. I. R. 1934 Pat. 13.

**Or by any law for the time being in force.**—An appeal from the judgment of a single Judge of the High Court given by cl. 15 of the Letters Patent of Calcutta High Court is expressly saved by the language of s. 104 of the C. P. Code. 25 C. W. N. 557=48 I. A. 76=48 C. 481=23 Bom. L. R. 681=60 Ind. Cas. 274 (P. C.); see also 25 M. 555; 26 C. 361.

**Clause (a).**—Under s. 104 (1) (a) no appeal lies when the arbitration is not superseded under Schedule II, cl. 8 of the Code. Where the lower Court in superseding an arbitration, has adopted procedure not prescribed by the law and there is no other available remedy, the Chief Court is competent to interfere in exercise of its revisional powers 251 P. W. R. 1912=125 P. R. 1912. An order refusing to file an award on the ground that there was no award to file under para 15 of Sch. 2 is not appealable. A. I. R. 1935 Bom. 78; see also A. I. R. 1936 Rang. 240=163 Ind. Cas. 590.

**Clause (b).**—The parties to a suit agree to refer their disputes relating to the properties in suit to the arbitration of two persons; and a consent of Judge's order was obtained. The two arbitrators differed on a question of law arising in the arbitration. The two arbitrators each expressed his opinion on the question and referred it for opinion to the High Court in the form of a special case under C. P. Code, Schedule II, rule 11, and the Indian Arbitration Act, s. 10. It was decided by the Chamber Judge: *Held* that no appeal lay, since the special case was in no sense an award. 12 Bom. L. R. 852=8 Ind. Cas. 171.

**Clause (c).**—The provision in cl. (c) of sub-section (1) of section 104 of the Code that an appeal shall lie from an order modifying or correcting an award, does not confer an unrestricted right of appeal; and when order has been made modifying an award, the validity of the whole award cannot be called in question in an appeal preferred against that order, but the appeal is allowed against the order only in so far as it modified the award. 15 Ind. Cas. 519. Appeal lies from a decree passed in terms of an award, only so far as it relates to modifications and correctness made in the award and on no other ground. A. I. R. 1930 Lah. 26=31 P. L. R. 668=11 Lah. 342=124 Ind. Cas. 339; see also 10 Lah. 688=122 Ind. Cas. 90=30 P. L. R. 322=A. I. R. 1930 Lah. 102; 93 Ind. Cas. 272=A. I. R. 1926 Oudh 370=13 O. L. J. 144; A. I. R. 1930 Lah. 102=10 Lah. 688=30 P. L. R. 722=122 Ind. Cas. 90; 120 Ind. Cas. 673=A. I. R. 1930 Lah. 219; 98 Ind. Cas. 336=A. I. R. 1926 Lah. 519=7 Lah. 327=8 Lah. L. J. 460=27 P. L. R. 541=98 Ind. Cas. 336. Appeal from decree based on modified award can be converted into appeal from the order modifying the award, where party was misled by the only decision on the point. 36 C. W. N. 1069=138 Ind. Cas. 848=A. I. R. 1932 Cal. 713. Under s. 104 (c) of the Code a party is entitled to appeal from an order modifying the award. If the appeal has been expressly from the order modifying the award, no second appeal would be admissible; but if the appeal is regularly prepared from the decree and not from the order, the form of the appeal might justify the admission of a second appeal. A. I. R. 1935 Pat. 109=153 Ind. Cas. 764.

**Clause (d)**—Where under para 17, Schedule II, C. P. Code an order for filling an agreement is made but on unwillingness of arbitrators to act the order of reference is revoked and the suit is dismissed, the order is not appealable. A. I. R. 1926 All. 55=48 A. 27=23 A. L. J. 891=89 Ind. Cas. 404; see also 107 P. W. R. 1916=117 P. R. 1916=34 Ind. Cas. 192. The provisions of s. 104 (d), C. P. Code are general and are not restricted to refusal to file an agreement on any particular grounds. An order refusing to file an agreement to refer certain disputes between parties to arbitration on the preliminary ground that the Court has no jurisdiction is appealable. 132 Ind. Cas. 218=32 P. L. R. 464=A. I. R. 1931 Lah. 673. The Court is competent to arrive at a decision that there was no agreement to refer to arbitration and as such an appeal lies therefrom. 65 P. W. R. 1917=62 P. W. R. 1917=39 Ind. Cas. 508.

**Clause (e).**—Order staying a suit under s. 19 of the Arbitration Act is not appealable. A. I. R. 1923 Sind 25=82 Ind. Cas. 81; see also 81 Ind. Cas. 759=17 S. L.

R. 195=A. I. R. 1923 Sind 38. An appeal lies against an order granting stay of suit pending arbitration. A. I. R. 1925 All. 154=47 A. 179=22 A. L. J. 1031=85 Ind. Cas. 341. Where parties agree to refer to arbitration under the C. P. Code or Arbitration Act, appeal lies from order granting or refusing stay of suit under s. 104 (e). 12 S. L. R. 34=48 Ind. Cas. 434 ; see also A. I. R. 1931 Lah. 644=132 Ind. Cas. 850.

**Clause (f).**—There is no appeal against the appellate order of the District Judge, dismissing an application to file an award. A. I. R. 1929 Lah. 507=120 Ind. Cas. 277. Order refusing application to set aside award where the reference is in a suit pending before the Court is not appealable. 111 Ind. Cas. 145=A. I. R. 1929 Lah. 369. Where an order allowing application for filing an award is reversed in appeal, a revision lies. 110 Ind. Cas. 302=A. I. R. 1929 Lah. 367. Order filing or refusing to file an award on arbitration without the intervention of Court cannot be regarded as a decree. A. I. R. 1928 Lah. 137=9 Lah. 380=107 Ind. Cas. 756. Under cl. (f) only final orders are contemplated and order remitting award to the arbitrators directing them to make fresh award in compliance with the agreement of reference does not amount to refusal to file award and is not appealable. A. I. R. 1926 Lah. 658=96 Ind. Cas. 779. Where at the hearing of an application for filing an award a decree is passed in accordance with the award, the decision of the Court dismissing the objection of the opposite party amounts to an order filing an award though there is no express order to that effect. A. I. R. 1925 Lah. 321=7 Lah. L. J. 91=26 P. L. R. 466=88 Ind. Cas. 533. Order refusing or allowing the award to be filed is appealable under s. 104 (1) (f). 76 Ind. Cas. 504. Appeal lies from an order filing the award passed after the objections have been disposed of even if the decree is thereby reversed. 73 Ind. Cas. 820=A. I. R. 1924 Lah. 231. Whereby a single order an award directed to be filed and decree in accordance with the award is passed an appeal therefrom is in substance an appeal from an order directing award to be filed, and can, therefore, be maintained. A. I. R. 1925 All. 409=47 A. 743=23 A. L. J. 440=88 Ind. Cas. 76. Order refusing to file an award is appealable and in absence of any rules made by the High Court under s. 20, C. P. Code is to be followed. A. I. R. 1921 All. 273=19 A. L. J. 132=43 A. 348=61 Ind. Cas. 269. But an order filing an award in reference by Court and under para 19, Schedule II is not appealable. 60 Ind. Cas. 590. Section 104 (f) refers to cases referred to arbitration privately. 47 Ind. Cas. 171=154 P. W. R. 1918. Under the Letters Patent, cl. 15, order refusing to set aside award is appealable, but not so under s. 104 (f). 45 C. 502=46 Ind. Cas. 687. Appeal lies from an order refusing to set aside of *ex parte* decree passed in accordance with award. 38 A. 297=14 A. L. J. 332=33 Ind. Cas. 80. Where part of a private award is outside the scope of arbitration the decision of Court on application to file is an order and is appealable. No second appeal can lie from decision in appeal. 65 P. R. 1915=146 P. W. R. 1915=31 Ind. Cas. 80. Section 104 (f) of the Code empowers the appellate Court not only to go into the question of the existence of the reference and of the award, but also to go into questions such as are indicated by para 14 or para 15 and this interpretation does not lead to any inconsistency. A. I. R. 1935 Pesh. 69.

**Ex parte decree.**—*Ex parte* decree passed in an application filed under para 20, Schedule II of the Code is appealable A. I. R. 1928 Mad. 969=55 M. L. J. 262=29 L. W. 490=112 Ind. Cas. 691. Appeal from order under s. 104 (f) is governed by Art. 11, Schedule II, Court-fees Act, for Court fees. A. I. R. 1928 Lah. 137=9 Lah. 380=107 Ind. Cas. 756 ; see also 6 Luck. 703. For appeal against order filing an award without the intervention of the Court, the Court-fee stamp is of eight annas. A. I. R. 1927 All. 771=25 A. L. J. 741=103 Ind. Cas. 315.

Appeal lies against order refusing to execute an award under the Co-operative Societies Act, holding it to be a mere nullity. A. I. R. 1926 Lah. 547=8 Lah. L. J. 310=27 P. L. R. 706=97 Ind. Cas. 288. The right of appeal to file an award is not barred by the pronouncement of judgment and drawing up of decree. A. I. R. 1925 Pat. 810=4 Pat. 670=7 P. L. T. 644=93 Ind. Cas. 261. Where the decree is not in excess of the award or where the award is made through intervention of Court, the order is not appealable. A. I. R. 1924 Bom. 324=26 Bom. L. R. 171=79 Ind. Cas. 723 ; see also 83 Ind. Cas. 26=A. I. R. 1924 Pat. 603=3 Pat. 839=6 P. L. T. 212. If an application is made to have an award made a rule of Court and the Court disallows the objection raised against the award and makes an order under Rule 21 of Schedule II directing the award to be filed and pronounces judgment according to the award, the order directing the award to be filed is appealable. 134 Ind. Cas. 474=14 O. L. J. 481=8 O. W. N. 789=A. I. R. 1931 Oudh 345.



Where the decree is not in excess of the award and where the award is made through intervention of Court, it cannot be treated either as a compromise under r. 3 Order 43, or an order appealable under s. 104 (1) (f). A. I. R. 1924 Bom. 324=26 Bom. L. R. 171=79 Ind. Cas. 723.

**Clause (ff).—**An order refusing costs under s. 35A is not appealable. 18 N. L. J. 309.

**Clause (g).—**Order refusing or allowing relief under s. 95 is appealable. 49 Ind. Cas. 86=25 M. L. T. 46=9 L. W. 69. But order made by s. 95 by a Small Cause Court is not appealable. 36 M. L. J. 435=(1919) M. W. N. 490=50 Ind. Cas. 886 ; but see 26 Ind. Cas. 359.

**Clause (h).—**Both an order of arrest and of attachment before judgment are appealable. A. I. R. 1924 Rang. 361=2 Rang. 362=3 Bur. L. J. 159=84 Ind. Cas. 270. Appeal from order of arrest or detention in civil prison of a person otherwise than in execution of decree is competent. 136 Ind. Cas. 367=1932 A. L. J. 221=A. I. R. 1932 All. 524=A. L. R. 1932 All. 508. Appeal lies under s. 96 though not under s. 104 (h) from an order issuing arrest warrant against judgment-debtor. A. I. R. 1924 Lah. 360=73 Ind. Cas. 766. Order in execution of decree under s. 9, Specific Relief Act, is not appealable, therefore no appeal lies from an order for arrest warrant of judgment-debtor. 5 P. W. R. 1917=18 P. L. R. 1917=39 Ind. Cas. 379 ; see also 39 Ind. Cas. 375. Both an order of arrest and of attachment before judgment are appealable, an order of arrest is not enumerated in Order 43 rule 1 the right is specifically given by s. 104, and being a statutory right given in the body of the Code is not a matter of procedure and cannot be taken away by rules contained in the Schedule. Its omission from Order 43 does not mean that it does not exist. A. I. R. 1924 Rang. 361=2 Rang. 362=3 Bur. L. J. 159=84 Ind. Cas. 210.

**Clause (i).—**Appeal lies from an order in a matter under a particular rule if appeal therefrom is permitted by that rule. 45 B. 99=22 Bom. L. R. 1126=59 Ind. Cas. 421. Appeal does not lie from order under Order XXI, r. 66. 8 L. B. R. 350=10 Bur. L. T. 115=36 Ind. Cas. 402. Order refusing to take action under Order 39, rule 2 (3) is appealable. 39 M. 907=3 L. W. 430=30 M. L. J. 523=19 M. L. T. 314=34 Ind. Cas. 588. No appeal lies from order granting leave to sue receiver for damages. A. I. R. 1921 Bom. 427=45 B. 99. Appeal does not lie from an order in terms of compromise passed in appeal by the District Court. A. I. R. 1922 Lah. 309=3 Lah. 175=66 Ind. Cas. 258. Order permitting withdrawal of a suit under Order 23, rule 1, does not amount to a decree and hence is not appealable. A. I. R. 1922 Lah. 267=65 Ind. Cas. 719. Order refusing withdrawal of execution case is appealable. A. I. R. 1922 Pat. 525=1 Pat. 232=3 P. L. T. 445=65 Ind. Cas. 122. Order made after preliminary decree directing Commissioners to ascertain value of the property and take possession, is merely an interlocutory order and as such not appealable. A. I. R. 1921 Oudh 224=24 O. C. 366=65 Ind. Cas. 983. No appeal lies from an order which is either conditional or provisional and does not result in a final decree. A. I. R. 1924 All. 376=46 A. 372=22 A. L. J. 345=79 Ind. Cas. 363. No appeal lies against an order, under the Arbitration Act. A. I. R. 1923 Sind 81. see also 81 Ind. Cas. 759=17 S. L. R. 195=A. I. R. 1923 Sind 38. An order allowing a suit to be withdrawn with liberty to bring a fresh suit is not appealable. A. I. R. 1926 Oudh 184=88 Ind. Cas. 1029. Appeal lies from Order under the Succession Act passed by the District Judge to High Court and is governed in procedure by the provisions of C. P. Code relating to appeals. A. I. R. 1929 Rang. 109=118 Ind. Cas. 401.

**Order granting interest on mortgage money for period during which sale-proceeds of mortgaged property are lying in Court is not appealable but is open to revision.** A. I. R. 1929 Rang. 127=118 Ind. Cas. 416. An appeal from an order granting an amendment as such cannot lie unless it be considered as a question of review. A. I. R. 1929 Cal. 676=50 C. L. J. 12=33 C. W. N. 958=57 C. 549=122 Ind. Cas. 634. No appeal lies from an order giving or refusing leave to bid at an execution sale. A. I. R. 1929 Mad. 903=122 Ind. Cas. 161. The Code does not provide for an appeal from an order passed under s. 151, and cannot therefore be maintained. A. I. R. 1930 Lah. 789=31 P. L. R. 477=12 Lah. L. J. 71=122 Ind. Cas. 102. No second appeal lies from order confirming the auction-sale. Non-adherence to the compromise by which the judgment-debtor withdrew his objection to the sale, cannot affect the competency of the second appeal. A. I. R. 1934 Lah. 326. This section read with

*Order 43, shows that no appeal lies against an order under rule 101 of Order 21.* Such an order may however be made subject of revision. 16 R. D. 160. An order removing a receiver is appealable at the instance of the parties to the litigation but the receiver himself has no right of appeal. 36 C. W. N. 903. A non-appealable order does not become an appealable decree because the order is drawn up in the form of a decree. A. I. R. 1934 Pat. 13.

**Sub section (2).**—section 104 (2) refers to appeals to High Courts in British India and does not forbid appeals to His Majesty in Council when they comply with the conditions laid down in ss. 109 and 110 of the Code. A. I. R. 1934 Oudh 291=11 O. W. N. 577=148 Ind. Cas. 238. Where a case is remanded on appeal from an order returning plaint for presentation to proper Court, no further appeal from the order of remand can lie. Nor there can be any revision. 125 Ind. Cas. 581. Second appeal does not lie from the result of appeal under Order 43, rule 1 (a) The Court cannot, by framing order as one, passed under Order 41, rule 23, allow an appeal which would not otherwise lie. A. I. R. 1930 All. 122=(1930) A. L. J. 454=121 Ind. Cas. 545. Second appeal cannot lie from result of appeal under provisions of Order 43, rule 1 (j). A. I. R. 1930 Lah. 208=11 Lah. L. J. 546=31 P. L. R. 57=120 Ind. Cas. 684. An appeal lies from an order recording compromise, forming basis of consent decree, and is the proper procedure for a party challenging validity of compromise on ground of want of consent. A second appeal in such cases cannot however lie. A. I. R. 1929 Lah. 472=119 Ind. Cas. 422. Where a decree-holder purchaser objected to the sale on the ground that he had agreed to purchase at the estimated value put down by him and accepted by Court, and, therefore, if the sale be said to have taken place as recorded by the *amin* for a greater amount, great loss would result to him, and the Court of first instance dismissed the objection, no second appeal lies to the High Court as order dismissing the objection was under Order XXI, r. 92 and the appeal was under Order 43. A. I. R. 1929 All. 553=115 Ind. Cas. 636. Where the Memorandum of Appeal purports to be one under s. 96, Order 21, r. 92 and Order 43, rule 1 (j), C. P. Code, but in reality the appeal lies only under the last provision, second appeal cannot lie. A. I. R. 1928 Lah. 414=10 Lah. L. J. 161=108 Ind. Cas. 391. Second appeal against order of appellate Court confirming or refusing to set aside a sale under Order 21, rule 92 is not maintainable. A. I. R. 1926 Lah. 204=91 Ind. Cas. 213. A second appeal from order returning plaint cannot lie. A. I. R. 1926 Lah. 141=89 Ind. Cas. 384. A second appeal against an order reversing order of lower Court and setting aside sale under Order 21, r. 90 is not competent. A. I. R. 1924 Pat. 803=5 P. L. T. 443=78 Ind. Cas. 315.

No second appeal lies from an appellate order under Order 43, rule 1 (a) and remanding the case for trial on merits. 2 Lah. 587=68 Ind. Cas. 304; see also 62 Ind. Cas. 986=3 Lah. L. J. 463=A. I. R. 1921 Lah. 156. Under section 104 (2) no second appeal lies from the order specified in sub section (1) but it cannot take away the right of appeal conferred by special provisions in the Letters Patent. A. I. R. 1922 Lah. 380=3 Lah. 188=67 Ind. Cas. 388. Interlocutory order is not appealable but if it has been admitted no second appeal lies. A. I. R. 1921 Lah. 265=82 P. L. R. 1922=67 Ind. Cas. 278. Appeal does not lie from an order in terms of compromise passed in appeal by the District Court. A. I. R. 1922 Lah. 309=3 Lah. 175=66 Ind. Cas. 258. Second appeal does not lie where first appeal is not permitted. A. I. R. 1921 Lah. 156=3 Lah. L. J. 463. No second appeal lies against appellate order upon petition by auction-purchasers to set aside sale on ground that judgment-debtor has no saleable interest. 45 Ind. Cas. 701. So also no second appeal is competent from an appellate order under Order 43, rule 1 (a) nor does the remedy by way of revision lie. 43 A. 334=19 A. L. J. 110=61 Ind. Cas. 36; see also 59 Ind. Cas. 2=7 P. W. R. 1921. No second appeal lies against appellate order upon petition by auction-purchasers to set aside on the ground that judgment-debtor has no saleable interest. 45 Ind. Cas. 701. Order passed under Order 21, r. 92 is not open to second appeal. 41 Ind. Cas. 121. An order recording a compromise or adjustment under Or. 23, rule 3, C. P. Code is not open to second appeal. 60 C. L. J. 173. So also no second appeal lies from order confirming the auction-sale. A. I. R. 1934 Pat. 13=151 Ind. Cas. 947. Alleged fraud in sale proclamation is no ground by itself for second appeal. 25 C. L. J. 399=40 Ind. Cas. 426. Second appeal does not lie under s. 10 of Letters Patent from an appellate order dismissing application under Order 21, rule 90. 39 A. 191=15 A. L. J. 46=39 Ind. Cas. 460. Order passed under Order 21, rule 90, can be interfered with by the High Court where the application is a combined application under Order 21, rule 90 and Order 21, rule 22, if appeal

lies from the decision under Order 21, r. 22. A. I. R. 1921 Pat. 145=2 P. L. T. 401=6 P. L. J. 319=61 Ind. Cas. 823. Sub-section 2 deals with internal appeals within the limits of British India. Section 104 does not take away the general right of appealing to the Crown given by section 109. A. I. R. 1924 P. C. 495=34 M. L. T. 62=51 C. 361=51 I. A. 72=22 A. L. J. 386=46 M. L. J. 628=26 Bom. L. R. 586=28 C. W. N. 977 (P. C.)=83 Ind. Cas. 531.

**105. [S. 591.]** (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction ;

Other orders. but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the Memorandum of Appeal.

(2) Notwithstanding anything contained in sub section (1), where any party aggrieved by an order of remand made after the commencement of this Code from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

**Scope.**—Though s. 105 refers only to decrees, the provisions of that section also apply to appeals against orders as well. A. I. R. 1936 Mad. 936. There is no law in India which compels a party to appeal from every interlocutory order under the penalty, if he does not do so, of forfeiting the benefit of the consideration of the appellate Court and whether the order is subject to appeal or not, the party aggrieved can impugn it in an appeal from the decree. 7 C. 148 ; 9 A. 477 ; 10 A. 97 ; 14 B. 232 ; 12 M. I. A. 185 ; 14 B. 232 ; 10 M. I. A. 359 ; 7 M. I. A. 283. An appeal lies against the final decree of a Court within the meaning of this section, though the only ground of appeal is the erroneous decision of Court in regard to an interlocutory order. It is not necessary for a suitor to appeal from every interlocutory order by which he may feel himself aggrieved. Any erroneous interlocutory order may be set aside in the appeal from the final decree. 6 Ind. Cas. 239=8 M. L. T. 72=20 M. L. J. 805=M. W. N. 1910, 226 ; see also 7 N. L. R. 162 ; 2 Bom. L. R. 649=24 B. 302. Though interlocutory order cannot be appealed against, it can be objected to in an appeal from final decree. A. I. R. 1930 Mad. 988=33 L. W. 391=60 M. L. J. 79=129 Ind. Cas. 63. This section applies to all interlocutory orders, orders and decrees leading to final decree. 4 L. W. 411=35 Ind. Cas. 74. An aggrieved party can challenge in appeal from decree any findings on preliminary issues regarding jurisdiction or limitations. A. I. R. 1921 Bom. 220=23 Bom. L. R. 92=45 B. 627=60 Ind. Cas. 885. An order allowing substitution of heirs or setting aside an abatement passed by a trial Court cannot be questioned in an appeal from a decree in view of this section. 145 Ind. Cas. 170=37 C. W. N. 138=A. I. R. 1933 Cal. 498. An order remitting the award to arbitrators for reconsideration the subsequent order superseding arbitration are not open to challenge in appeal in as much as these orders do not affect the final decision on merits. A. L. R. 1933 Lah. 1194=A. I. R. 1933 Lah. 530=146 Ind. Cas. 334. But an order setting aside an award is an "order affecting the decision of the case" within the meaning of this section, and even if no appeal is preferred therefrom, it can be challenged in the appeal from the decree. A. L. R. 1934 Oudh 19=10 O. W. N. 1177. An order setting aside an abatement cannot be questioned in appeal as it does not affect the decision on the merits. 34 P. L. R. 221=A. I. R. 1933 Lah. 152=14 Lah. 361=141 Ind. Cas. 337. It may however be questioned in second appeal "if it affects the decision of the case". 144 Ind. Cas. 133=A. I. R. 1933 All. 294=1933 A. L. J. 561. An order setting aside abatement is non-appealable. 14 A. L. J. 610=35 Ind. Cas. 209. Where a conditional order granting leave is passed and the failure of the defendant to fulfil the conditions, the Court decrees the suit according to the terms of order passed, it is open to the appellant to convey the validity of the conditional order granting leave. A. I. R. 1935 Rang. 245=13 Rang. 239.

In an appeal from a decree the appellant is entitled to challenge it on the ground of any error, defect or irregularity in any order affecting the decision of the case, and it is for the Court to which appeal is referred to consider what points the appellant is entitled to urge in such an appeal. The same principle applies to appeal to the Privy Council. 35 Bom. L. R. 415=A. I. R. 1933 Bom. 51=145 Ind. Cas. 258. Sub-section (1) does not apply to an order passed after decree as the order is not interlocutory order. A. I. R. 1928 All. 194=26 A. L. J. 166=114 Ind.

Cas. 41. Sections 105 and 99 are not mutually destructive. A. I. R. 1927 Rang. 150=5 Rang. 80=102 Ind. Cas. 379. This section enables an order superseding an award to be a ground of attack in appeal from a final decree. A. I. R. 1925 All. 556=47A. 916=23 A. L. J. 656=89 Ind. Cas. 713. In an appeal from the final decree of a partition suit, where there is no appeal from preliminary decree, the duty of appellate Court is to see whether preliminary decree was capable of enforcement. A. I. R. 1924 Cal. 80=38 C. L. J. 111=75 Ind. Cas. 319. This section does not apply to order refusing permission to withdraw with liberty to bring fresh suit as the order is such as does not affect merits. A. I. R. 1925 Cal. 711=41 C. L. J. 186=86 Ind. Cas. 1029. Question of custom can be agitated in second appeal from final decree if certificate is obtained. A. I. R. 1923 Lah. 535=5 L. L. J. 392=73 Ind. Cas. 650.

**Save as otherwise expressly provided.**—"Save as otherwise expressly provided" means except as provided in Acts other than the Civil Procedure Code. A. I. R. 1924 Rang. 237=2 Rang. 117=80 Ind. Cas. 746.

**Decree**—The word "decree" should be construed as meaning a decree passed by the Court which made the order which is alleged to be erroneous, defective or irregular. It is open to a Court of appeal after remand by the appellate Court and the subsequent decision by the original Court. 5 M. L. T. 75=32 M. 318=2 Ind. Cas. 525.

**Requirements under this section.**—This section contemplates two things, there being a regular appeal about something else, and in that appeal the insertion of a ground of objection. 22 A. 366=A. W. N. 1900, 109.

**Error, defect or irregularity.**—These words mean an error, defect or irregularity in procedure of law and not in matters of fact. And even then, *i. e.*, where there is any defect, etc., in procedure or in law, it should be such as to affect the decision of the case. 12 A. 200; A. I. R. 1936 Nag. 8=31 N. L. R. (Sup.) 72. An error, defect or irregularity in any non-appealable interlocutory order, affecting the decision of the case may be set forth as a ground of objection in the Memorandum of Appeal. A. I. R. 1922 All. 118=44 A. 524=20 A. L. J. 349=66 Ind. Cas. 920; see also A. I. R. 1923 Mad. 147=46 M. 47=43 M. L. J. 406=74 Ind. Cas. 804=16 L. W. 29. Error, defect or irregularity in order making a person party in appeal though non-appealable can be made a ground of attack in appeal under this section. A. I. R. 1925 All. 768=47 A. 853=23 A. L. J. 757=88 Ind. Cas. 493. Error, defect or irregularity in preliminary order affecting merits can form ground of objection in appeal against final order. A. I. R. 1925 Mad. 199=48 M. 267=47 M. L. J. 710=21 L. W. 136=85 Ind. Cas. 333. Error, defect or irregularity in an interlocutory order though partly in favour of an unsuccessful party, can be made a ground of objection in appeal if it affects merits. A. I. R. 1927 Cal. 733=46 C. L. J. 51=104 Ind. Cas. 151. Error, defect or irregularity mentioned in this section must be of law or procedure and not of fact. A. I. R. 1930 Pat. 266=9 Pat. 102=125 Ind. Cas. 136; 32 C. W. N. 1020=115 Ind. Cas. 184=A. I. R. 1929 Cal. 26. An appeal against an order is not the same thing as advancing a ground of appeal about error, defect or irregularity in the said order. 133 Ind. Cas. 129=1931 A. L. J. 377=A. I. R. 1931 All. 294 (F. B.). Though interlocutory order is not appealable it can be objected to in an appeal for error, defect or irregularity in the final order. A. I. R. 1930 Pat. 626=9 Pat. 102=125 Ind. Cas. 136. Appeal from an order is different from ground of appeal about error, irregularity or defect therein. A. I. R. 1931 All. 294. An appellate Court is not bound in appeal to interfere with an order passed by the Subordinate Court under s. 151 although the order may be technically wrong. Such an order can only be challenged in appeal if it affects the decision of the case on merits. A. I. R. 1934 Lah. 312=35 P. L. R. 266=147 Ind. Cas. 1013.

**Affecting the Decision of the case.**—Affecting the decision of the case means an unjust result has been arrived at in the decision of the case on merits. A. I. R. 1931 All. 294; see also 32 C. W. N. 1020; 115 Ind. Cas. 183; A. I. R. 1929 Cal. 26; 48 A. 175=90 Ind. Cas. 180 (F. B.); see also A. I. R. 1936 Nag. 8=31 N. L. R. Supp. 72=160 Ind. Cas. 202. Order setting aside an award is one affecting the decision of the case, therefore, an appeal from the final decree such an order can be questioned. A. I. R. 1929 Cal. 322=56 C. 21=121 Ind. Cas. 675. Defect in procedure affecting the decision of the case is a good ground of appeal. A. I. R. 1929 Pat. 609=10 P. L. T. 589=120 Ind. Cas. 304. Decision of a case cannot be affected by an order superseding arbitration and it cannot be set forth as a ground of objection in appeal from final decree. A. I. R. 1921 Lah. 145=3 Lah.

L. J. 59=38 P. L. R. 1921 ; see also 38 Ind. Cas. 206 ; 37 Ind. Cas. 844. Order of lower appellate Court setting aside abatement is such as affects the merits and can be made ground of appeal as per s. 105 (1). A. I. R. 1923 Lah. 230=71 Ind. Cas. 587 ; see also A. I. R. 1925 All. 426=47 A. 555=23 A. L. J. 449=87 Ind. Cas. 211 ; 85 Ind. Cas. 100=A. I. R. 1925 Cal. 473=40 C. L. J. 588 ; A. I. R. 1925 Cal. 766=52 C. 472=29 C. W. N. 675=85 Ind. Cas. 100 ; A. I. R. 1923 Lah. 230=71 Ind. Cas. 587. Order setting aside an award is non-appealable but can form ground of objection in appeal if it affects merits. A. I. R. 1928 Lah. 753=110 Ind. Cas. 748. The word "affect" predicates that the error, defect or irregularity in the order has influenced the conclusion in such a way that an unjust result has been arrived at in the decision of the case on the merits. 1931 A. L. J. 377=A. I. R. 1931 All. 294 (F. B.). It is not necessary to read into s. 195 additional words "on merits". A. I. R. 1927 Rang. 150=5 Rang. 80=102 Ind. Cas. 379. An order refusing to set aside the abatement of a suit is one which "affects the decision of the case" within the meaning of s. 105, C. P. Code, and can therefore be challenged in appeal and second appeal : 39 C. W. N. 1173. An order refusing to record an adjustment is not an order affecting the decision of a case, but is merely an order ensuing that the merits of the case should be determined. It is therefore open for an appellant to challenge such order in appeal under s. 105 when it has not been appealed against. A. I. R. 1936 Nag. 8=31 N. L. R. (Supp.) 172.

**Order setting aside an *ex parte* decree.**—"Affecting the decision of the case" means affecting the decision on the merits. Where an *ex parte* decree was passed and was set aside on an application for review, held that the propriety of setting aside the *ex parte* decree could not be questioned in an appeal which was passed ultimately after review. A. I. R. 1931 All. 329=131 Ind. Cas. 518 ; see also A. I. R. 1931 All. 294 (F. B.)=1931 A. L. J. 377=133 Ind. Cas. 129. This section does not apply to order setting aside *ex parte* decree where such order does not affect merits. A. I. R. 1927 B. 455=51 B. 495=29 Bom. L. R. 325=103 Ind. Cas. 262 ; A. I. R. 1923 Lah. 425=72 Ind. Cas. 40 ; 79 Ind. Cas. 69=A. I. R. 1924 All. 929 ; see also 3 O. L. J. 231=34 Ind. Cas. 713 ; 31 Ind. Cas. 914=40 F. R. 1916=133 P. W. R. 1916. But this section applies when that order affects merits. A. I. R. 1924 Mad. 890=47 M. L. J. 641=20 L. W. 954=85 Ind. Cas. 808 ; A. I. R. 1927 Rang. 150=5 Rang. 80=102 Ind. Cas. 379 ; A. I. R. 1929 Lah. 174=118 Ind. Cas. 434 ; A. I. R. 1929 Cal. 322=56 C. 21=121 Ind. Cas. 675.

Where Court improperly refused adjournment and passed *ex parte* decree and an application to set aside *ex parte* decree was dismissed, the order refusing adjournment can be set forth as a ground in appeal from *ex parte* decree according to s. 105. A. I. R. 1925 Pat. 534=7 P. L. T. 381=1925 Pat. 199=91 Ind. Cas. 167.

**Sub-section (2).**—Nullifies effect of decision of Full Bench case in 29 C. 758. A. I. R. 1923 Cal. 385=72 Ind. Cas. 588. Judges of High Court before whom case comes for final hearing with findings after remand, can disregard remand order and dispose appeal on original findings. 2 Pat. L. J. 669=2 Pat. L. W. 71=41 Ind. Cas. 337. Correctness of remand order cannot be challenged. Grounds on which it was based are equally immune from attack. A. I. R. 1928 Rang. 297=6 Rang. 506=113 Ind. Cas. 803. Order of remand if not appealed against precludes disputing its correctness thereafter. A. I. R. 1928 Cal. 325=55 C. 506=110 Ind. Cas. 397 ; see also A. I. R. 1926 Nag. 161=89 Ind. Cas. 1009 ; A. I. R. 1923 Nag. 283=82 Ind. Cas. 645 ; A. I. R. 1925 Pat. 530=6 P. L. T. 805=88 Ind. Cas. 495 ; A. I. R. 1923 Rang. 29=1 Bur. L. J. 231=70 Ind. Cas. 893 ; A. I. R. 1926 Cal. 509=91 Ind. Cas. 287 ; 72 Ind. Cas. 588. If a party is aggrieved by order of remand from which an appeal lies he must appeal therefrom or else he shall be precluded thereafter from disputing its correctness. A. I. R. 1923 Mad. 67=(1922) M. W. N. 657=43 M. L. J. 340=31 M. L. T. 465=69 Ind. Cas. 673 ; see also A. I. R. 1925 Nag. 185=80 Ind. Cas. 626 ; 65 Ind. Cas. 745 ; 63 Ind. Cas. 845 ; 53 Ind. Cas. 644=1 Lah. 51 ; 46 Ind. Cas. 816 ; 46 Ind. Cas. 922 ; 20 C. W. N. 43=32 Ind. Cas. 866 ; A. I. R. 1923 Pat. 45=2 Pat. 207=3 P. L. T. 765=68 Ind. Cas. 363 ; 70 Ind. Cas. 893=1 Bur. L. J. 231=A. I. R. 1923 Rang. 29 ; 62 Ind. Cas. 703=40 M. L. J. 528=14 L. W. 236 ; 61 Ind. Cas. 575=A. I. R. 1921 Nag. 129 ; 60 Ind. Cas. 975=A. I. R. 1921 All. 276=19 A. L. J. 139=43 A. 377 ; 57 Ind. Cas. 52=2 U. P. L. R. (Lah) 120 ; 47 Ind. Cas. 886 ; 86 Ind. Cas. 608=A. I. R. 1925 Mad. 916. The prohibition contained in s. 105 (2), C. P. Code exists only if an appeal lies from the order of remand. 157 Ind. Cas. 1119=1935 A. L. J. 517=A. I. R. 1935 All. 553.

Order of remand as to existence or non-existence of a custom is not appealable. 76 P. W. R. 1917=109 P. L. R. 1917=39 Ind. Cas. 775. Where the defendants have failed to raise the objection as to attestation before the High Court where the case was remanded, s. 105 precludes them from raising it at the subsequent stage of the same litigation. 35 Ind. Cas. 571.

Where in remand order, one point is raised, decision on other point also must be thought to be confirmed by remand order. A. I. R. 1922 P. C. 57=26 C. W. N. 739=16 L. W. 447=74 Ind. Cas. 597. Pending suit Court remands case for finding on undecided issues. The Court can disregard, when finally deciding case reasons for remanding case. But decision on law points by Court of co-ordinate jurisdiction is final regarding setting aside decision of lower Court and laying down law on remand. A. I. R. 1923 Pat. 226=4 P. L. T. 35=76 Ind. Cas. 136. Remand order is conclusive only regarding points decided by it. A. I. R. 1925 Oudh 527=85 Ind. Cas. 468. Remand order is proper where decision is affected on merits. A. I. R. 1923 Oudh 177=26 O. C. 10=10 O. L. J. 36=73 Ind. Cas. 591. Section 105 does not control Art. 15, Letters Patent. Hence order of remand can be attacked in an appeal under Art. 15 against the final decree. A. I. R. 1929 Mad. 349=30 L. W. 787=118 Ind. Cas. 291. Section 105 (2) precludes a person from disputing afterwards correctness of remand order which is appealable but against which no appeal is preferred. But the section, however, does not preclude a person from raising any other legitimately open objection if the case comes to the High Court. A. I. R. 1928 Mad. 430=27 M. L. W. 483=109 Ind. Cas. 130. Section 15 (2) does not apply to Privy Council appeals. A remand order of High Court which is not final cannot be appealed against in Privy Council. A. I. R. 1925 Nag. 349=22 N. L. R. 132=88 Ind. Cas. 69; see also A. I. R. 1925 Rang. 147=3 Bur. L. J. 248=84 Ind. Cas. 519; A. I. R. 1924 Mad. 701=46 M. L. J. 357=19 L. W. 458=78 Ind. Cas. 938. A person who is aggrieved by an order of remand is precluded under s. 105 (2), C. P. Code from disputing its correctness only if an appeal lies to the Privy Council against the order. Where no appeal lies to the Privy Council under s. 109 (a) on the ground that the decision of the High Court is not a "final order" or "a decree" passed on appeal by the High Court, s. 105 (2) would have no application. A. L. R. 1933 B. 352=35 Bom. L. R. 458=144 Ind. Cas. 916=A. I. R. 1933 B. 260.

An aggrieved party can dispute correctness of remand order in second appeal if he be otherwise entitled to do so. A. I. R. 1926 Mad. 900=51 M. L. J. 119=24 L. W. 630=97 Ind. Cas. 790=1926 M. W. N. 613. Although a party cannot refer question decided before order of remand, Court can reopen the same if necessary. A. I. R. 1926 Mad. 830=94 Ind. Cas. 226. Sub-section (1) does not apply to a remand order returning plaint by appellate Court as it does not affect merits. A. I. R. 1926 Mad. 900=51 M. L. J. 119=(1926) M. W. N. 613=24 L. W. 630=97 Ind. Cas. 790. Objection as to amendment of plaint must be taken before order of remand. A. I. R. 1922 Cal. 255=26 C. W. N. 73=35 C. L. J. 25=65 Ind. Cas. 39. Order of remand is appealable if appellate Court confirms dismissal of suit in part and remands the case as to the other part. A. I. R. 1921 Lah. 154=3 Lah. L. J. 426=2 Lah. 252=63 Ind. Cas. 776.

**106. [S. 589.]** Where an appeal from any order is allowed it shall lie to the Court to which an appeal would lie. What Courts to hear appeals. from the decree in the suit in which such order was made, or where such order is made by a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

**Amendment in Burma.**—For the words "a High Court" read "the High Court" in British Burma.—*Vide* G. B. Order of 1937.

#### GENERAL PROVISIONS RELATING TO APPEALS.

**107. [S. 582.] (1)** Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power—

- (a) to determine a case finally ;
- (b) to remand a case ;
- (c) to frame issues and refer them for trial ;
- (d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid,, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein.

**Object of the Section.**—The provision of this section as elucidated by Order 41, rule 27 is clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak part of his case and fill up omissions in the Court of appeal. 58 I. A. 254=A. I. R. 1931 P. C. 143=1931 A. L. J. 513=33 Bom. L. R. 1015=35 C. W. N. 786=54 C. L. J. 1=(1931) M. W. N. 929=60 M. L. J. 489.

**Scope of the section.**—Sub-section (1) is new. "We think it desirable to have in the body of the Code a general provision about the powers of an appellate Court."—*Report of the Select Committee.* An appellate Court has no power to order a remand except under Order 41, rr. 23 and 25. 20 Ind. Cas. 39=18 C. L. J. 613. When an appeal is presented, on a sufficiently stamped Memorandum on the last day allowed by the law of limitation, the Court must not reject the Memorandum for want of stamp, but must allow the appellant to make up the deficiency in stamp as provided in Order 7, rule 11 (c) and s. 107 of the C. P. Code. 15 Bom. L. R. 902=21 Ind. Cas. 337. The appellate Court may strike out name of wrong defendant and substitute proper defendant in the Memorandum of Appeal if the mistake be *bona fide*. A. I. R. 1930 All. 131=123 Ind. Cas. 824. Appellate Court can make a respondent an appellant if necessary. A. I. R. 1930 All. 786=(1930) A. L. J. 926; A. I. R. 1927 Cal. 37=44 C. L. J. 243. But the appellate Court cannot add a person as respondent who was not a party to the original suit. A. I. R. 1929 Bom. 353=53 B. 598=31 Bom. L. R. 672=119 Ind. Cas. 654. Where party abuses process of Court by remaining absent and not by adducing evidence inspite of Court's indulgence, case should not be remanded. A. I. R. 1929 Lah. 444=30 P. L. R. 93=116 Ind. Cas. 180. Appellate Court can reverse judgment if a party suppresses evidence or raises inconsistent pleadings. A. I. R. 1929 P. C. 95=(1929) A. L. J. 261=49 C. L. J. 308=33 C. W. N. 430=29 L. W. 501=31 Bom. L. R. 721=57 M. L. J. 565=11 P. L. T. 101=(1929) P. C. 104 (P. C.)=114 Ind. Cas. 592. Appellate Court can examine any party for the ends of justice. 42 A. 48=17 A. L. J. 945=52 Ind. Cas. 289. The appellate Court can pass order which the Court of first instance might have passed inspite of Order 39, r 2 (3). 39 M. 907=3 L. W. 430=30 M. L. J. 523=19 M. L. T. 314=(1916) M. W. N. 328=34 Ind. Cas. 588. The appellate Court is competent to add a party in appeal. (1918) Pat. 276=5 P. L. W. 216=3 P. L. J. 409=46 Ind. Cas. 308. Appellate Court can revise interlocutory orders though appeal lies from final decree. 5 Pat. L. J. 550=1 P. L. T. 668=58 Ind. Cas. 281. Appellate Court can allow adjustment or withdrawal of suit if it sets aside first Court's decree. A. I. R. 1926 Nag. 444=95 Ind. Cas. 424. Appellate Court can return Memorandum of Appeal for presentation to proper Court. A. I. R. 1923 Nag. 310=8 N. L. J. 63=74 Ind. Cas. 93; see also 74 Ind. Cas. 33=A. I. R. 1923 Nag. 310. Appellate Court can grant permission to withdraw or abandon part of a claim with leave to prefer fresh appeal. A. I. R. 1921 Bom. 278=45 B. 206=59 Ind. Cas. 210. Where the applicant is a party to appeal from the whole decree the appellate Court can entertain application to have *ex parte* decree set aside. S. 107 does not confer powers not conferred by order 41. (1917) M. W. N. 808=22 M. L. T. 480=7 L. W. 10=42 Ind. Cas. 972.

**Clause (a).**—*Vide* Order 41, r. 24.

**Clause (b).**—*Vide* Order 41, r. 23.

**Clause (c).**—*Vide* Order 41, r. 25.

**Clause (d).**—*Vide* Order 41, rr. 27, 28.

**Power of appellate Court to remand.**—Appellate Court has inherent power to remand. 37 M. L. J. 536=10 L. W. 359=53 Ind. Cas. 417; see also 15 C. L. J. 258; 12 C. L. J. 368, 44 C. 929=21 C. W. N. 877=26 C. L. J. 49=41 Ind. Cas. 598; 43 C. 938=20 C. W. N. 547=32 Ind. Cas. 791; 15 C. L. J. 6; 36 M. 492=24 M. L. J. 512=15 Ind. Cas. 859=(1912) M. W. N. 100; 58 Ind. Cas. 664=5 P. L. J. 146; 9 Ind. Cas. 790=9 M. L. T. 373=(1911) 2 M. W. N. 199. The powers of the High Court as to remand are wide and the High Court can always make an order of remand if the exigencies of the case require it. 43 C. 1001=20 C. W. N. 1192=34 Ind. Cas. 235. Power of the appellate Court, of remanding cases for trial by original

Court is not governed or limited by order 41 alone, but is subject to such conditions and limitations as may be prescribed in the rules and orders, such as an amendment of plaint and addition of parties in a Court of appeal. 43 C. 938=20 C. W. N. 547=32 Ind. Cas. 791; see also 41 C. 108=18 C. L. J. 613=20 Ind. Cas. 39; 33 Ind. Cas. 576=18 Bom. L. R. 27; 56 Ind. Cas. 516. Remand is improper on the ground that circumstances of the particular case were not considered. A. I. R. 1926 Mad. 1065=(1926) M. W. N. 5. Appellate Court will not insist on deciding suit finally if the party be satisfied with remand order. A. I. R. 1926 Lah. 65=7 Lah. 179=27 P. L. R. 50=8 Lah. L. J. 13=93 Ind. Cas. 344. Where the original Court held evidence to be irrelevant and the appellate Court held it relevant, the remand is on preliminary point. A. I. R. 1922 Mad. 505 (F. B.)=45 M. 900=16 L. W. 425=43 M. L. J. 354=31 M. L. T. 208=69 Ind. Cas. 828. The power of remand may be exercised when important questions were disallowed during examination of witnesses resulting in a want of trial in the first Court. 36 Ind. Cas. 813. An appellate Court has the power to return the plaint itself for presentation to the proper Court. An order of remand for that purpose is mere surplusage. 149 Ind. Cas. 1050=36 P. L. R. 99=A. I. R. 1934 Lah. 233. No remand order should be made where the pleadings and issuing were clear and the parties could not have failed to appreciate what the real issues were that fell for determination in the suit, still the plaintiff did not produce evidence. A. I. R. 1935 Rang. 19=155 Ind. Cas. 10. The High Court has inherent power to remand even where the provisions of s. 107 do not apply. A. I. R. 1930 Nag. 140.

**To take additional evidence, etc.**—Appellate Court can admit additional evidence if justice requires. A. I. R. 1926 P. C. 34=49 M. 435=53 I. A. 84=3 O. W. N. 568=(1926) M. W. N. 495=24 L. W. 115=44 C. L. J. 67=28 Bom. L. R. 291=31 C. W. N. 1=51 M. L. J. 570=94 Ind. Cas. 767. But the powers must be exercised very sparingly. A. I. R. 1932 Oudh 227=9 O. W. N. 379=138 Ind. Cas. 513. Where there is no lacuna or defects to be filled up or remedied, and no substantial causes for taking the additional evidence, the so-called additional evidence, as it stands, is legally inadmissible and must be left out of consideration in disposing the case. 8 O. W. N. 627=A. I. R. 1931 Oudh 298=14 O. L. J. 420=132 Ind. Cas. 259.

**Power of Court to allow withdrawal.**—As regards proper procedure for withdrawal, *vide* 39 C. W. N. 586.

**Sub-section (2).**—Under s. 107 (2) an appellate Court is invested with all the powers of original Court and has accordingly, the same powers as are conferred upon the original Court under Order 7, rule 13, which says that the rejection of a plaint shall not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. Applying this provision *mutatis mutandis* to the case of appeals the rejection of a Memorandum of Appeal by the appellate Court shall not, of its own force, preclude the appellant from presenting a fresh Memorandum on proper Court-fee. 59 C. 388=138 Ind. Cas. 643=A. I. R. 1932 Cal. 482. Under this section an appellate Court has power to issue a commission for local investigation. 135 Ind. Cas. 243=A. I. R. 1932 All. 270. Order 7, rule 11 read with s. 10 (2) would seem to make it clear that in case of deficit stamp the Memorandum of Appeal should first be returned for correct stamping. 1932 M. W. N. 104. An appellant, has the right to withdraw his appeal unconditionally, his only liability being as to costs, wherein cross objections have been filed. (1931) A.L.J. 232. An amendment of a Memorandum of Appeal can be made by an appellate Court by virtue of the powers conferred in it under s. 107 (2), C. P. Code. A. I. R. 1937 All. 243.

**108. [Ss. 587, 590.]** The provisions of this Part relating to appeals

Procedure in appeals from original decrees shall, so far as may be, apply to appeals—

(a) from appellate decrees, and

(b) from orders made under the Code or under any special or local law in which a different procedure is not provided.

**Scope.**—The words “so far as may be” are not equivalent to so far as possible but mean so far as is consistent with the principles on which appeals from appellate decrees are admitted and determined, 7 M. 52. Where a compromise has been recorded and it has not been challenged in any way in the lower Court the recording



of the compromise must be held to have been done by consent and s. 96 (3) read with s. 108 would bar and appeal against the order. 57 Bcm. 206=144 Ind. Cas. 448=35 Bom. L. R. 127=A. I. R. 1933 Bom. 205.

#### APPEALS TO THE KING IN COUNCIL.

109. [S. 595.] Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction ;

(b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction ;

(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

**Amendments in Burma.**—For “British India” read “British Burma” and for “a High Court” read “the High Court.”

**Scope.**—There is nothing in s. 104 to take away the general right of appealing to the Crown given by s. 109. A. I. R. 1924 P. C. 95=(1924) M. W. N. 79=7 N. L. J. 62=34 M. L. T. 62=22 A. L. J. 386=51 C. 361=46 M. L. J. 628=28 C. W. N. 977=83 Ind. Cas. 531 (P. C.). The order of High Court to enrol a person as a legal practitioner is a disciplinary or administrative order and no leave to appeal to His Majesty can be granted. A. I. R. 1922 Pat. 603=1 Pat. 590=4. P. L. T. 229=70 Ind. Cas. 172. Against order refusing application under s. 45 of the Specific Relief Act of the Special Bench of the High Court, appeal lies to Privy Council. A. I. R. 1921 Bom. 378=23 Bom. L. R. 1132 (29 B. 396 and 28 B. 253 relied on). Order as to the validity of order of lower Court recording compromise is not order by consent and a certificate can be issued in respect thereof. A. I. R. 1922 Pat. 256=3 P. L. T. 61=6 P. L. J. 171=62 Ind. Cas. 235. Where the defendant neither filed written statement nor took any part in defending the suit, or the appeal to High Court, he cannot file a separate appeal to the Privy Council other than what is filed by the rest of the defendants. A. I. R. 1921 Pat. 134=2 P. L. T. 173=60 Ind. Cas. 500. No appeal lies against order dismissing an appeal in default of appellants' compliance with certain Court rules. A. I. R. 1921 Pat. 97=2 P. L. T. 111=5 P. L. J. 719=16 Ind. Cas. 285. An order passed by the High Court on appeal from the District Court dismissing a creditor's petition for adjudication of an alleged debtor as an insolvent on the ground that the petition did not disclose any available act of insolvency on which the petition could be based is a final order under clause 37 of the Letters Patent and ss. 109 and 110. 12 Rang. 355=A. I. R. 1934 Rang. 292. An order passed in contempt proceedings is passed by the High Court in the exercise of the inherent jurisdiction of the High Court and is of a criminal nature. This section does not apply in such a case. A. I. R. 1935 All. 811=1935 A. L. J. 810.

An order refusing to leave to appeal *in forma pauperis* is not a final order. A. I. R. 1927 Pat. 175=6 Pat. 67=100 Ind. Cas. 886. An application *in forma pauperis* for leave to appeal to Privy Council is not maintainable. 1115 Ind. Cas. 832. Ordinarily an appeal which *prima facie* falls under s. 109 (a) cannot be convened into one under s. 109 (c) merely because it fails to reach the money value required by s. 110. A. I. R. 1933 Oudh 394=10 O. W. N. 394.

**Decree.**—No appeal lies to Privy Council from order dismissing application for restoration of the appeal dismissed for default, it not being decree or final order passed in appeal nor an order passed in the exercise of the original civil jurisdiction of the High Court. A. I. R. 1924 Rang. 208=2 Bur. L. J. 294=79 Ind. Cas. 504. A consent decree is not appealable to His Majesty in Council. 5 P. L. J. 383=1 P. L. T. 599=57 Ind. Cas. 245. “Any decree or order” do not mean any decree or order other than the decree or final order passed on appeal by a High Court or by any other Court of final jurisdiction. 6 O. L. J. 664=54 Ind. Cas. 828. High Court's judgment granting probate is a final decree, and an appeal lies to Privy Council. A. I. R. 1927 Rang. 56=5 Rang. 119=5 Bur. L. J. 176=99 Ind. Cas. 759.

**Final order.**—There is a vast difference between an order made or a judgment passed on the appellate side of a Court and the final order passed on appeal. The latter may be included in the former but the former is necessarily not the same as the latter. A. I. R. 1936 Pat. 465=17 Pat. L. T. 760=15 Pat. 659. An order is final if it disposes of the rights of the parties finding. 47 I. A. 124=47 C. 918 (P. C.); see also A. I. R. 1936 Pat. 465=17 Pat. L. T. 760; (1891) 1 Q. B. 734; (1903) 1 K. B. 547; (1916) 2 K. B. 139; A. I. R. 1936 Oudh 205=1936 O. W. N. 218. The final order within the meaning of s. 109 is not confined to a final order passed in the suit itself but may be a final order in any other proceeding or case arising subsequent to the suit. If that order finally terminates that proceeding and determines the rights of the parties so far as the question of controversy between the parties in that proceeding arose, it is a final order within the meaning of that section. 1932 A. L. J. 838. An order is a final order when it comprises the decision of the High Court upon the cardinal issue in the suit, that issue being one which goes to the foundation of the suit and one which can never while this decision stands be disputed again. *Ibid.* An order is final if it determines the rights of the parties and interlocutory if it relates to a matter of procedure. An order of remand which determined a cardinal issue in the case is a final order. 27 N. L. R. 172=A. I. R. 1931 Nag. 24=130 Ind. Cas. 102; see also A. I. R. 1930 Sind 254=123 Ind. Cas. 231. Where a case is remanded for effecting partition on another basis the remand order is not final. A. I. R. 1925 Nag. 349=22 N. L. R. 132=88 Ind. Cas. 69; see also A. I. R. 1925 All. 263=23 A. L. J. 19=47 A. 335=86 Ind. Cas. 161. Ordinarily order of remand is merely interlocutory. If the order in question finally decides cardinal point in the suit, it is a final order from which leave to appeal should be granted. A. I. R. 1925 Rang. 147=3 Bur. L. J. 248=84 Ind. Cas. 519. A matter of procedure can never be treated as a cardinal point in the suit. A. I. R. 1924 Lah. 571=5 Lah. 329=6 Lah. L. J. 240 (F. B.)=80 Ind. Cas. 366; see also A. I. R. 1924 All. 119=45 A. 741=21 A. L. J. 686=79 Ind. Cas. 87. The decision of the High Court on cardinal issue in the suit is a decree within s. 10). A. I. R. 1921 Cal. 177=25 C. W. N. 1896=62 Ind. Cas. 776; see also A. I. R. 1921 Lah. 203=2 Lah. 106=65 P. L. R. 1921=60 Ind. Cas. 522; 23 O. C. 324=60 Ind. Cas. 208. Where High Court on appeal reverses decision of the Court below and directs accounts to be taken for determining liability, the order is a 'final order' from which an appeal would lie to His Majesty. A. I. R. 1922 P. C. 257=49 C. 560=43 M. L. J. 41=16 L. W. 536=26 C. W. N. 954=35 C. L. J. 438=30 M. L. T. 228=20 A. L. J. 409=24 Bom. L. R. 700=49 I. A. 108=67 Ind. Cas. 124 (P. C.). Where order of subordinate Court dismissing a partition suit is set aside by the High Court, it is a final order. 2 P. L. T. 155=6 P. L. J. 116=60 Ind. Cas. 479. The term 'final order' in section 109 denotes an order which finally decides any matter which is directly at issue in the case in respect of the rights of the parties. If the order in effect finally decides the cardinal point in the suit, if it decides an issue which goes to the foundation of the suit and therefore is an order which could never, while the decision stood, be questioned again in the suit, it is final within the section, notwithstanding that there may be subordinate enquiries to be made. The question has to be decided with reference to the precise relation in which the order stands to the proceeding before the Court. 15 C. W. N. 879=13 C. L. J. 688. Where in a suit for dissolution of partnership and accounts, liability to account is declared, such order is final. A. I. R. 1922 Mad. 510=16 L. W. 718=43 M. L. J. 758=31 M. L. T. 385. An order holding document excluded by lower Court admissible and remanding the suit is not a final order. A. I. R. 1935 Lah. 438=154 Ind. Cas. 942; see also 42 L. W. 558=1935 M. W. N. 796=69 M. L. J. 497. No appeal lies to His Majesty in Council against an order of the High Court remanding an execution proceeding for redecision as there is no final order. 38 P. L. R. 112. Appellate Court affirmed the decision of the Court below when the decree is affirmed, though the appellate Court reaches the same conclusion on different grounds. A. I. R. 1923 Oudh 49=25 O. C. 277=70 Ind. Cas. 283. Final order means an order which puts an end to the litigation between the parties. A. I. R. 1922 Bom. 383=47 B. 106=28 Bom. L. R. 925=69 Ind. Cas. 80; see also A. I. R. 1922 Pat. 611=3 P. L. T. 781=(1922) Pat. (Sup) 296=67 Ind. Cas. 991; see also A. I. R. 1920 P. C. 86=56 Ind. Cas. 302=28 M. L. T. 87 (P. C.)=39 M. L. J. 27=24 C. W. N. 721=18 A. L. J. 591=49 I. A. 124=22 Bom. L. R. 606.

**Order dismissing an appeal as being abated is final order.** 14 Lah. 609=144 Ind. Cas. 18=34 P. L. R. 946=A. I. R. 1933 Lah. 650. An order directing the dismissal

of an appeal for failure to furnish security for the costs of the respondent is a final order passed on appeal. 54 A. 390=140 Ind. Cas. 125=1932 A. L. J. 254=A. I. R. 1932 All. 312.

**Passed on Appeal.**—Orders passed by High Court in the exercise of its revisional jurisdiction under s. 115 of the C. P. Code or of its power of superintendence under section of the Charter Act, are orders made or passed on appeal within the meaning of section 39 of the Letters Patent. 15 C. W. N. 848=13 C. L. J. 90. In the above case *Mookerjee J.* said: "In other words, as put by *Lord Westbury* in *Att. Gen. v. Gillen*, 10 H. L. C. 704, the right of appeal is the right of entering a superior Court and invoking its aid and interposition to redress the error of the Court below; or as Mr. Justice *Subramania Ayyar* observes in *Chappan v. Moidin*, 22 M. 68 (80) the two things which are required to constitute appellate jurisdiction, are the existence of the relation of superior and inferior Court, and the power on the part of the former, to review decisions of the latter. Both these elements are obviously essential." See also 15 C. W. N. 879=13 C. L. J. 688. "There is no definition of appeal in the Code of Civil Procedure, but their Lordships have no doubt that any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent." *Per Sir. Dinshaw Mulla* in 36 C. W. N. 803 (P. C.) at p. 806=59 I. A. 283=137 Ind. Cas. 529=34 Bom. L. R. 1065=1932 A. L. J. 643=55 C. L. J. 528=33 P. L. R. 621=36 L. W. 7=1932 M. W. N. 817=A. I. R. 1932 P. C. 105=63 M. L. J. 389 (P. C.); see also 13 C. L. J. 681; *contra*; A. I. R. 1936 Pat. 465=17 Pat. L. T. 760. A. I. R. 1926 All. 202=48 A. 226=23 A. L. J. 997=90 Ind. Cas. 904. But the applicant is not entitled as a matter of right to appeal from an order passed on the revisional side of the High Court. A. I. R. 1934 All. 198=1934 A. L. J. 1166=147 Ind. Cas. 1067.

Sections 109 and 110 cover decrees or orders passed on appeal. There is a distinction between a final judgment, decree or order and one made on appeal. A judgment, decree or order passed by the High Court in its appellate jurisdiction is not necessarily a judgment, decree or order passed on appeal. 136 Ind. Cas. 183=A. I. R. 1932 Bom. 90=A. L. R. 1932 Bom. 125. An order refusing to admit an appeal as time-barred is an order on appeal. 127 P. W. R. 1917=131 P. L. R. 1917=42 Ind. Cas. 893. Order dismissing an appeal as barred by time and refusing to extend time under s. 5 of the Limitation Act is one passed on appeal. A. I. R. 1921 Cal. 415=33 C. L. J. 128=62 Ind. Cas. 216. Where a first appeal has been dismissed, for default and an application for restoration was also dismissed, the latter order though a final order is not one passed on appeal and as such no appeal lies to the Privy Council. 1933 A. L. J. 255=A. I. R. 1933 All. 453 (1)=145 Ind. Cas. 534.

**Order when not final.**—Order that an alleged compromise should not be recorded and that the suit should proceed in usual way is not a final order. A. I. R. 1925 Cal. 857=29 C. W. N. 832=89 Ind. Cas. 94. Order that rejects application to appeal as pauper is not a final order. A. I. R. 1925 Oudh 518=2 O. W. N. 393=88 Ind. Cas. 575. Order directing final decree to be passed in accordance with the preliminary decree passed by the Privy Council is not a final decree. A. I. R. 1925 Mad. 187=20 L. W. 753. An order of High Court refusing to set aside an order of the lower Court restoring to file a suit is not a final order. A. I. R. 1924 Mad. 701=19 L. W. 458=46 M. L. J. 357=34 M. L. T. 112=78 Ind. Cas. 938. Where a suit is dismissed due to plaintiff's want of *locus standi* and on appeal a *prima facie* case is held as made and case is remanded for further hearing the order is not final. A. I. R. 1925 Cal. 574=78 Ind. Cas. 117. An order granting a review is not a final order. A. I. R. 1923 Mad. 57=43 M. L. J. 559=(1922) M. W. N. 731=32 M. L. T. 98=69 Ind. Cas. 977. Order refusing to extend time for deposit of Court-fees in an appeal is not a final order under s. 109. 17 A. L. J. 443=50 Ind. Cas. 79. An order of the High Court, deciding the Court below had jurisdiction to execute a decree is not a final order nor is the order a decree under ss. 47 and 2 of C. P. Code. 4 P. L. J. 461=52 Ind. Cas. 461. When order was passed on Civil Extraordinary application but it did not finally dispose of the rights of the parties, it was not a final order within the meaning of s. 109(a). A. I. R. 1923 Bom. 39=79 Ind. Cas. 210. A refusal to appoint a receiver is not a final order. A. I. R. 1925 Pat. 173=6 P. L. T. 119=82 Ind. Cas. 178.

An order refusing to appoint a receiver is not a final order. 12 Pat. L. T. 723=144 Ind. Cas. 457=14 P. L. T. 302=A. I. R. 1933 Pat. 293. Where the High Court

by an order only purported to send down an issue for a finding under Order 41, rule 25, and although by an interlocutory judgment says "we allow the appeal" and mentions that costs were to abide the final decree, it does not in terms set aside the decree of the lower Court; that order cannot be a "final order" within the meaning of s. 109, C. P. Code. A. I. R. 1933 B. 336=35 Bom. L. R. 415=A. I. R. 1933 Bom. 251=145 Ind. Cas. 258. An order refusing leave *in forma pauperis* is not a final order as it does not purport to affect the merits of the suit in any sense or to determine the rights of the parties. 10 Rang. 504=A. I. R. 1932 Rang. 192 (1)=A. L. R. 1932 Rang. 349. An order granting a review is not a final order, in as much as such an order does not finally dispose of any case, but merely reopens the decree that was originally passed by the Court. 54A. 401=1932 A. L. J. 235=140 Ind. Cas. 110=A. I. R. 1932 All. 318=A. L. R. 1932 All. 551.

A decree passed by the High Court after taking accounts according to the directions of the Privy Council is not a judgment, decree or order passed on appeal. 33 Bom. L. R. 1476=55 B. 785.

**Order of remand.**—Order of remand deciding only one issue out of several, raised in first Court is not a final order. 14 A. L. J. 50=38 A. 150=32 Ind. Cas. 360; see also 48 Ind. Cas. 132=(1918) M. W. N. 844. Order of remand by High Court directing disposal or merits of suit dismissed by lower Court on preliminary issue without evidence is not final under s. 109. 19 O. C. 36=33 Ind. Cas. 756=43 Ind. Cas. 290; see also (1918) Pat. 1=14 P. L. W. 342. Order of remand with the direction that a person should be sued as a residuary legatee, is not a final decree or order. 22 C. W. N. 610=46 Ind. Cas. 681. But an appeal against an order of remand is competent when it decides cardinal point in the case. 3 P. L. J. 339=5 P. L. W. 45=45 Ind. Cas. 192; 49 Ind. Cas. 520=21 O. C. 336. An order of remand under Order 41, r. 23, is not a final order. 46 Ind. Cas. 922. The order of remand is not a decree, and an appeal, would lie only if it amounts to a final order. The main test as to the finality of the orders of remand is whether it finally decides the rights of parties, and the decision can never be challenged again. In order to have finality it is not sufficient that a question of jurisdiction of the Court to entertain the suit has been decided. The finality must be a finality in relation to the suit itself, and if the suit is still a live suit in which the rights of the parties have still to be determined, there is yet no final order. An order of remand under which an order of Revenue Court returning the plaint for presentation to the Civil Court is set aside does not dispose of the rights of the parties, and therefore is not final. A. I. R. 1934 All. 58=1934 P. L. J. 219=56 A. 277=147 Ind. Cas. 376.

Order of remand necessitating further trial, final determination of rights of parties not being made, is not a final order. A. I. R. 1924 Oudh 81=10 O. L. J. 289=71 Ind. Cas. 339; see also (1918) Pat. 1=4 P. L. W. 342=45 Ind. Cas. 290. Where a suit is dismissed by the Subordinate Judge as barred by *res judicata* but the decision is reversed by the High Court which remanded the case, leave to appeal to Privy Council should not be given. 1 U. P. L. R. (All) 168=18 A. L. J. 83=54 Ind. Cas. 504. A case having been remanded by the High Court on 14-4-30, an application for leave to appeal to the Privy Council was made and dismissed on 2-3-31 on the ground that as the case was only remanded for fresh decision on certain important issue, there was no final order as contemplated by s. 109 (a). A. L. R. 1933 Lah. 23=A. I. R. 1933 Lah. 82=145 Ind. Cas. 131. Where the High Court decided the point on limitation but remanded the case for decision of the lower Court on the other essential or cardinal points on the case, the order of the High Court is not a final order. 144 Ind. Cas. 916=35 Bom. L. R. 458=A. I. R. 1933 Bom. 269. An order though it decided an important and vital issue in the case but did not finally dispose of the rights of the parties is not a final order. 60 I. A. 76=11 Rang. 58=1933 A. L. J. 244=37 L. W. 331=142 Ind. Cas. 328=33 Bom. L. R. 331=57 C. L. J. 136=1903 M. W. N. 166=37 C. W. N. 405=A. I. R. 1933 P. C. 58=64 M. L. J. 307. (P. C.). On the face of it when order which remands a case for further consideration *prima facie* does not purport finally to dispose of the rights of the parties. But of the effect of the order is that the Court has finally determined the cardinal issue in the suit and only subsidiary and subordinate issues remain to be decided, the remand order is a final order. 10 Rang. 499=A. I. R. 1932 Rang. 189; see also 10 Rang. 335=A. I. R. 1932 Rang. 137=140 Ind. Cas. 420; A. I. R. 1931 Lah. 556=132 Ind. Cas. 211.

**Clause (b).**—The words "original jurisdiction" in cl. 39 of Letters Patent Bombay, are used in contradistinction to the words "made on appeal". A. I. R. 1923 P. C.

148=74 Ind. Cas. 469=28 C. W. N. 307=50 J. A. 212=25 Bom. L. R. 908=21 A. L. J. 675. The provision of this clause should be read subject to the special jurisdiction conferred under s. 12 (1) of the Oudh Courts Act. 134 Ind. Cas. 1017=8 O. W. N. 1207; see also A. I. R. 1932 Oudh 163. The Judicial Committee refused special leave to appeal against a decision of the Bombay High Court passed on appeal from an award of compensation made by the Court to which a reference had been made under s. 18 of the Land Acquisition Act. 17 C. W. N. 421 (P. C.); see also 28 Ind. Cas. 260; 16 C. W. N. 961 (P. C.). The Oudh Chief Court is a High Court, within the meaning of this clause in as much as it falls within the definition of a High Court in s. 3 (24) of the General Clauses Act. A. I. R. 1932 Oudh 163. An order of a single Judge of the High Court refusing a mandamus under s. 66 (3) of the Indian Income-tax Act on the ground that there is no question of law is a final judgment of the High Court passed in the exercise of its original jurisdiction, and where the subject-matter involved is Rs. 10,000 or more in value, gives the applicant an appeal to the Privy Council as of right. 32 P. L. R. 234=A. I. R. (1931) Lah. 138 (F. B.).

**Clause (c)**—Clause (c) is only intended to meet special cases, such as those in which the point in dispute is not measurable by money, though it may be of great public importance. It requires that the case must be certified to be a fit one for appeal to His Majesty in Council. 35 Bom. L. R. 458=144 Ind. Cas. 916=A. I. R. 1933 Bom. 260; see also A. I. R. 1930 Nag. 91=12 N. L. J. 170=123 Ind. Cas. 430; A. I. R. 1928 Rang. 187=6 Rang. 43; A. I. R. 1927 Pat. 363=6 Pat. 282=107 Ind. Cas. 313; 1931 M. W. N. 760=A. I. R. 1931 Mad. 642; see also A. I. R. 1934 Lah. 515=35 P. L. R. 546; A. I. R. 1934 All. 58=56A. 277=1934 A. L. J. 219. The special power of certifying a case to be a fit one for appeal has been conferred on the High Court to meet particularly new cases and that on such a special certificate having been given the appeal to His Majesty in Council becomes competent. A.I.R. 1934 All. 198=1934 P. L. J. 1166. High Court is competent to grant leave against an order by a Bench, suspending an advocate from practice under the Bar Councils Act and clause of the Letters Patent. 150 Ind. Cas. 699=1934 A. L. J. 722.

The powers under this clause should be exercised only in exceptional cases of great public and private importance. A. I. R. 1927 Cal. 481=31 C. W. N. 540=103 Ind. Cas. 561; see also A. I. R. 1927 Pat. 363=6 Pat. 282=8 P. L. T. 615. The power of granting leave to appeal to the Privy Council under clause (c), should be sparingly used and in order to entitle a party to the benefit of this section the case should involve not only a question of law but also involve matters of principle which not only affect the parties to the litigation but are likely to concern a large class of persons who are or may be in the same situation as the parties to the appeal in question, and in whose case the decision of the Privy Council is sure to be a guiding precedent. If the above conditions are satisfied, it will undoubtedly be a fit case for appeal to His Majesty in Council. A. L. R. 1933 A. 502=54 A. 459=A. I. R. 1933 All. 4=143 Ind. Cas. 312; see also A. L. R. 1933 All. 8=54 A. 431=140 Ind. Cas. 418=A. L. R. 1933 All. 385; see also 18 M. L. T. 366=2 L. W. 992=31 Ind. Cas. 46; 38 A. 150=14 A. L. J. 50=33 Ind. Cas. 345; 54 A. 459=A. I. R. 1933 A. 4; 1 P. L. T. 239=(1920) P. 209=56 Ind. Cas. 615; A. I. R. 1921 Oudh 30=8 O. L. J. 1=61 Ind. Cas. 131; A. I. R. 1924 Oudh 81=10 O. L. J. 289=71 Ind. Cas. 339; A. I. R. 1923 Mad. 125=(1922) M. W. N. 683=16 L. W. 517=34 M. L. T. 335=43 M. L. J. 722=69 Ind. Cas. 385; A. I. R. 1923 Rang. 71=11 L. B. R. 335=1 Bur. L. J. 62=68 Ind. Cas. 690; A. I. R. 1923 Mad. 232=44 M. L. J. 217=32 M. L. T. 126=72 Ind. Cas. 250; A. I. R. 1923 Mad. 602=44 M. L. J. 424=73 Ind. Cas. 217; A. I. R. 1923 Nag. 272=73 Ind. Cas. 221; A. I. R. 1924 Mad. 616=46 M. L. J. 239=19 L. W. 372=78 Ind. Cas. 165; A. I. R. 1930 All. 121=52 A. 329=122 Ind. Cas. 412; A. I. R. 1929 Nag. 336=120 Ind. Cas. 409; A. I. R. 1929 Bom. 341=53 B. 552=31 Bom. L. R. 632=119 Ind. Cas. 782; 54 A. 431=140 Ind. Cas. 418; A. I. R. 1933 A. 8; 116 Ind. Cas. 208=A. I. R. 1929 Oudh 243=6 O. W. N. 211; A. I. R. 1934 Pat. 564; A. I. R. 1934 All. 898; 62 C. 992; A. I. R. 1935 Rang. 113=13 Rang. 123=8 P. R. 8; A. I. R. 1935 All. 424=1935 A. L. J. 233; 42 L. W. 568=1935 M. W. N. 796=69 M. L. J. 497; A. I. R. 1936 Rang. 65=14 Rang. 86. The effect of s. 109 (c) is to restore an unlimited right of appeal to the Privy Council, when the case is certified to be a fit one for appeal to the Privy Council. Neither the limitations imposed by clauses (a) and (b) nor any other limitations affect the unrestricted right of appeal to Privy Council that is thus created. Nor is this right of appeal subjected to any further proviso by s. 110. That section affects only the provisions of clauses (a) and (b). 34 Bom. L. R. 398=138 Ind. Cas. 454=A. I. R. 1932 Bom. 218=A. L. R. 1932 Bom. 901.

No real mischief can arise if s. 110 is not liberally construed because such cases, if worthy of being tried by a higher tribunal, can always be dealt with under sub-section (c) of s. 109. A. I. R. 1925 P. C. 159=22 L. W. 255=30 C. W. N. 98=27 Bom. L. R. 867=49 M. L. J. 20=52 C. 650=52 I. A. 207=41 C. L. J. 823=88 Ind. Cas. 445.

Where two Judges have arrived at diametrically opposite conclusions on the vital question on which the suit should be decided, the case is a fit one for appeal. 6 O. L. J. 664=54 Ind. Cas. 828. The question whether fraud of the mortgagor would vitiate registration and disentitle the mortgagee to enforce his mortgage is a substantial question of law and hence an appeal would lie to the Privy Council. 2 U. P. L. R. (All) 99=18 A. L. J. 137=54 Ind. Cas. 528. Where there is involved a matter of real importance namely, as to whether the Court has jurisdiction to make an order, the case is a fit one for appeal to the Privy Council. 70 Ind. Cas. 519=A. I. R. 1922 Cal. 130=26 C. W. N. 819.

Special leave cannot be granted where a decision upon the construction of a section of Tenancy Act only incidentally affects the rights of the tenure-holders. A. I. R. 1921 Pat. 33=6 P. L. J. 125=2 P. L. T. 657=61 Ind. C.s. 563. Certificate under Order 45 should show on its face on what grounds it has been granted or that discretion under s. 109 was exercised. 44 M. 293=48 I. A. 31=19 A. L. J. 161=40 M. L. J. 229=23 Bom. L. R. 718=33 C. L. J. 277=25 C. W. N. 630 (P. C.). Where a question of procedure with some unusual character is involved and it is possible that a higher tribunal might take a different view in respect thereto, the High Court ought to certify the case as fit one for appeal. A. I. R. 1924 Pat. 468=5 P. L. T. 17=75 Ind. Cas. 58.

Where the High Court in its judgment on a reference under s. 66 (2) of the Indian Income-tax Act answered the first question in the negative as it considered that the matter admitted of no doubt and in fact the Counsel for the Commissioner had practically conceded that the contention of the assessee was correct, the second question in favour of the assessee having regard to the terms of the award and the third also in his favour in view of the certain decisions of the Privy Council: *Held* in an application by the Commissioner under s. 66 (a) of the Act for leave to appeal to His Majesty in Council that the case was not a fit one for appeal to the Privy Council. A. I. R. 1933 Lah. 637. S. 109 (c) has a very limited scope and must be applied with considerable discrimination and caution. A. I. R. 1933 A. 502=54 A. 459=A. I. R. 1934 A. 4=143 Ind. Cas. 312.

An order directing prosecution for a criminal offence under s. 237, Companies Act is more of a criminal nature and it is doubtful whether s. 109 (c) and Order 45, rule 2, applies to such a case. A. I. R. 1931 Sind 120=132 Ind. Cas. 474. Whether a contingent reversioner is entitled to continue a suit filed by a Collector, even though he applies to be made a party after the expiry of the period of limitation is a question of importance. A. I. R. 1934 All. 198=1934 P. L. J. 1166. The question whether a suit brought for recovery of possession by Hindu widows, or by Court of Wards on their behalf is a suit of a representative character brought in the interest of the whole body of reversioners, is a question of importance so that the contingent reversioner not only can be impleaded but must be impleaded; and if he asks for such a prayer the Court would be acting with material irregularity in the exercise of its jurisdiction if it refuses. *Ibid.* Where the defendant applies for leave to appeal to Privy Council, the Court is not concerned with the different considerations that might arise in a case where the applicant for leave to appeal to His Majesty in Council is the plaintiff in the suit. A. I. R. 1934 Rang. 65=12 Rang. 164=149 Ind. Cas. 1033. Where there is no inconsistency in certain ruling of a Court, but different High Courts in India have held divergent views in respect of matters similar to those before the High Court, this in itself is no reason for certifying the case as one fit for appeal to His Majesty in Council. A. I. R. 1936 Pesh. 194. Where two separate appeals are filed in the High Court from the same suit, by two sets of defendants and are disposed of by the High Court by practically one judgment and on ground common to all the defendants but the valuation of one appeal is above Rs. 10,000 while that of the other is less than Rs. 10,000, the High Court can certify under s. 109 (c) that the latter case is a fit one for appeal to His Majesty in Council, although the requirements of s. 110 are not fulfilled. A. I. R. 1936 All. 832=1936 A. L. J. 1025=1936 A. W. R. 883.

\***Certified to be fit one.**—Under section 109 (c) the High Court must be satisfied that the case is a fit one for appeal. A. I. R. 1929 Mad. 696=119 Ind. Cas. 595.

Where as regards question of limitation, there is no serious divergence of judicial opinion on the points, it is not a fit case for appeal to the Privy Council. 31 P. L. R. 17=121 Ind. Cas. 506; A. I. R. 1936 Sind 68=163 Ind. Cas. 275; 1936 A. L. J. 1272. Where a question of law involved has been settled definitely by the judgment of the Privy Council, the case should not be sent to Privy Council for a fresh decision on the same point. A. I. R. 1929 All. 339=(1929) A. L. J. 241=123 Ind. Cas. 333; 92 Ind. Cas. 1013. Where High Court ignored rules regarding recitals in ancient documents, petition for the certificate may be granted. A. I. R. 1929 Mad. 827=123 Ind. Cas. 344. Where point of law has been settled by Full Bench so far as the Court in which leave for appeal is prayed, the fact that there is conflict between that Court and some other High Court does not render the case as fit one for appeal to Privy Council. A. I. R. 1928 Mad. 448=109 Ind. Cas. 167. The words "substantial question of law" mean questions of general importance and do not include the question of the construction of a document in which the parties alone are interested. 3 O. W. N. 841=98 Ind. Cas. 164; see also A. I. R. 1924 Mad. 231=45 M. L. J. 514=18 L. W. 348=76 Ind. Cas. 811.

In an application by a pleader for leave to appeal to Privy Council from an order suspending him from practice for being punished for contempt of Court committed personally: *Held* that the Allahabad High Court can grant leave either under s. 109 (c), C. P. Code or s. 30, Letters Patent. A. I. R. 1933 All. 225=55 A. 246=1933 A. L. J. 273=145 Ind. Cas. 853; 1932 A. L. J. 861. Where the conditions prescribed by this section are fulfilled, it is the duty of the High Court to grant leave to appeal. The chance of success of the appellant in the proposed appeal is not material. 139 Ind. Cas. 54=35 L. W. 206=A. I. R. 1932 Mad. 46. Where even respondent is not opposing, the Court in granting leave must nevertheless be satisfied about fulfilment of conditions precedent to grant of leave. 10 Rang. 499=A. I. R. 1932 Rang. 189. The question of consolidation of two appeals will come up for consideration only after the necessary certificate has been granted. A. I. R. 1932 Lah. 441=33 P. L. R. 455=140 Ind. Cas. 70.

110. [S. 596.] In each of the cases mentioned in clauses (a) and (b)

Value of subject-matter.

of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

**Scope of the section.**—"In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards." The word "and" occurring here means "and" and not "or" so that for the competency of an appeal to the Privy Council, each condition must be separately fulfilled. 35 C. W. N. 669=53 C. L. J. 390=132 Ind. Cas. 605=61 M. L. J. 273=33 Bom. L. R. 954=A. I. R. 1931 P. C. 125=1931 M. W. N. 657; see also 13 C. W. N. 1127; A. I. R. 1929 Nag. 75; 34 C. W. N. 235=57 I. A. 56=53 M. 157 (P. C.)=33 Bom. L. R. 954. The second paragraph of the section is intended to deal with property other than that forming part of the actual subject-matter in dispute and which would be affected by the final decree or order. A. I. R. 1921 L. B. 48=11 L. B. R. 152=66 Ind. Cas. 606. This para refers to some specific property and does not contemplate property which a party may be desirous of acquiring. A. I. R. 1922 Lah. 131=26 P. L. R. 1922=2 Lah. 297=116 P. L. R. 1921=65 Ind. Cas. 239. Although subject-matter of a suit may be above Rs. 10,000 if the decree of the lower Court is affirmed by the High Court and there is no variation of any kind in the substantial portion of the decree except the awarding of costs in the original suit unless the suit involves a substantive question of law there is no right of appeal to the Privy Council. A. I. R. 1929 Oudh 43=5 O. W. N. 1076=114 Ind. Cas. 320.

To satisfy the requirements of section 110 the subject-matter in the Court of first instance must be Rs. 10,000 and in addition the amount or value of the subject-matter on appeal must also be Rs. 10,000 or upwards or the decree must involve some claim or question to or respecting property of like amount or value. The amount for value of the subject-matter of a suit is clearly the amount the plaintiff claims together with, at most, interest that had accrued up to the date of decree. A. I. R. 1923 Rang. 71=11 L. B. R. 335=1 Bur. L. J. 62=68 Ind. Cas. 690; see also A. I. R. 1921 Pat. 229=2 P. L. T. 463=6 P. L. J. 596=62 Ind. Cas. 959. As regards the value of the property referred to in the second paragraph of s. 110 the material date is the date of the decree from which the appeal to His Majesty in Council is made. 138 Ind. Cas. 37=33 P. L. R. 647=A. I. R. 1932 Lah. 526. When the appellate Court modifies that original decree upon a single point and that completely in favour of the applicant for leave to appeal to the King in Council, so that he has no further grievance in that matter, he cannot because of that modification have a right to an appeal to the Privy Council on other points on which the Courts have commenced without showing that some substantial question of law is involved. 38 C. W. N. 1174.

**Valuation.**—The valuation of the subject-matter of the suit in trial Court must also be 10,000 rupees or upwards. 39 M. 843=30 M. L. J. 317=18 M. L. T. 450=2 L. W. 1057=31 Ind. Cas. 296. Market value of the subject-matter and not valuation under the Suits Valuation Act is to be taken for purposes of s. 110. A. I. R. 1924 Lah. 82=6 Lah. L. J. 44=4 Lah. 185=75 Ind. Cas. 520; 58 C. 66=132 Ind. Cas. 910=A. I. R. 1931 Cal. 417. Where a suit for property including pro-notes on their face value amounts to less than Rs. 10,000 interest up to date of decree cannot be added to make up the deficiency. A. I. R. 1930 P. C. 44=34 C. W. N. 235=121 Ind. Cas. 513=58 M. L. J. 184=51 C. L. J. 168=32 Bom. L. R. 517=53 M. 167=57 J. A. 56; see also 32 M. L. J. 400=37 Ind. Cas. 502. When determining the value of the subject-matter of a suit for leave to appeal to Privy Council, the interest payable until realization can not be taken into account. 4 P. L. W. 240=3 Pat. L. J. 317=44 Ind. Cas. 475; A. I. R. 1921 Pat. 229=2 P. L. T. 463=6 P. L. J. 596=62 Ind. Cas. 959; 56 M. 886=143 Ind. Cas. 139=A. I. R. 1933 Mad. 401=64 M. L. J. 496. But in determining value of subject-matter of mortgage suit, interest *pendente lite* and future interest up to *dies daties* can be included. 28 N. L. R. 345=15 N. L. J. 154=141 Ind. Cas. 42=A. I. R. 1932 Nag. 22. Under s. 110 the value of the subject-matter of the suit is the real market value. The fact that for the purpose of stamp-duty the plaintiff under the option given to him by s. 7 of the Court-fees Act valued it at less than its market value will not deprive him of his right to appeal to the Privy Council. 39 Ind. Cas. 911=5 L. W. 542=(1917) M. W. N. 422; see also 55 M. 106=61 M. L. J. 692=A. I. R. 1932 Mad. 125; 1932 A. L. J. 838. For the purpose of ascertaining the amount or value of the subject-matter of the suit in the Court of first instance, it is necessary to ascertain the amount or value of the subject-matter of the suit at the date of the institution of the suit A. I. R. 1934 Rang. 65=12 Rang. 164=149 Ind. Cas. 1033. Plaintiff's claim which exceeded Rs. 10,000 was dismissed in the trial Court as against the applicant, but the High Court passed a decree for Rs. 9,182-6-3 with interest at 9 per cent. and the decree of the High Court exceeded Rs. 10,000 including the interest up to date of decree: *Held* that the applicant should be given leave to appeal to Privy Council as the conditions under s. 110 were complied with. A. I. R. 1934 Rang. 65. Under s. 110 it is the extent to which the decree or order has operated to the prejudice of the applicant that determines whether the decree or order is subject to appeal or not, and whatever may be the value of the property in respect of which a claim or question is involved in the appeal no appeal lies under s. 110 unless the value of the loss or detriment which the applicant has suffered by the passing of the decree or order, and from which he seeks to be relieved by His Majesty in Council, is Rs. 10,000 or upwards. A. I. R. 1934 Rang. 292=12 Rang. 355. The question whether for the purpose of s. 110 in the right to appeal to His Majesty in Council the valuation for the purpose of that section is to be taken of the entire property which it is sought to partition or whether it is the value of the share claimed by the plaintiff is one of sufficient importance for allowing leave to appeal to His Majesty. A. I. R. 1935 Pat. 266=16 Pat. L. T. 279=155 Ind. Cas. 633. Where the original claim in the alternative way for refund of Rs. 10,000 and when the question whether that amount should or should not be refunded to the plaintiff would also be a question in the contemplated appeal in case the Privy Council should think fit and proper to dismiss the claim for possession, the matter involved is of requisite valuation. 61 C. L. J. 69. For the purpose of



determining the value under s. 110 the decree is to be looked at and it affects the interests of the party prejudiced by it. A. I. R. 1937 Bom. 181. Where the applicant erroneously undervalued the subject-matter of the suit to be Rs. 2,100 in the Court of the Subordinate Judge and the suit was decreed and on appeal by the opposite party the High Court allowed the appeal and dismissed the suit, on application to leave to appeal to His Majesty, held that the suit having been tried by the Subordinate Judge and the first appeal also being heard by the High Court there would have been no change of forum if the real value were mentioned in the plaint and as such the opposite party had not been prejudiced. Hence the mere mistake in stating the value in plaint did not stop the applicant from showing that the real value of the subject-matter in the Court of first instance was Rs. 10,000 or upward. A. I. R. 1937 Cal. 292.

When the plaintiff in his plaint alleged the value of the subject-matter to be Rs. 3,000 but the District Judge on appeal held it to be Rs. 24,000 under s. 21, N. W. P. and Assam C. C. Act, an application for leave to appeal to Privy Council cannot be granted. (1927) Pat. 301=42 Ind. Cas. 966. Value of the subject-matter of the suit, must be taken to be the amount or value which the plaintiff either obtained or had he been successful would have obtained in his suit at the date when the decree was passed. 2 P. L. T. 340=60 Ind. Cas. 523 ; see also 22 C. W. N. 282 (P. C.)=46 Ind. Cas. 576. The plaintiff valued their suit at Rs. 7,590 but for leave to appeal to the Privy Council valued the property at Rs. 12,000 : *Held* that the increase in value *pendente lite* would not be sufficient to bring the suit within s. 110. 51 Ind. Cas. 975=(1919) Pat. 241. The Privy Council does not interfere with any question of valuation unless it is shown that some item has improperly been made the subject of valuation or excluded therefrom, or that there is some fundamental principle affecting the valuation which renders it unsound. A. I. R. 1921 P. C. 50=48 C. 110=25 C. W. N. 289=22 Bom. L. R. 1370=48 I. A. 255=18 A. L. J. 1095=39 M. L. J. 195=57 Ind. Cas. 606 ; see also A. I. R. 1922 P. C. 257=45 M. 475=43 M. L. J. 323=49 I. A. 221=27 C. W. N. 1=36 C. L. J. 450=74 Ind. Cas. 584. Where cause of action against one defendant distinct and different from cause of action against other defendants, the fact that a joint suit is brought cannot make value of the subject-matter of appeal against him to Privy Council higher than what is decreed against him. A. I. R. 1923 Mad. 30=16 L. W. 262=30 M. L. T. 337. The test of valuation is the detriment to the person seeking to appeal to the Privy Council. A. I. R. 1931 Rang. 138=132 Ind. Cas. 280=9 Rang. 52.

**Party taking advantage of a valuation cannot deny it.**—Plaintiff knowingly under-valuing his claim and not paying additional Court-fee will not be allowed to change that valuation at the time of leave to appeal to Privy Council. A. I. R. 1930 Cal. 737=34 C. W. N. 671=128 Ind. Cas. 108 ; see also 38 C. W. N. 751=59 C. L. J. 448. A party taking advantage of the valuation put upon the subject-matter by the other party, cannot be permitted to allege that the original valuation was incorrect. A. I. R. 1927 Mad. 862=104 Ind. Cas. 577 ; see also A. I. R. 1927 Cal. 418=45 C. L. J. 225=101 Ind. Cas. 901 ; 14 C. W. N. 872=6 Ind. Cas. 792 ; 74 Ind. Cas. 214=A. I. R. 1923 Oudh 93=9 O. L. J. 531=26 O. C. 24. For the purpose of valuation for Privy Council appeal, value at date of decree should be considered and not value at the institution of suit. 44 C. 119=24 C. L. J. 350=21 C. W. N. 530=35 Ind. Cas. 605. But where the plaintiff deliberately under-valued the suit in the lower Court, he cannot, for purpose of leave to appeal to the Privy Council, be allowed to repudiate the valuation and show the real market value of the subject-matter. A. I. R. 1923 Mad. 125=43 M. L. J. 728=31 M. L. T. 335=16 L. W. 517=(1922) M. W. N. 683=69 Ind. Cas. 385 ; see also 91 Ind. Cas. 572=A. I. R. 1925 Mad. 1223=43 M. L. J. 309. The plaintiff is not absolutely precluded from saying that his valuation in the plaint is wrong. The Court will treat his admission as a strong piece of evidence against him. A. I. R. 1927 Mad. 862=104 Ind. Cas. 577 ; see also A. I. R. 1927 Cal. 225=44 C. L. J. 572=31 C. W. N. 268=99 Ind. Cas. 921. Leave to appeal to Privy Council cannot be granted, where valuation of subject-matter in trial Court is neither challenged in appeal nor by cross-objections to reopen that question. A. I. R. 1926 Rang. 138=4 Rang. 92=5 Bur. L. J. 23=96 Ind. Cas. 107 ; but see 47 B. 477=18 Bom. L. R. 469=37 Ind. Cas. 371. The doctrine that a person cannot for purpose of appeal to Privy Council both approve and reprobate applies to the case where he appeals to the lower appellate Court upon a valuation not consistent with the valuation upon which he seeks a certificate enabling him to appeal to Privy Council. 58 C. 66=132 Ind. Cas. 910=

A. I. R. 1931 Cal. 417 ; see also 34 L. W. 817=61 M. L. J. 69. But parties are not bound by the valuation fixed by the Court. 133 Ind. Cas. 415.

**Value of the subject-matter of suit in the Court of first instance.**—The words “the amount or value of the subject-matter of the suit in this Court of the first instance”, mean the amount or value at the institution of the suit, and not at the date of the decree in the Court of the first instance, which is not affected by the alternative condition which follows in the section. 38 P. L. R. 767=A. I. R. 1936 Lah. 31. The amount of interest to be given by Court in its discretion but not claimable as of right, cannot be included in the value under s. 110. A. I. R. 1929 Nag. 75=124 Ind. Cas. 97. For valuation of subject-matter of a suit, involving a claim for *mesne* profits, the *mesne* profits which might be awarded by the Court, whether they had actually accrued at the date when the suit was instituted or whether they were future *mesne* profits should be taken into consideration. A. I. R. 1929 Pat. 547=117 Ind. Cas. 189 ; 107 Ind. Cas. 828 ; but see A. I. R. 1937 All. 169. Whether a suit is a partition suit or a partnership suit does not make a difference for valuation for purpose of Privy Council appeal. Value of the appellant's share and not the value of the whole property determines the value of the subject-matter. A. I. R. 1925 Bom. 137=49 B. 149=26 Bom. L. R. 126=85 Ind. Cas. 191 ; see also 44 B. 104=22 Bom. L. R. 243=55 Ind. Cas. 972 ; but see 10 C. W. N. 564 ; 2 P. L. T. 386 and 138 Ind. Cas. 670=30 A. L. J. 730 ; A. I. R. 1932 A. L. J. 730=138 Ind. Cas. 670. Although for purposes of Court-fees the value of suits for redemption is “the principal money expressed to be secured by the instrument of mortgage”, the mortgage money is not the basis of the valuation for the purposes of jurisdiction. In such cases the value of the mortgaged property should be the basis. A. I. R. 1927 Rang. 304=5 Rang. 499=105 Ind. Cas. 412. In estimating the value of an *Inam* wet land for purposes of Privy Council appeal, house sites in the vicinity should be excluded from consideration and only cultivable lands in the vicinity should be relied upon. A. I. R. 1928 Mad. 448=109 Ind. Cas. 167. Where the real claim in suit is less than Rs. 10,000 but Court unnecessarily recorded finding relating to other property worth more than Rs. 10,000, it does not make subject-matter of suit, worth more than Rs. 10,000. A. I. R. 1929 Nag. 85=110 Ind. Cas. 855. The consideration for the contract of sale must alone determine the value of the subject-matter in dispute on appeal to His Majesty in Council. A. I. R. 1929 Nag. 75=124 Ind. Cas. 697. Where during the pendency of a suit for specific performance of a contract of sale, new machinery is brought on the premises in suit, and not mentioned in the pleadings or in evidence, or even at argument, its value cannot be taken into account. A. I. R. 1929 Nag. 75=124 Ind. Cas. 697. Where the applicant's interest in the property is less than Rs. 10,000 but the property in dispute is worth over Rs. 10,000, leave to appeal should be granted. A. I. R. 1923 Bom. 176=25 Bom. L. R. 77=72 Ind. Cas. 127 ; see also A. I. R. 1923 Cal. 387=71 Ind. Cas. 371 ; A. I. R. 1923 Bom. 23=24 Bom. L. R. 350=67 Ind. Cas. 938 ; 20 C. W. N. 1279 (P. C.) ; but see A. I. R. 1921 Bom. 266=23 Bom. L. R. 374. Where in an ejectment suit, it was found that the value of the property was Rs. 10,000, held that the certificate to appeal to His Majesty from the decree in the suit must be granted. A. I. R. 1923 Bom. 23=24 Bom. L. R. 350=67 Ind. Cas. 938. When in a partition suit the decree affects the interest not only of the plaintiff's who are appealing but of some of the defendants, the value of the subject-matter is the value of the property and not that of the plaintiff's share therein. A. I. R. 1921 Pat. 502=2 Pat. L. T. 386=60 Ind. Cas. 844.

The cost of the suit ought not to be added to the value of the subject-matter to bring the valuation up to the appealable amount. A. I. R. 1927 Pat. 338=8 Pat. L. T. 714=6 Pat. 444=104 Ind. Cas. 267. Where a petitioner prays for leave to appeal to Privy Council in respect of a decision involving a claim of Rs. 3,900 the petition cannot be granted. A. I. R. 1925 P. C. 159=22 L. W. 255=30 C. W. N. 98=27 Bom. L. R. 867=49 M. L. J. 20=52 C. 650=52 I. A. 207=41 C. L. J. 623 (P. C.)=88 Ind. Cas. 445. Mortgage claim amounts to over Rs. 10,000 against several properties. Subsequent mortgages of a certain plot worth less than Rs. 10,000 denied that it was covered by the plaintiff's mortgage. High Court held on appeal that the plot has not been included in the plaintiff's mortgage. On application of the plaintiff for leave to appeal to Privy Council, held that the subject-matter in dispute was really the whole debt for purposes of valuation for Privy Council appeal. A. I. R. 1927 Pat. 391=103 Ind. Cas. 831. To determine the value prescribed by s. 110 the decree has to be looked at. If the detriment to the party seeking relief is

estimated at less than Rs. 10,000 than the matter in dispute in appeal is not of the prescribed value and the decree itself does not involve any claim or question to or respecting property of the prescribed value. 4 Pat. L. J. 415=52 Ind. Cas. 723. This section does not speak of the valuation of the suit as put in the plaint but of the value of the subject-matter in dispute or of the value of the property as affected by it. 1932 A. L. J. 836; see also 56 B. 526=34 Bom. L. R. 834=A. I. R. 1932 Bom. 543.

The subject-matter of the suit should be of the value of Rs. 10,000. 14 P. L. T. 725=A. I. R. 1933 P. C. 232=12 P. 679 (P.C.). The subject-matter of a suit and of appeal are not necessarily identical with the subject-matter in dispute between the parties. The subject-matter in dispute may not always be capable, of being measured in terms of money, even in cases where the subject-matter of the suit or the appeal has an appreciable value. A. I. R. 1933 All. 502.

**The decree or final order must involve directly or indirectly, etc.—** The question whether a decree involves indirectly or claim respecting property of the value of Rs. 10,000 or upwards within paragraph (2) must be determined with reference to the actual circumstances at the time and not to be mere possibility. 128 Ind. Cas 622=A. I. R. 1930 Bom. 509=32 Bom. L. R. 1189=128 Ind. Cas. 622. The value of the property should be determined with reference to the date of the decree from which the appeal to His Majesty in Council is to be made. A. I. R. 1929 Nag. 75=124 Ind. Cas. 69; see also 44 B. 104=22 Bom. L. R. 243=55 Ind. Cas. 572; 44 C. 119=24 C. L. J. 350=21 C. W. N. 530; 138 Ind. Cas. 37=33 P. L. R. 649. The second clause would apply if the matter in dispute is incapable of valuation as in the case of easement. A. I. R. 1926 Rang. 138=4 Rang. 92=5 Bur. L. J. 23. In case of easement to light and air, leave to appeal to Privy Council is not the value of the whole property which is to be taken into consideration but the value of the easement. A. I. R. 1929 Bom. 241=53 Bom. L. R. 552=31 Bom. L. R. 632=119 Ind. Cas. 782; see also A. I. R. 1928 Mad. 785=111 Ind. Cas. 795. Para 2 relates not only to claims to property of Rs. 10,000 in value but to questions respecting property of the like amount. A. I. R. 1928 Pat. 191=106 Ind. Cas. 538. Section 110 applies to the value of the annuity sought to be recovered and not to the value of the property upon which that annuity is charged. A. I. R. 1923 P. C. 102=26 Bom. L. R. 731=(1923) M. W. N. 590=45 M. L. J. 253=18 L. W. 146=26 O. C. 216=28 C. W. N. 289=75 Ind. Cas. 502. Where the value of subject-matter in dispute on appeal to the Privy Council is admittedly below Rs. 10,000 but the petitioner alleges that there is another appeal pending on behalf of another party affected by the decree and that the value would be more than Rs. 10,000 if the value of the property in that appeal be taken into account but it is admitted that the decision in appeal, for which leave is sought, could have no effect on the other appeal whether by way of *res judicata* or in any other way, the order can not be held directly or indirectly involve a claim or question to or respecting property involved in the other appeal within the meaning of clause (2), s. 110 and appeal to Privy Council does not lie. A. I. R. 1937 Lah. 95. If none of the conditions mentioned in para 1 is fulfilled, but the sole condition mentioned in para 2 is fulfilled, the requirements of s. 110 will be complied with, because these two sets of conditions are alternative and mutually exclusive. The conditions laid down in para 2, is independent and self sufficient and is not in any way dependent on the fulfilment of both or either of the conditions in para 1. Right of appeal therefore exists even on fulfilment of condition in para 2. A. I. R. 1937 All. 169. The phrase "directly or indirectly" in s. 110 refers to suits in existence and cannot be included to cover suits not yet brought. The indirect relation must be decided with reference to actual circumstances at the time and not to circumstances which are remote. On the other hand the possibility of future suits may be taken into consideration if such suits will be affected by the doctrine of *res judicata*. A. I. R. 1936 Lah. 31=38 P. L. R. 767; see also A. I. R. 1936 Oudh 181=1936 O. W. N. 181=160 Ind. Cas. 799.

**Mesne profits** subsequent to the date of the High Court decree, and awarded to the decree-holders cannot be taken into consideration in making an estimate of the value under para 2. A. I. R. 1926 Bom. 265=50 B. 160=28 Bom. L. R. 454=94 Ind. Cas. 755. Where the matter in dispute between the parties is solely in the nature of the tenancy of the site, buildings on site should not be taken into account involving subject-matter. The second paragraph means that the suit must to satisfy its conditions, involve rights and claims to property which rights and claims are worth Rs. 10,000 or upwards not that the rights, effect or properties whose value is

Rs. 10,000 or more. A. I. R. 1923 Lah. 286=6 Lah. L. J. 78=75 Ind. Cas. 654 ; see also 73 Ind. Cas. 407=A. I. R. 1922 Oudh 214 ; 66 Ind. Cas. 606=A. I. R. 1921 L. B. 48=11 L. B. R. 152. A suit does not involve claim "indirectly" simply because similar questions may arise in other estates or in connection with other like thing in the same Province. A. I. R. 1929 Mad. 780=(1929) M. W. N. 602=57 M. L. J. 477=3 L. W. 946=122 Ind. Cas. 648. Two decrees of the same Court, between the same parties but opposite in characters may be joined for granting certificate to appeal. 23 C. W. N. 582=50 Ind. Cas. 760 ; but see A. I. R. 1926 Mad. 1024=51 M. L. J. 295=97 Ind. Cas. 592 ; A. I. R. 1923 Mad. 603=44 M. L. J. 424=73 Ind. Cas. 217 ; 13 A. L. J. 1075=33 Ind. Cas. 369. "Directly or indirectly" do not cover a claim distinct in its character and to which there is an irrelevant reference in the plaint. A. I. R. 1926 Rang. 128=5 Bur. L. J. 45=45 Ind. Cas. 377 ; see also A. I. R. 1922 Mad. 34=15 L. W. 140=30 M. L. T. (H. C.) 42=42 M. L. J. 78=(1922) M. W. N. 46=66 Ind. Cas. 686. On two connected suits where the points are identical but one only exceeds Rs. 10,000 in value and is certified as fit for appeal to the Privy Council the other suit should also be certified though its subject-matter is less than Rs. 10,000 in value. 43 A. 223=18 A. L. J. 1119=59 Ind. Cas. 794. The mere possibility of similar litigation in the same Presidency will not entitle the petitioner to add to the value in one case that of the other cases as 'indirectly involved' unless the other litigation will be affected by the doctrine of *res judicata*. 34 L. W. 817=61 M. L. J. 69. The expression "involving directly or.....upwards" refers to suits in existence and not to suits in *germio futuri*. The words refer to questions arising between parties to a pending suit and not to questions relating to the title of one only of the parties which might be made the basis of a prosecution. 54 A. 431=140 Ind. Cas. 418 ; see also 59 I. A. 29=59 C. 1012=36 C. W. N. 221=55 C. L. J. 172=34 Bom. L. R. 481=36 M. L. J. 336=A. I. R. 1932 P. C. 28.

**Subject-matter and property.**—"Subject-matter" and "property" used respectively in cls. 1 and 2 cannot be treated as synonymous terms. "Property" in cl. (2) indicates property not in suit or dispute, which may be, directly or indirectly involved. A. I. R. 1929 Nag. 75=124 Ind. Cas. 697.

**Immediately below.**—A single Judge of the High Court is a Court immediately below the Division Bench of the High Court. 32 P. L. R. 833=13 L. W. 338=135 Ind. Cas. 605=A. I. R. 1932 Lah. 121=A. L. R. 1932 Lah. 839 (Civ).

**Affirm the decision.**—To affirm the decision of the lower Court, it is sufficient for the appellate Court to affirm the decree. A. I. R. 1927 Oudh 535=4 O. W. N. 613=102 Ind. Cas. 433 ; see also A. I. R. 1929 Nag. 85=110 Ind. Cas. 855 ; A. I. R. 1930 Lah. 102=10 Lah. 688=30 P. L. R. 722=122 Ind. Cas. 90 ; 26 P. L. R. 614=92 Ind. Cas. 476. The decision of the appellate Court affirms the decision of the Court below if the decree is affirmed though on different grounds. A. I. R. 1923 Oudh 49=25 O. C. 277=70 Ind. Cas. 283 ; A. I. R. 1925 Oudh 219=83 Ind. Cas. 90 ; A. I. R. 1929 Mad. 30=16 L. W. 263=30 M. L. T. 337 ; A. I. R. 1921 Oudh 111=24 O. C. 164=63 Ind. Cas. 292 ; A. I. R. 1922 All. 89=44 A. 200=20 A. L. J. 9=64 Ind. Cas. 916. Where the High Court entirely confirms the decision of the lower Court on the merits of the case except as to costs its decree merely affirms the decision of the Court below within the meaning of this section. A. I. R. 1922 Cal. 316=34 C. L. J. 299=66 Ind. Cas. 407 ; see also A. I. R. 1934 Oudh 433=11 O. W. N. 1055=151 Ind. Cas. 307. A decree of the High Court dismissing an appeal on account of insufficiency of Court-fee is one of affirmance. 2 U. P. L. R. 27=1 P. L. R. 1920=16 P. W. R. 1920=54 Ind. Cas. 400. Decree which affirms the decree of the lower Court with variation is not a decree of affirmance. A. I. R. 1923 Cal. 215=26 C. W. N. 651=70 Ind. Cas. 933 ; A. I. R. 1921 All. 270=19 A. L. J. 3=43 All. 220 ; A. I. R. 1929 Pat. 561=117 Ind. Cas. 19 ; A. I. R. 1928 Pat. 609=9 P. L. T. 731=116 Ind. Cas. 541 ; A. I. R. 1932 Pat. 555=3 P. L. T. 550=68 Ind. Cas. 663 ; *contra* A. I. R. 1926 Nag. 245=91 Ind. Cas. 200 ; A. I. R. 1922 All. 243=66 Ind. Cas. 721 ; 25 C. W. N. 715=66 Ind. Cas. 621 ; see also A. I. R. 1935 Oudh 489=1935 O. W. N. 947=156 Ind. Cas. 10. Where the High Court on appeal modifies the decree of the lower Court in favour of the applicant for leave to appeal, the decree is not one affirming the decree of the Court below. 62 C. 175=60 C. L. J. 424=39 C. W. N. 52=A. I. R. 1935 Cal. 250. Where the modification is made by the appellate Court in favour of the applicant, the applicant cannot because of that modification contained that it is not a judgment of affirmance and have a right to appeal on other points on which both the Courts have been in agreement, without showing a substantial question of law. 15 Pat. 637=163 Ind. Cas. 139=17 Pat.

L. T. 602=A. I. R. 1936 Pat. 553. No appeal lies against a consent decree to the Privy Council and leave to appeal cannot be granted. (1920) Pat. 349=5 Pat. L. J. 383=1 P. L. T. 599=57 Ind. Cas. 245. Partial reversal of decree does not mean confirming of a decree. 18 M. L. T. 387=(1916) 1 M. W. N. 122=31 Ind. Cas. 272; Reversal by High Court in appeal under cl. 15 of Letters Patent of judgment of single Judge of High Court setting aside lower appellate Court decree affirms decision of latter Court, 43 C. 50=33 Ind. Cas. 745. A decree which substantially alters decree of the Court below cannot be said to be a decree affirming that decision. A. I. R. 1929 Pat. 561=117 Ind. Cas. 193; see also A. I. R. 1927 Pat. 379=103 Ind. Cas. 703.

For purposes of appeal to Privy Council no substantial question of law need be involved if there is a small variation by the appellate Court in the lower Court's decree. A. I. R. 1925 P. C. 60=51 C. 969=51 I. A. 319 (P. C.)=86 Ind. Cas. 504. The word "decision" in s. 109 (a) means merely the decision of the suit by the Court and not judgment. Hence in order to affirm the decision of the Court below within the meaning of this section it is sufficient for the appellate Court to affirm the decree. 14 Lah. 609=144 Ind. Cas. 18=34 P. L. R. 946=A. I. R. 1933 Lah. 690. Though the value of the subject-matter exceeds Rs. 10,000 no leave to appeal to Privy Council can be granted in the case of the High Court affirming the decision of the Court below, unless there is a substantial question of law involved or it is shown that the case is otherwise fit to be certified. 32 P. L. R. 860; see also 9 Rang. 360=133 Ind. Cas. 404=A. I. R. 1931 Rang. 283; 61 M. L. J. 456 (P. C.); A. I. R. 1931 P. C. 173=131 Ind. Cas. 781=14 O. L. J. 357; see also 35 L. W. 206=139 Ind. Cas. 54=A. I. R. 1932 M. 279; 32 P. L. R. 833=A. I. R. 1932 Lah. 121.

Where an appeal was dismissed and a cross-objection was allowed with the result that the decree was varied, held an appeal to Privy Council by a person whose appeal was dismissed will lie as a matter of right. (1931) A. L. J. 968=54 A. 146=135 Ind. Cas. 234=A. I. R. 1932 All. 65. But this rule is not applicable in case of cross appeals. A. I. R. 1935 All. 374=1935 P. L. J. 352 (F. B.). Separate appeals which are filed in the High Court are separately numbered and ordinarily separate decrees are passed and prepared. In such cases it may not be possible to show that although the appeal has been dismissed the decision of the Court below has not been affirmed by the decree passed in that decree. 54 A. 146=(1931) A. L. J. 968=135 Ind. Cas. 234=A. I. R. 1932 All. 65 (F. B.). This section merely says "affirm the decision of the Court" and does not say "affirms the decision of the decree on merits". An order rejecting an appeal for failure to furnish security for costs is an order affirming the decision of the Court below within the meaning of this section. 54 All. 390=140 Ind. Cas. 125=1932 A. L. J. 254=A. I. R. 1932 All. 312. Where in a suit for account a decree is not entirely affirmed, it is not affirming the decree. A. I. R. 1932 Mad. 46=25 L. W. 206=139 Ind. Cas. 54; see also 28 N. L. R. 142=A. I. R. 1933 Nag. 118=140 Ind. Cas. 68.

Where a decree is affirmed on different grounds, still it is an affirming judgment. A. I. R. 1933 Pat. 703 (S. B.)=146 Ind. Cas. 744. Costs are matter of discretion and a variation in this matter alone does not affect the question whether the judgment of the High Court is or is not one of affirmance. A. I. R. 1933 Pat. 703 (S. B.). The question whether the judgment of the High Court is a judgment of affirmance or not does not depend upon whether the appellant is the plaintiff or defendant. 144 Ind. Cas. 320=A. I. R. 1933 Pat. 262.

**Substantial question of law.**—The words "substantial question of law" in s. 110 do not mean any alleged question of law good, bad or indifferent. 13 Rang. 744. In partition suits, the question of valuation itself is of sufficient importance. A. I. R. 1935 Pat. 266=16 Pat. L. T. 279. A substantial question of law does not mean a substantial question of general importance but a substantial question of law as between the parties in the case involved. A. I. R. 1930 Bom. 509=32 Bom. L. R. 1189=128 Ind. Cas. 622; A. I. R. 1928 P. C. 172=55 C. 941=55 I. A. 235=32 C. W. N. 817=29 P. L. R. 429=48 C. L. J. 119=26 A. L. J. 1215=55 M. L. J. 651=30 Bom. L. R. 1384=5 O. W. N. 668=109 Ind. Cas. 723; A. I. R. 1928 Nag. 114=106 Ind. Cas. 531; A. I. R. 1928 Nag. 76=23 N. L. R. 156=106 Ind. Cas. 366; A. I. R. 1927 P. C. 110=2 Luck. 93=54 I. A. 126=31 C. W. N. 495=102 Ind. Cas. 889 (P. C.); see also 10 O. W. N. 87=147 Ind. Cas. 121. A question of law is not said to be involved in an appeal under s. 110 if it need not be decided for disposal of appeal or if such question may arise in certain contingencies. The word 'involved'

implies a considerable degree of necessity. 19 O. C. 131=36 Ind. Cas. 807; see also 41 Ind. Cas. 781=129 P. W. R. 1917=133 Pat. L. R. 1923 Mad. 30=30 M. L. T. 337; A. I. R. 1921 Oudh 30=8 O. L. J. 1=61 Ind. Cas. 131. Substantial questions of law are those that affect a large number of persons. A. I. R. 1923 Nag. 272=73 Ind. Cas. 221; A. I. R. 1928 All. 19=103 Ind. Cas. 654; A. I. R. 1923 Mad. 443=17 L. W. 445=72 Ind. Cas. 918. Construction of particular documents ordinarily cannot be treated as a question of general importance or a substantial question of law. A. I. R. 1922 Oudh 214=73 Ind. Cas. 407; 40 Ind. Cas. 182; A. I. R. 1925 Oudh 219=83 Ind. Cas. 90. But the interpretation of a document may amount to a substantial question of law, but that will depend on the circumstances of each particular document. A. I. R. 1934 Oudh 433=11 O. W. N. 1055=151 Ind. Cas. 307. The question that Sub-Judge has no jurisdiction to go behind the order of the sale-officer and that the order of the sale-officer cannot be questioned by the Civil Court in execution proceedings is not a substantial question of law. A. I. R. 1934 Oudh 299=11 O. W. N. 577. Whether the rule of constructive *res judicata* is applicable in a case is not a substantial question of law. 157 Ind. Cas. 605=61 C. L. J. 69. Where in the beginning the plaintiff had made certain allegations which at a subsequent stage of the trial changed and the High Court found that the new facts alleged by him were the correct facts and having found them true decreed the plaintiff's suit: *Held* this is not a substantial question of law. A. I. R. 1935 Lah. 91=157 Ind. Cas. 1024. Where the decision regarding the title to certain property is contained in a decision to which the petitioner was a party but the petitioner seeks to show that no decision was given in respect of his title, this is not a question of law but is a question of the interpretation of that decision. A. I. R. 1937 Pesh. 61. Where the applicants applied for leave to appeal to His Majesty in Council, challenging the act of executive Government of U. P. of Agra and Oudh in taking the estate of applicants under management and superintendence of Court of Wards, and such matter was settled by statute contained in U. P. Court of Wards Act: *Held* that the application did not involve a substantial question of law within s. 110 and so leave could not be granted. A. I. R. 1937 Oudh 132. Where the only question of law raised by the application for leave to appeal to Privy Council, is concluded by a decision of the Privy Council or a long series of decisions there is no substantial question of law involved, and leave should not be granted. A. I. R. 1931 Rang. 283=133 Ind. Cas. 494=9 Rang. 360; 51 C. L. J. 270=A. I. R. 1931 Cal. 174=126 Ind. Cas. 719; 132 Ind. Cas. 2; 32 P. L. R. 599=A. I. R. 1931 Lah. 753=134 Ind. Cas. 790. A point of law to be substantial should be such as to impress the Judges that it is debatable in view of the authorities or that the authorities themselves may require reconsideration. A. I. R. 1933 Pat. 703 (S. B.)=146 Ind. Cas. 744. The words "substantial question of law" in the last clause of section 110, C. P. Code mean a substantial question of law as between the parties in the case involved and not a question of general importance. A. I. R. 1933 Oudh 409=10 O. W. N. 879; see also 14 Lah. 609=34 P. L. R. 946=A. I. R. 1933 Lah. 690; A. I. R. 1933 Mad. 221=142 Ind. Cas. 771. A point decided by uniform course of decisions cannot be a substantial question of law. A. I. R. 1933 Lah. 1044. In considering whether a *wakf* is illusory or not the construction of a document involves a substantial question of law. 145 Ind. Cas. 549=1933 A. L. J. 172=A. I. R. 1933 All. 461.

Where the decree of the High Court is one of affirmation except as regards a variation made in the lower Court's decree with the consent of the person trying to appeal to the Privy Council, those persons have to show that a substantial question of law is involved. A. I. R. 1921 Cal. 81=25 C. W. N. 775=66 Ind. Cas. 621; see also A. I. R. 1921 Cal. 94=33 C. L. J. 131=62 Ind. Cas. 205; A. I. R. 1924 Pat. 468=5 P. L. T. 17=75 Ind. Cas. 58; A. I. R. 1924 All. 66=45 A. 667=21 A. L. J. 665=75 Ind. Cas. 100; A. I. R. 1926 Nag. 5=89 Ind. Cas. 941; A. I. R. 1926 Oudh 17=2 O. W. N. 860=91 Ind. Cas. 93; A. I. R. 1927 Cal. 543=45 C. L. J. 426=31 C. W. N. 572=103 Ind. Cas. 65; A. I. R. 1929 Oudh 53=5 O. W. N. 1076=114 Ind. Cas. 320; A. I. R. 1929 Bom. 341=53 B. 552=31 Bom. L. R. 632=119 Ind. Cas. 782; A. I. R. 1929 Bom. 359=31 Bom. L. R. 619=119 Ind. Cas. 771; A. I. R. 1930 Lah. 554=31 P. L. R. 236=123 Ind. Cas. 523; A. I. R. 1928 All. 280=50 A. 640=26 A. L. J. 336=108 Ind. Cas. 238; A. I. R. 1927 Mad. 413=53 M. L. J. 375=103 Ind. Cas. 3; 10 L. B. R. 307=62 Ind. Cas. 71; A. I. R. 1929 Nag. 85=110 Ind. Cas. 855.

Where authoritative decisions of the Privy Council exist on a matter that matter does not remain a substantial question of law. A. I. R. 1926 Oudh 381 (F. B.)=1

Luck. 265=29 O. C. 215=3 O. W. N. 557=95 Ind. Cas. 193. A substantial question of law is a question of law in respect of which there may be a difference of opinion. 26 P. L. R. 614=92 Ind. Cas. 479; A. I. R. 1929 Lah. 55=9 Lah. 581=29 P. L. R. 529; A. I. R. 1924 Lah. 473=78 Ind. Cas. 417; A. I. R. 1926 Nag. 215=90 Ind. Cas. 270. Particular law point is not laid down by Privy Council. It is still material question of law though cases involving somewhat similar point has been dealt with by the Privy Council. A. I. R. 1929 Rang. 280=7 Rang. 271=119 Ind. Cas. 218. Question of appeal to Privy Council from interlocutory order passed by High Court does not arise till the suit is finally decided. A. I. R. 1934 Lah. 26=35 P. L. R. 347=148 Ind. Cas. 54.

Whether the inheritance of the cash allowances known comprehensively in Berar as *lawajana* is governed by the *Inam* Rules or by the law relating to ordinary pensions, is a question of considerable public importance. A. I. R. 1927 Nag. 63=96 Ind. Cas. 751. The application of well-defined legal principles to a particular set of facts is not a substantial question of law. A. I. R. 1928 All. 61=50 A. 208=25 A. L. J. 970=107 Ind. Cas. 33; see also A. I. R. 1928 Nag. 76=23 N. L. R. 156=106 Ind. Cas. 366. The Court can grant or refuse to grant time for making up deficit Court-fee, and whether a Court has used proper discretion in a particular case is a substantial question of law. 63 Ind. Cas. 222. Construction of an indemnity bond is a mixed question of law and fact; and as regards the law it is a substantial question. A. I. R. 1927 Mad. 443=(1927) M. W. N. 213=53 M. L. J. 375=39 M. L. T. 15=103 Ind. Cas. 31; see also A. I. R. 1929 Pat. 561=117 Ind. Cas. 193. Point not directly decided by any Courts in India, but well established upon principles laid down in such cases, is not a substantial question of law. A. I. R. 1928 Pat. 581=110 Ind. Cas. 483; see also A. I. R. 1927 Rang. 288. Where reasonable discretion has been used in granting a decree for specific performance, the right of such discretion involves a substantial question of law and satisfy the requirements of s. 110. A. I. R. 1928 Nag. 232=112 Ind. Cas. 430=114 Ind. Cas. 28. Whether the law of pre-emption applies to estate part of which is movable property is a substantial question of law. A. I. R. 1928 Rang. 132=6 Rang. 169=110 Ind. Cas. 386. Applicability of Limitation Act to suits by minors against administrators for account is a substantial question of law. 45 Ind. Cas. 182. Where the point is not of general importance, a certificate for leave to appeal to Privy Council should not be granted. 54 Ind. Cas. 463; 56 Ind. Cas. 526. Question of procedure disallowing a new plea in second appeal is not a substantial question of law and a certificate should not be granted in such a case. A. I. R. 1923 All. 463=76 Ind. Cas. 516. Leave should be granted where the interpretation of documents involves a substantial question of law. A. I. R. 1924 All. 559=46 A. 227=79 Ind. Cas. 213. Refusal to grant leave under cl. 12 of the Letters Patent to file an additional written statement is not a substantial question of law. A. I. R. 1922 Bom. 11=24 Bom. L. R. 196=77 Ind. Cas. 941. Where the trial Court in its discretion, refuses to extend the time for putting in Court-fees, it can hardly be said that the question is a substantial question of law arising between the parties to the case. It is more a question between the Court and the plaintiff. A. I. R. 1928 Lah. 560=110 Ind. Cas. 179. Whether certain documents executed by a Hindu widow were binding on the estate and the reversioner is not a substantial question of law. A. I. R. 1928 All. 19=103 Ind. Cas. 654.

The principle that although the point of law may be obviously untenable, if the decision in the case turns upon it, that point would be a substantial point of law, is not tenable. A. I. R. 1928 Mad. 233=39 M. L. T. 655=107 Ind. Cas. 643. Whether mistakes, which though not material, are sufficient to entitle the Court to reopen a settled account, is a question of law. A. I. R. 1927 Pat. 311=102 Ind. Cas. 752. Where it is not clear from the record whether presumptions by several strangers were for exactly the same grounds as those in the suit, the case does not involve questions of wide public importance. A. I. R. 1923 Cal. 451=27 C. W. N. 204=84 Ind. Cas. 581. Whether a Hindu widow *qua* executrix can compromise is not a substantial question of law. A. I. R. 1926 Cal. 711=43 C. L. J. 266. Whether the legatee signing the Will as witness did not sign to attest the Will does not amount to a substantial question of law. A. I. R. 1925 Oudh 541=2 O. W. N. 394=88 Ind. Cas. 579. The revival after 1871 of a claim barred by limitation before 1871 is not a substantial question of law. A. I. R. 1924 Pat. 271=1 Pat. L. R. 314=85 Ind. Cas. 8. Where the grounds of appeal raise questions of law which are not substantial in the sense that they are debatable, of general interest or without previous decisions of their Lordships of the Privy Council to guide Indian Courts, leave cannot be

granted. A. I. R. 1935 Oudh 545=85 Ind. Cas. 409. Substantial does not mean important. A substantial question of law is one on which there may be a difference of opinion. Where the question is one of the application of the law to the facts of the case, the case does not comply with the requirements of s. 110. 33 P. L. R. 299=132 Ind. Cas. 2=A. I. R. 1932 Lah. 56; see also A. I. R. 1932 Oudh 134=9 O. W. N. 103=138 Ind. Cas. 630; 1932 A. L. J. 730=138 Ind. Cas. 670; 32 P. L. R. 599=A. I. R. 1931 Lah. 753.

**When leave can be granted.**—A person in contempt cannot be heard in prosecution of his own appeal until he purges his contempt, and his appeal, as it is not proper to keep the other party before the Court for an indefinite period, can be dismissed. A petition, therefore, for leave to appeal to Privy Council against such dismissal cannot be maintained. A. I. R. 1929 Mad. 672=(1928) M. W. N. 462=117 Ind. Cas. 724. High Court cannot grant leave to appeal to Privy Council in *forma pauperis* especially when the petition for leave is on behalf of a whole community. 115 Ind. Cas. 832; see also 44 Ind. Cas. 781; 47 Ind. Cas. 646=42 M. 32. Leave cannot be granted if the appellant takes up a new position while appealing to Privy Council. 2 U. P. L. R. (A) 402=58 Ind. Cas. 179. Certificates should make plain upon their face that the discretion has in fact been exercised. A. I. R. 1921 P. C. 128=2 P. L. T. 132=29 M. L. T. 156=13 L. W. 365=62 Ind. Cas. 320. Leave cannot be granted where the applicant's appeal to the High Court is dismissed for want of prosecution. A. I. R. 1926 Rang. 111=3 Reng 656=94 Ind. Cas. 464. No leave to appeal to Privy Council can be granted against an order suspending a vakil from practice, which is disciplinary matter and not a judgment. A. I. R. 1922 Mad. 440=43 M. L. J. 382=31 M. L. T. 173=69 Ind. Cas. 290. If an affidavit that the decree involves a claim respecting property exceeding ten thousand rupees in value, is filed and there is no counter affidavit the High Court may assume that the petitioner's affidavit is correct. A. I. R. 1926 Lah. 416=26 P. L. R. 123=94 Ind. Cas. 554. A defendant having no interest in the prosecution of the suit and leaving it entirely to his co-defendant cannot separately prefer an appeal to His Majesty in Council. A. I. R. 1921 Pat. 129=2 P. L. T. 173=60 Ind. Cas. 500. Where special leave to appeal is granted on *ex parte* application the Board is not precluded from going into question of competency on appeal of facts being known. A. I. R. 1931 P. C. 22=12 P. L. T. 1=35 C. W. N. 33=32 Bom. L. R. 1576=59 N.L.J. 444=57 I. A. 279=130 Ind. Cas. 612 (P. C.). Where a party transfers his interest in subject-matter of a suit, leave cannot be granted unless a substantial point of law has been involved. A. I. R. 1926 Rang. 111=3 Rang. 656=94 Ind. Cas. 464. Where there is nothing on record to sustain the contention that the value of the subject-matter of the suit in the Court of first instance or of the projected appeal to the Privy Council was worth Rs. 10,000 or upwards a certificate for leave to appeal cannot be granted as a matter of right. A. I. R. 1933 All. 4=143 Ind. Cas. 312=54 A. 459. But where the decree involves property of Rs. 10,000 or upwards, leave can be properly given. A. I. R. 1933 Oudh 397=10 O. W. N. 880.

111. [S. 597.] Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—

Bar of certain appeals.

(a) from the decree or order of one Judge of a High Court [constituted by His Majesty by Letters Patent]\* or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or

(b) from any decree from which under section 102 no second appeal lies.

**Amendments in Burma.**—In Burma substitute the words "the High Court" for the words "a High Court" and for "such High Court"—*Vide* G. B. Order of 1937.

**Scope.**—This section is applicable to a single Judge of a High Court established under the Charter Act, 1861. 127 P. W. R. 1917=131 P. L. R. 1917=42 Ind. Cas. 893. No appeal lies to Privy Council from decree or order of High Court Judge. A. I. R. 1924 Mad. 399=46 M. 958=46 M. L. J. 117=75 Ind. Cas. 604. No appeal lies to the Privy Council under this section against order passed by a single Judge

\* The words within square brackets have been substituted by G. I. Order of 1937.



of the High Court either in appeal or on revisional application. 33 Bom. L. R. 1106 = A. I. R. (1931) Bom. 503 ; see also 56 C. 512 ; 46 M. 938. Oudh Chief Court is not High Court within the meaning of this section. A. I. R. 1932 Oudh 163. The prohibition in s. 111 is unconditional. Where therefore the decision sought to be appealed from is a decision of a single Judge of the High Court, leave to appeal from it to the Division Bench having been rejected, an appeal to His Majesty in Council is prohibited by s. 111. A. I. R. 1936 Pat. 106 = 17 Pat. L. T. 173 = 150 Ind. Cas. 150.

**111A.** Where a certificate has been given under section 205 (1) of the Government of India Act, 1935, the three last preceding sections shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council, and accordingly references to His Majesty shall be construed as references to the Federal Court :

Provided that—

(a) so much of the said sections as delimits the cases in which an appeal will lie shall be construed as delimiting the cases in which an appeal will lie without the leave of the Federal Court otherwise than on the ground that a substantial question of law as to the interpretation of the said Act, or any order in Council made thereunder, has been wrongly decided ;

(b) in determining under clause (c) of section 109 whether the case is a fit one for appeal, and, under section 110, whether the appeal involves a substantial question of law, any question of law as to the interpretation of the said Act, or any order in Council made thereunder, shall be left out of account

**Application in Burma.**—This section which has been inserted by G. I. Order is not applicable in British Burma. \*

**Section 205 (1).**—An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

**112. [S. 616.]** (1) Nothing contained in this Code shall be deemed—

(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee. \*

(2) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

**Privy Council Rules.**—*Vide* A. I. R. 1931 Bom. 278 = 132 Ind. Cas. 438 = A. I. R. 1931 Bom. 278.

## PART VIII.

### REFERENCE, REVIEW AND REVISION.

**113. [S. 617.]** Subject to such conditions and limitations as may be prescribed, any Court may state a case and refer the same for the opinion of the High Court, and the High Court may make such order thereon as it thinks fit.

\* Inserted by G. I. Order.

**Scope.**—The High Court can entertain a reference under this section where there is a suit or appeal before the Court making the reference, in which the decree is final. 16 C. P. L. R. 17 ; see also 7 A. 815=A. W.N. 1885, 245. A Court is not competent to make a reference to the High Court under this section in a case in which the decree of the Court would not be final. 5 Ind. Cas. 584. A reference under this section must distinctly set out the legal point or points in the case, as to the decision of which the Judge entertain a reasonable doubt. 93 P. L. R. 1902. There is no analogy between a reference and an appeal. An appeal is made by an aggrieved party where as a reference is made not by a party but by a Court. The decision of the subject-matter of appeal is by the Court entertaining the appeal whereas the decision of the matter about which a reference is made is not necessarily by the Court deciding the reference. 1932 A. L. J. 816=140 Ind. Cas. 123=A. I. R. 1932 All. 651=A. L. R. 1932 All. 1083. Reference made by a Deputy Commissioner as to the legality of actions of Subordinate Judge in issuing a temporary injunction is not a "reference made by a Court" within the meaning of the Code. A. I. R. 1928 Oudh 485=5 O. W. N. 891=113 Ind. Cas. 800. A reference can be allowed where it is doubtful, if Court had any reasonable doubt, but where the parties do not object to the reference being made. 76 Ind. Cas. 519=A. I. R. 1923 Rang. 193=76 Ind. Cas. 519 ; see also 61 P. R. 1913=123 P. L. R. 1913 ; 8 P. R. 1914. The Collector while hearing an application under s. 23 of the Bombay Mamlatdar Courts Act is not competent to make a reference under this section because he cannot be called a Court trying a suit or appeal or executing a decree. 14 Ind. Cas. 782. The High Court of Allahabad is not competent to entertain an application of reference from the State Court of Benares. 47 A. 322=86 Ind. Cas. 23.

#### Review.

114. [S. 622.] Subject as aforesaid, any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed by this Code, or

(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit.

**Scope.**—This section has to be read with Order 47, rule 1, Sch. I of the Code, in as much as the Code provides that the rules in Sch. I shall have effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions of the Code. A. I. R. 1934 P. C. 213=151 Ind. Cas. 41=11 O. W. N. 1084=40 L. W. 383=1934 A. L. J. 918=1934 M. W. N. 1005=36 P. L. R. 305=39 C. W. N. 1=60 C. L. J. 267=36 Bom. L. R. 1179=15 Pat. L. T. 763=67 M. L. J. 608 (P. C.). An application for review of judgment passed by a Bench hearing an appeal from the decision of a single Judge would not lie. A. I. R. 1931 All. 244=1931 A. L. J. 187 (F. B.)=132 Ind. Cas. 24. A lower Court should not review its former order merely on the ground that a ruling of the High Court has not been brought to its notice on the previous occasion. A. I. R. 1931 Cal. 91. The decree, in review, is a new decree superseding the original one and, therefore no appeal lies from the decree originally passed. A. I. R. 1928 Cal. 418=107 Ind. Cas. 751. Section 114 and order 47 apply to an application for review of a decree in any appeal under Letters Patent. A. I. R. 1927 Bom. 232=29 Bom. L. R. 371=101 Ind. Cas. 766. High Court cannot disregard the express provisions of the Code and entertain an application for review to His Majesty in Council but is dismissed for want of prosecution. A. I. R. 1927 Bom. 232=29 Bom. L. R. 371=101 Ind. Cas. 766. The powers of review can be exercised by a Court dealing with a continuous matter in proceedings for the grant of Letters of Administration. A. I. R. 1925 Rang. 314=3 Rang. 261=91 Ind. Cas. 509. Generally an order rejecting an application for review is not open to revision. A. I. R. 1924 Lah. 400=71 Ind. Cas. 160. Where the Privy Council reversed the decree of the High Court, it is no ground for review of the judgment passed prior to the decision of the Privy Council. This section does not authorise the review of a decree which was right when it was made on the ground of happening of some subsequent event. A. I. R. 1922 Mad. 227=(1922) M. W. N. 304=15 L. W. 593=43 M. L. J. 33=31 M. L. J. 473=70 Ind. Cas. 741.

There is no provision in the Letters Patent appeal from review which must be expressly conferred. (1931) A. L. J. 187=A. I. R. 1931 A. 244=132 Ind. Cas. 24 (F. B.) ; see also A. I. R. (1931) Pat. 409=12 P. L. T. 652=134 Ind. Cas. 630. It is a wrong procedure for a lower Court to review its former order merely on the ground that a ruling of the High Court had not been brought to its notice on the previous occasion. 132 Ind. Cas. 815=1931 A. L. J. 889=A. I. R. 1931 All. 91. The Revenue Court has no power to review a judgment. 138 Ind. Cas. 465=A. I. R. 1932 All. 293=1932 A. L. J. 437 (F. B.).

A review proceeding commences ordinarily with an *ex parte* application. The Court then may either reject the application at once or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the rule may either be admitted or discharged, and the hearing of this rule may involve to some extent an investigation into the merits. If the rule is discharged then the case ends. If on the other hand, the rule is made absolute, then the third stage is reached ; the case is reheard on the merits and may result in a repetition of the former decree or in some variation of it. Though in one aspect, the result is the same whether the rule is discharged or on the re-hearing the original decree be repeated in law, there is a material difference ; for in the latter case, the whole matter having been re-opened, there is a fresh decree ; in the former case, the parties are relegated to and still rest on the old decree. 55 M. 871=139 Ind. Cas. 436=1932 M. W. N. 1124=36 L. W. 242=A. I. R. 1932 Mad. 669=63 M. L. J. 357. An obvious and patent error of law might be a good ground for a review, but where there is no such blunder no review lies. 146 Ind. Cas. 946=A. I. R. 1933 Rang. 85.

115. [S. 622.] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

**Amendment in Burma.**—For “such High Court” substitute “the High Court”—*Vide* G. B. Order of 1937.

**Scope.**—“The 115th section of the Civil Procedure Code enables the High Court, in a case in which no appeal lies, to call for the record of any case if the Court by which the case was decided appears to have acted in the exercise of a jurisdiction not vested in it by law, or to have failed to have exercised a jurisdiction vested in it, or to have exercised its jurisdiction illegally or material irregularity, and further enables to pass such order in the case as the Court may think fit. It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise of it or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not “involved”. *Per Lord Atkins in Balkishna v. Vasudeva*, 40 Ind. Cas. 650=15 A. L. J. 645=2 P. L. W. 101=33 M. L. J. 69=26 C. L. J. 143=19 Bom. L. R. 715=40 M. 793 (P. C.) ; see also A. I. R. 1930 Lah. 468=127 Ind. Cas. 159 ; A. I. R. 1930 All. 158= (1929) A. L. J. 1157=124 Ind. Cas. 478 ; A. I. R. 1929 Nag. 317=120 Ind. Cas. 401, 115 Ind. Cas. 176 ; A. I. R. 1929 Rang. 21=6 Rang. 667=114 Ind. Cas. 543 ; A. I. R. 1924 Sind 49=75 Ind. Cas. 1041 ; A. I. R. 1923 Lah. 506=75 Ind. Cas. 437 ; A. I. R. 1923 All. 392=21 A. L. J. 313=45 A. 425=74 Ind. Cas. 778 ; 20 C. W. N. 1080=1 P. L. J. 465=3 P. L. W. 55=37 Ind. Cas. 129. This section ought to receive a liberal interpretation. 40 B. 86=17 Bom. L. R. 1097=33 Ind. Cas. 358 ; 13 N. L. R. 203=42 Ind. Cas. 746. The section must be read as a whole. A. I. R. 1921 U. B. 27=4 U. B. R. 16=63 Ind. Cas. 838. So long as a Court has jurisdiction to determine a question even if a wrong decision is come to, the High Court will not interfere in revision especially where substantial justice has been done. 73 Ind. Cas. 873. Where no appeal lies the remedy is by way of revision. A. I. R. 1929 Oudh 389=6 O. W. N. 661=4 Luck. 539=119 Ind. Cas. 357 (F. B.). In the exercise of the powers of superintendence, the High Court may order the District Judge to do which he was bound to do, *e. g.*, direct him to hear a petition which he

has thrown out on the erroneous view that the petition had no *locus standi* under the law to make it. 39 C. W. N. 971. The High Court cannot under s. 115, Civil Procedure Code, interfere with the orders of the Courts below on the ground that the findings of facts are perverse or the view of law is erroneous. A. I. R. 1937 Pat. 357. Even if it be held that upon a strict construction of s. 115, C. P. Code, the High Court is precluded from interfering in revision with an order refusing to amend a decree, it is still open to it to interfere under s. 151. A. I. R. 1937 Oudh 246. The High Court has power, under section 115, C. P. Code to interfere with an order by which the lower Court has given a person the benefit of a contract to which it has found that person not to have been a party *e. g.*, a decree for rent in favour of the landlord against a person who is found not to be his tenant but to have been inducted by the tenant under an agreement to pay the rent to the landlord. There must be some limit to the principle that the Court has jurisdiction to decide wrongly as well as rightly. 41 C. W. N. 601. No revision lies where the lower Court undoubtedly has jurisdiction to decide the question. A. I. R. 1936 Nag. 280. Revision cannot be allowed unless party has fully utilised its right of appeal. A. I. R. 1930 All. 604=(1930) A. L. J. 924=126 Ind. Cas. 832. An appeal and an application for revision are quite different. Right of appeal is a substantive right created by statute and the powers of the Court of appeal are contemporaneous with those exercised by the Court of original jurisdiction. Even when the appeal is dismissed, the appellate Court exercises its jurisdiction. Not so with revisional jurisdiction as of right. Where a High Court dismisses an application for revision it merely abstains from exercising the jurisdiction and allows the subordinate Courts' order to stand. A. I. R. 1931 Nag. 17=130 Ind. Cas. 145. Revisional Court is not a Court of appeal and every decision on a point of law or fact cannot be corrected by the High Court in its revisional jurisdiction. A. I. R. 1929 All. 593=(1929) A. L. J. 769=51 A. 910=119 Ind. Cas. 103. The exercise of revisional power is entirely discretionary. 54 C. L. J. 253=36 C. W. N. 16; 55 C. 1084=113 Ind. Cas. 833. Wrong exercise of jurisdiction is no ground for interference. A. I. R. 1922 Mad. 3=41 M. L. J. 378=64 Ind. Cas. 493. Dismissing stay of execution on sole ground of delay is irregularity and revision lies. A. I. R. 1925 Cal. 254=82 Ind. Cas. 435. Where rule was wrongly interpreted in the exercise of jurisdiction, order is revisable. A. I. R. 1925 Mad. 1201=48 M. 676=49 M. L. J. 366=22 L. W. 606=92 Ind. Cas. 300. Where the Legislature states that the decision of a particular Court shall be final such decision is open to revision. A. I. R. 1924 Mad. 561=47 M. 369=46 M. L. J. 201=19 L. W. 402=34 M. L. T. 50=78 Ind. Cas. 98.

Where the Court deciding a suit has jurisdiction a wrong decision is no ground for revision. 120 P. W. R. 1018=46 Ind. Cas. 289. Decision of Court under Order 21, rule 89 regarding *locus standi* of a judgment-debtor to apply for setting aside the sale cannot be revised. A. I. R. 1923 All. 392=21 A. L. J. 313=45 A. 425=74 Ind. Cas. 778. An order based upon acceptance or rejection of any piece of evidence is not revisable. A. I. R. 1924 Pat. 816=76 Ind. Cas. 60. A mistaken view as to what does or does not constitute misconduct in an arbitrator is not ground of revision. 13 S. L. R. 98=52 Ind. Cas. 864. An order fixing a fair and equitable rent under s. 105, B. T. Act by a Court having jurisdiction under that section is not open to revision, on the ground that the rent fixed is not fair or equitable. 53 Ind. Cas. 411. Conditional order for adjournment cannot be interfered in revision. A. I. R. 1924 Pat. 529=1 Pat. L. R. 270=84 Ind. Cas. 1013. Order of returning appeal for proper presentation cannot be interfered in revision. A. I. R. 1925 Pat. 488=6 P. L. T. 448=90 Ind. Cas. 321=(1925) Pat. 167. If a Court has jurisdiction to decide the matter before it the High Court will not interfere with its order however wrong it may be on facts or law. A. I. R. 1930 Nag. 136=120 Ind. Cas. 332; see also A. I. R. 1929 Oudh 26=5 O. W. N. 873=4 Luck. 93=115 Ind. Cas. 105; A. I. R. 1930 All. 122=1930 A. L. J. 464=121 Ind. Cas. 545; 49 M. L. J. 381=90 Ind. Cas. 771.

A Court can construe its own order and the High Court would not interfere if there is no irregularity. A. I. R. 1925 Pat. 318=3 Pat. L. R. 100=6 P. L. T. 481=96 Ind. Cas. 107.

Decision based on error of law and on misunderstood and inadmissible evidence does not involve any question of jurisdiction and no revision lies against it. (1918) Pat. 347=48 Ind. Cas. 930; 31 Ind. Cas. 209; 51 Ind. Cas. 873=4 P. L. J. 340. A person who applies for revision, relying upon want of jurisdiction must substantiate the plea by affidavit or production of record. 1 U. P. L. R. (H. C.) 18=52 Ind. Cas. 32. Where the right of appeal is barred, if the order of the

Court below involves a question of jurisdiction, the High Court will interfere in revision. 4 Pat. L. J. 57=49 Ind. Cas. 442. Order of a Court trying a suit without jurisdiction but without objection by any party is not open to revision. A. I. R. 1924 Nag. 17=19 N. L. R. 179=75 Ind. Cas. 769. Fresh objection regarding jurisdiction cannot be raised. A. I. R. 1927 Cal. 338=45 C. L. J. 218=101 Ind. Cas. 688. Although objection as to jurisdiction is taken in lower Court at a late stage in the proceedings, it ought to be entertained in revision. There can be no estoppel as to the question of jurisdiction by conduct of parties. But delay can be taken into account in awarding costs. A. I. R. 1930 All. 873=1930 A. L. J. 997=52 A. 947=132 Ind. Cas. 35.

Revisional Courts is not a Court of appeal and every decision on a point of law or fact cannot be corrected by the High Court in its revisional jurisdiction. A. I. R. 1929 All. 593=(1929) A. L. J. 769=51 A. 910=119 Ind. Cas. 103. The refusal to issue a commission for the examination of a witness does not constitute a question in which jurisdiction was involved therefore no revision lies. A. I. R. 1926 Sind 92=23 S. L. R. 403=116 Ind. Cas. 97. Remedy by revision is discretionary and revision may be granted though other remedy is open. 4 N. L. J. 55=63 Ind. Cas. 46. The powers under s. 115 should be interpreted liberally, specially upon the applicant where he has no other remedy. A. I. R. 1921 Sind 80=15 S. L. R. 135=65 Ind. Cas. 37; A. I. R. 1924 Sind 49=75 Ind. Cas. 1041. If appeal is allowed there is no revision but revision is allowed even in presence of other remedies. A. I. R. 1928 All. 588=51 A. 338=(1929) A. L. J. 62=114 Ind. Cas. 741.

Powers under s. 25 of the Provincial Small Cause Courts Act are wider than those under s. 115. L. R. 3 A. 17; see also A. I. R. 1924 Rang. 54=2 Bur. L. J. 154=85 Ind. Cas. 362; A. I. R. 1928 Lah. 274=115 Ind. Cas. 757; A. I. R. 1930 All. 832=(1930) A. L. J. 1090=128 Ind. Cas. 766. Scope of appeal and order is co-extensive. A. I. R. 1927 Mad. 859=103 Ind. Cas. 670. Unappealable order under s. 60 or rule 61 of Order 21 is revisable. A. I. R. 1927 Nag. 286=10 N. L. J. 155=103 Ind. Cas. 12. A Court cannot refuse to exercise its jurisdiction and act at the same moment in the exercise of it with material irregularity. A. I. R. 1926 Cal. 773=53C. 679=30 C. W. N. 570=96 Ind. Cas. 705. High Court can interfere and correct gross and palpable errors of subordinate Courts. A. I. R. 1926 Cal. 530=91 Ind. Cas. 839. Where the decision of the Court is the very basis and foundation of the jurisdiction in its limited sense as distinguished from the powers it has got, held that the case comes within the scope of s. 115. A. I. R. 1924 Pat. 506=75 Ind. Cas. 856=5 P. L. T. 107=83 Ind. Cas. 599. An order purporting to be passed under Order XXIII, rule 1, but made in disregard of the procedure presented therein is irregular exercise of jurisdiction and deserves revision. A. I. R. 1925 Oudh. 291=27 O. C. 231=11 O. L. J. 613=79 Ind. Cas. 1033.

The Court is reluctant to exercise its extraordinary powers of revision unless it is satisfied that either grave injustice or great inconvenience would otherwise be the result. The section is not directed against conclusion of law or fact in which jurisdiction is not involved. It applies to jurisdiction alone the regular exercise or non-exercise of it or the illegal assumption of it. 134 Ind. Cas. 454=1931 A. L. J. 13=A. I. R. 1931 All. 72; see also 8 O. W. N. 999=A. I. R. (1931) Oudh 408; 27 S. L. R. 190=A. I. R. 1933 Sind 329. It is an extraordinary jurisdiction and should be used only in appropriate occasions. Jurisdiction under this section is not to be lightly exercised. 30 S. L. R. 271=A. I. R. 1936 Sind 172; A. I. R. 1934 Pat. 41=146 Ind. Cas. 933; A. I. R. 1934 Pesh. 33=36 P. L. R. 69. A Court, setting aside a sale under section 174 (3) of the Bengal Tenancy Act in the absence of a deposit as contemplated by that provision, without being satisfied that such deposit is unnecessary and without recording reasons therefor, exercises its jurisdiction with material irregularity such as attracts section 115 of the Code of Civil Procedure. 39 C. W. N. 913=62 C. L. J. 308. Where an order withdrawing the complaint is made by the District Judge, the application in revision against that order is governed by s. 115. A. I. R. 1934 Pat. 55=147 Ind. Cas. 535. Where substantial justice has been done the High Court may refuse to interfere. 33 P. L. R. 116=A. I. R. 1932 Lah. 305=138 Ind. Cas. 277; 1932 M. W. N. 72=138 Ind. Cas. 121=A. I. R. 1932 Mad. 223. The interference by the High Court is justified when the view of the lower Court if allowed to prevail would result in confusion and subvert the result of past litigation or would allow the parties to embark on long and expensive litigation. 137 Ind. Cas. 603=34 Bom L. R. 206=A. I. R. 1932 Bom. 210; 54 A. 516=1932 A. L. J. 359=A. I. R. 1932 All. 441. Where the execution application was

time-barred but the executing Court entertained it all the same but the same was thrown out in appeal : *Held* that assuming there was no right of appeal it was not a fit case for interference in revision. 35 C. W. N. 31=A. I. R. 1931 Cal. 435=131 Ind. Cas. 561 ; see also 46 C. L. J. 172. Where the dismissal of the mortgage suit after preliminary decree in abuse of the process of the Court, it can be rectified in revision. 8 Luck. 496 ; 10 O. W. N. 293. In the absence of question of jurisdiction no ground for interference in revision under s. 115 of the C. P. Code exists. 8 O. W. N. 1235 ; see also 27 N. L. R. 251=A. I. R. 1931 Nag. 17=130 Ind. Cas. 145. The powers under s. 115 can be exercised to subserve the ends of justice and to prevent the denial of justice. A. I. R. 1933 All. 154=144 Ind. Cas. 904 ; see also 35 Bom. L. R. 388=A. I. R. 1933 Bom. 245 ; A. I. R. 1933 Rang. 64=144 Ind. Cas. 163=11 Rang. 134. A wrong order passed with jurisdiction can be revised. 146 Ind. Cas. 258=A. I. R. 1933 Lah. 327. An order passed under Order 9, rule 9, even though made without jurisdiction is not subject to interference by the High Court in revision. 143 Ind. Cas. 222=A. I. R. 1933 Oudh 331. An erroneous decision as regards *res judicata* can not be interfered in revision. 32 P. L. R. 130. The mere fact that the decision of the lower Court is erroneous is no ground for a revision. 8 O. W. N. 1235=12 L. R. 380 (Rev.) ; see also A. I. R. 1931 Rang. 111=132 Ind. Cas. 832.

**Power of High Court to revise.**—The powers of the High Court under s. 115 are strictly limited to those matters mentioned therein. 35 C. W. N. 775=134 Ind. Cas. 1063=A. I. R. 1931 Cal. 604. Where no appeal is possible to High Court it has jurisdiction in a fit case to deal with the matter under s. 115 even without an application on that behalf. 23 C. L. J. 235=31 Ind. Cas. 812 ; A. I. R. 1922 Pat. 525=1 Pat. 232=3 P. L. T. 445=65 Ind. Cas. 122. In exercising its powers under s. 115 of the Code the High Court has power to make such order as the justice of the case requires. 42 A. 18=17 A. L. J. 868=52 Ind. Cas. 263. The civil revisional jurisdiction is in reality an aspect of the civil appellate jurisdiction. 20 C. W. N. 1071=17 C. L. J. 339=43 C. 1143=35 Ind. Cas. 515. Powers of revision should be exercised in cases where there would be multiplicity of proceedings unnecessarily but for High Court's interference. 60 M. L. J. 713=132 Ind. Cas. 311. Where an appeal does not lie the High Court can set aside the order of the appellate Court in revision. 55 Ind. Cas. 653. High Court has no power in its revisional jurisdiction to treat an application under Order IX as an application for review under Order XLVII. A. I. R. 1926 Cal. 735=43 C. L. J. 285=94 Ind. Cas. 172. The Chief Court may interfere by revision in appealable cases to avoid irreparable damage or for some other pressing cause. 50 Ind. Cas. 797. Mere technical defect will not justify interference in revision unless some injustice is caused. A. I. R. 1926 Oudh 28=12 O. L. J. 626=2 O. W. N. 543=89 Ind. Cas. 225. High Court will interfere in proper cases in matters of amendments and Court-fees. A. I. R. 1927 Mad. 212=38 M. L. T. 33=98 Ind. Cas. 458. Where the lower Court has decided the case on a totally incorrect and inequitable view and injustice has resulted and a further remand appears to be undesirable it is open to the High Court in revision to go through the record and decide the case on the merits. 32 P. L. R. 710=A. I. R. 1931 Lah. 748. Though the High Court does not interfere in revision except at the request of one of the parties to a suit the powers conferred upon it by s. 115, Civil Procedure Code, are very wide and in fit cases it is open to High Court to interfere even *suo motu* in order to remedy injustice. A. I. R. 1936 Sind 1=160 Ind. Cas. 361 ; see also 15 Pat. 738=A. I. R. 1936 Pat. 591. But the powers of the High Court are limited by s. 115 and all it can do is to determine whether the lower Court examined its jurisdiction with material irregularity. A. I. R. 1936 Nag. 140.

No revision lies on any matter decided under Agra Tenancy Act. A. I. R. 1925 All. 800=87 Ind. Cas. 351 ; but see A. I. R. 1926 All. 113=48 A. 104=23 A. L. J. 965=92 Ind. Cas. 288. Power of decision should not be exercised except in aid of justice. A. I. R. 1925 Pat. 123=80 Ind. Cas. 575. Refusal to hear a party on the merits without just grounds is a ground for interference in revision. A. I. R. 1922 Bom. 207=24 Bom. L. R. 744=47 B. 11=69 Ind. Cas. 169. The High Court cannot in its revisional jurisdiction interfere under s. 115 with an order under s. 36, Legal Practitioners Act. 21 Cr. L. J. 449=13 S. L. R. 212=56 Ind. Cas. 433 ; see also A. I. R. 1923 Mad. 188=16 L. W. 795=23 Cr. L. J. 705=44 M. L. J. 437=69 Ind. Cas. 433. Where the lower Court acts in a way amounting to a denial of justice, High Court can interfere in revision. A. I. R. 1930 Rang. 142=126 Ind. Cas. 655. Revision is not competent from order refusing to make reference. A. I. R. 1923 Bom. 290=47 B. 699=25 Bom. L. R. 392. Orders disallowing or allowing claims to rateable

distribution are not revisable except in very exceptional circumstances. 60 Ind. Cas. 371 (Lah). The High Court can interfere in revision where the lower Court refuses party leave to adduce evidence in guardianship proceedings. A. I. R. 1931 Cal. 59=130 Ind. Cas. 449. The High Court will interfere in revision to prevent multiplicity of proceedings. A. I. R. 1931 Mad. 511=34 L. W. 531=131 Ind. Cas. 14. Where the lower Court has found a different case for the petitioner from that set up by them in their petitions, and allowed their claim, it is an irregularity which justifies interference in revision. 132 Ind. Cas. 301=A. I. R. 1931 Mad. 534. The question whether a Government pleader or a public prosecutor in the mofussil is a salaried officer under Government within the meaning of s. 13 of the Madras Local Board Act of 1900 is a mixed question of fact and law with which the High Court cannot interfere in revision. 54 Mad. 627=130 Ind. Cas. 177=33 L. W. 168=A. I. R. 1931 Mad. 83=63 M. L. J. 191.

Wrong allocation of burden of proof as to certain issues is not revisable. 35 P. L. R. 334. When an order for restitution is based upon inherent powers of Court rather than on terms of s. 144, the section is inapplicable and no appeal lies from such an order. But when the order is one refusing restitution, a revision will lie against the order. A. L. R. 1934 Mad. 330=A. I. R. 1934 M. 320=39 L. W. 574. Omission to give finding on necessary issues is failure to exercise jurisdiction. A. I. R. 1934 Pesh. 33. Decisions that plaintiff was in constructive possession and defendant's refusal to restore possession amounted to trespass are not questions of jurisdiction. A. I. R. 1934 All. 541. The High Court is not bound to exercise jurisdiction under s. 115 except in cases where not doing so will cause grave injustice. 147 Ind. Cas. 226=1932 M. W. N. 1262=36 L. W. 586. A wrong decision on a question of *res judicata* is not a subject for the interference of the High Court. 135 Ind. Cas. 85=33 Bom. L. R. 1596=A. I. R. 1932 Bom. 81.

An application to restore a suit dismissed for default under Order 9, rule 3 would lie. A. L. R. 1934 Pesh. 13=A. I. R. 1934 Pesh. 13. It is so manifestly improper that one party to a suit should be given a commission and the advantage of a report by the Commissioner without knowledge of the opposite party that this alone would be sufficient to justify the interference of a revision Court. 1934 M. W. N. 155. If the trial Court applies its mind to the matter before it with due reference to the provisions of order 23 and gives its decision because it considers that the circumstances of the case do fulfil the requirements of the rule, then it becomes a matter of exercise of the discretion vested in the Court and the High Court will interfere in revision. A. I. R. 1934 All. 137. Where the Court in which a suit was instituted returned the plaint for presentation to the proper Court, held that no revision lay to the High Court against the order of the appellate Court. A. L. R. 1934 Lah. 161. Where there is no question of jurisdiction involved in the case, no revision lies against an order of remand not covered by Order 41, rule 22. A. L. R. 1934 P. 46. Where an order is made without jurisdiction by the first appellate Court, though no second appeal will lie this order will be liable to be set aside by the High Court in revision. A. L. R. 1934 Lah. 55=A. I. R. 1934 Lah. 79. Though s. 115 is inapplicable High Court can interfere if great deal of money can be saved to parties. A. I. R. 1934 Cal. 503. Question of construction of letters cannot be examined in revision. A. I. R. 1934 All. 503. Interlocutory order can be revised by High Court. 50 Ind. Cas. 470. But the High Court cannot in exercising the special powers given by s. 115 enter into the question whether upon the facts a particular order is right or wrong and it is doubtful if it can extend to time fixed by the lower Court for the doing of a particular act. 30 C. L. J. 64=52 Ind. Cas. 4. The powers of High Court under s. 25 of the Small Cause Courts Act are wider than under s. 115. A. I. R. 1921 All. 325=19 A. L. J. 555=63 Ind. Cas. 435. Where the Small Cause Court Judge returned a plaint which had been first presented to, and returned by the Munsiff to be presented before the former, High Court can make such an order as would enable the plaintiff to have his action tried. A. I. R. 1922 Pat. 368=2 P. L. T. 739=64 Ind. Cas. 891. No revision lies to the High Court from an order of remand passed by District Judge as a Court of appeal from the order of Assistant Collector under the Agra Tenancy Act. A. I. R. 1921 All. 236=19 A. L. J. 596=63 Ind. Cas. 891; see also 72 Ind. Cas. 1023=A. I. R. 1924 Oudh 16=10 O. L. J. 191. An improper order of the District Court refusing payment of money to the guardian of the person of a minor can be set aside in revision. 41 Ind. Cas. 240.\* So long as a subordinate Court has arrived at a finding based on evidence before it, the High Court will not interfere in revision under s. 115. 34 Ind. Cas. 521. It is the privilege and prerogative of the High Court when once a record is brought

before it which is so erroneous as manifestly to amount to an injustice, to exercise its powers of superintendence to revise such order or set it aside and direct such further proceedings to be taken as justice may require. A. I. R. 1920 Pat. 56=1 P. L. T. 467=56 Ind. Cas. 155. Putting the plaintiff to election regarding two causes of action joined in his plaint can be revised. A. I. R. 1922 Mad. 436=16 L. W. 175=(1922) M. W. N. 453=43 M. L. J. 218=69 Ind. Cas. 966.

Wrong procedure is no ground for revision where substantial justice has been done. A. I. R. 1926 Cal. 245=86 Ind. Cas. 756 ; A. I. R. 1925 Cal. 1223=85 Ind. Cas. 750 ; A. I. R. 1925 Pat. 36=3 Pat. 778=6 P. L. T. 309 ; A. I. R. 1925 Pat. 674=7 P. L. T. 82=89 Ind. Cas. 814 ; A. I. R. 1924 Mad. 586=19 L. W. 532 ; A. I. R. 1926 Mad. 1059=24 L. W. 443=97 Ind. Cas. 795 ; A. I. R. 1928 Mad. 234=107 Ind. Cas. 815 ; 120 Ind. Cas. 174 (Lab.).

Where as case is transferred, the High Court in revision has authority to re-transfer it to the original Court even before the plaint is filed in the Court to which it was transferred. A. I. R. 1923 All. 249=21 A. L. J. 86=75 Ind. Cas. 495. Where a subordinate Court in spite of an express jurisdiction to pass an appealable order invents a novel form of procedure and makes a non-appealable order the High Court can revise the order. A. I. R. 1924 Oudh. 11=10 O. L. J. 209=74 Ind. Cas. 335. The enquiry by the High Court as to the jurisdiction is not confined to the lower appellate Court alone, it can also enquire whether the Court of first instance has failed to exercise its jurisdiction or not. A. I. R. 1925 Oudh. 163=80 Ind. Cas. 694. The High Court has jurisdiction to revise an order of the lower Court restoring a suit dismissed for default. A. I. R. 1929 All. 599=51 A. 908=117 Ind. Cas. 111. High Court cannot in revision correct an error of judgment. A. I. R. 1929 All. 581=(1929) A. L. J. 911=51 A. 957=121 Ind. Cas. 267 ; A. I. R. 1929 All. 683=1929 A. L. J. 961=119 Ind. Cas. 859.

The acts of a District Judge under Act XIV of 1920 are open to correction by the High Court under its revisional jurisdiction exercisable under s. 115. A. I. R. 1929 All. 581=1929 A. L. J. 911=51 A. 987=121 Ind. Cas. 267. Whether a party's pleader was authorized to state that his client would abide by the decision of the High Court in another suit, is one of fact on which no revision lies. A. I. R. 1929 Mad. 416=120 Ind. Cas. 742. Order on election application if absolutely unjust is open to revision. A. I. R. 1927 Mad. 935=103 Ind. Cas. 821 ; see also A. I. R. 1929 Nag. 282=12 N. L. J. 82=119 Ind. Cas. 682 ; but see A. I. R. 1930 Mad. 225=126 Ind. Cas. 97.

Where the execution application is time-barred but the executing Court entertains it but the same is thrown out in appeal, assuming there is right of appeal, it is a fit case for interference in revision. A. I. R. 1931 Cal. 425=131 Ind. Cas. 561. An order directing an enquiry for *mesne* profits in a partition suit without specific notice to the opposite party is open to revision. 43 Ind. Cas. 458. Where facts and law applicable have been considered, decision though erroneous is not open to revision. 38 Ind. Cas. 129. Refusal to issue a sale certificate to an auction purchaser when he is otherwise entitled to it is an illegality and order can be revised. 1 P. L. T. 446=3 P. L. W. 78=38 Ind. Cas. 576. Where the High Court is satisfied that the subordinate Court has failed to exercise its inherent power to restore a suit for default, in a proper case it may interfere in revision. 122 Ind. Cas. 585. Revision lies against an improper order of remand. A. I. R. 1923 Mad. 113=30 M. L. T. 314=16 L. W. 593=70 Ind. Cas. 665. In cases where no suit lies it is the practice of the High Court to interfere in revision. A. I. R. 1922 Cal. 19=26 C. W. N. 169=70 Ind. Cas. 539. A revision lies where the finding is vitiated by an obvious error. A. I. R. 1922 Nag. 111=5 N. L. J. 1. Misconstruction of a material document and omission to consider other evidence on record are sufficient grounds for interference in revision. L. R. 4 A. 248 Rev. A revision lies where the lower Court held a suit bad for misjoinder of cause of action and directed the plaintiff to elect which cause of action he would proceed with, in the suit. A. I. R. 1922 Mad. 436=43 M. L. J. 318=(1922) M. W. N. 453=16 L. W. 175=69 Ind. Cas. 966. A decision omitting to take into consideration a material point which arises in the case is revisable. 10 L. B. R. 332=64 Ind. Cas. 361. An order refusing to set aside an execution sale after refusing to go into evidence adduced by the applicant on the ground that it was unnecessary can be revised. (1919) Pat. 60=49 Ind. Cas. 389. Suppression of an issue of limitation and refusal on the part of the Court to follow a statute of Legislature justify revision under s. 115. 27 P. W. R. 1920=116 P. L. R. 1920=55 Ind. Cas. 55. Where substantial justice has been done no revision will lie even though the



decision be erroneous. 49 Ind. Cas. 311 ; see also 67 Ind. Cas. 742. Where a Court finds the loss of a document not proved and refuses to admit secondary evidence it cannot be said that it has refused to exercise jurisdiction or has exercised jurisdiction with material irregularity, nor is there any gross or palpable error to justify interference in revision. A. I. R. 1929 Nag. 288=121 Ind. Cas. 33. Revision lies where the lower Court's finding is obviously incorrect. A. I. R. 1922 Nag. 104=19 N. L. J. 131=5 N. L. J. 1=67 Ind. Cas. 806.

Where a Lower Court decides a case on a question not arising in the case, a revision lies on that ground alone. A. I. R. 1930 Lah. 80=129 Ind. Cas. 689. Interference in revision is discretionary and when likely to work against the interest of justice such a course should not be taken. A. I. R. 1930 Lah. 417=127 Ind. Cas. 215. An erroneous decision on an issue is no ground for revision when the suit is pending. A. I. R. 1929 Rang. 270=126 Ind. Cas. 538. Error of law or error of fact is no ground for interfering in revision. A. I. R. 1929 Cal. 831=125 Ind. Cas. 274. Failure to mention importance of fresh evidence in review is no ground for revision. A. I. R. 1927 Mad. 611=50 M. 891=52 M. L. J. 682=39 M. L. T. 11=26 L. W. 277=(1927) M. W. N. 806=103 Ind. Cas. 377. Dismissal of petition for revision does not bar fresh application. A. I. R. 1928 Lah. 550=110 Ind. Cas. 833. Where finding of fact is not based on due consideration of law it is open to revision. A. I. R. 1928 Mad. 484=109 Ind. Cas. 696. An order for transfer made without notice to the other party can be set aside in revision. A. I. R. 1925 Lah. 189=79 Ind. Cas. 614. Failure to examine to ascertain real points in dispute justifies interference in revision. A. I. R. 1924 Nag. 191. Where the lower Court disregards the admissions in the pleadings and decides the case against the pleadings, High Court can interfere in revision. A. I. R. 1924 Nag. 101=7 N. L. J. 13=21 N. L. R. 6=76 Ind. Cas. 46. Where High Court would not interfere even in second appeal it will not do so in revision. A. I. R. 1929 Mad. 259=116 Ind. Cas. 133.

An application in revision is matter of discretion for the High Court and it will not interfere with an order though made without jurisdiction when interference with such order amounts to doing grave injustice. A. I. R. 1930 Pat. 279=12 P. L. T. 249=126 Ind. Cas. 910. The High Court can interfere in revision if an application under Order XXI, rule 89, has been wrongly admitted. A. I. R. 1923 Mad. 659=17 L. W. 680=76 Ind. Cas. 853. No revision lies where suit of Small Cause nature is tried on regular side and decree confirmed in appeal. A. I. R. 1922 Mad. 352=47 M. L. J. 118=14 L. W. 349=66 Ind. Cas. 207. No revision lies where there is no prejudice and the order complained against does not affect applicant's interests. 66 Ind. Cas. 127 (Cal). A revision can lie where a decree-holder is deprived of his just remedy by an erroneous view of the Court. A. I. R. 1930 Lah. 512=31 P. L. R. 105. Where the lower Court finds that the defendants evade service and refuse postal notices, and at the same time gives a finding that there is no due service the High Court can direct the lower Court to reconsider and come to a consistent conclusion. (1930) M. W. N. 1227. If the lower Court's method of arriving at the conclusion is irregular and the point at issue is misconceived there is sufficient ground for High Court's interference in revision. A. I. R. 1929 Rang. 244=7 Rang. 300=119 Ind. Cas. 740 ; see also A. I. R. 1929 Rang. 347=120 Ind. Cas. 404 ; A. I. R. 1925 Mad. 884=48 M. L. J. 685 ; A. I. R. 1923 Pat. 518=4 P. L. T. 401=1 Pat. L. R. 89=72 Ind. Cas. 148.

A finding based upon no evidence can be interfered in revision. A. I. R. 1925 Lah. 278=6 Lah. L. J. 593=86 Ind. Cas. 383. If a suit not maintainable at all, it might in some cases be advisable for the High Court to interfere and thus to prevent further waste of time and money. A. I. R. 1925 Mad. 820=48 M. L. J. 534=87 Ind. Cas. 194 ; see also 48 M. L. J. 451=A. I. R. 1925 Mad. 707=87 Ind. Cas. 113. Revisional powers are discretionary. A. I. R. 1925 All. 264=85 Ind. Cas. 660. Revision lies against order reducing interest without discretion. A. I. R. 1927 Lah. 798=100 Ind. Cas. 75. No revision lies where there is no prejudice and the order complained against does not affect applicant's interests. 66 Ind. Cas. 127. A revision does not lie only on technical grounds. 63 Ind. Cas. 140. No revision lies when suit partly not triable by Small Cause Court but tried on merits without objection. A. I. R. 1925 All. 51=81 Ind. Cas. 870. Failure to treat a suit as an application for execution can be rectified in revision. A. I. R. 1921 Nag. 130. Where property attached before judgment is in Court, and decree is passed in the suit but the decree-holder does not apply for execution of his decree, and the holder of another decree applies for attachment of the property, the Court is entitled to

order the attachment and failure to give notice to the other decree-holder does not merit revision under s. 115. A. I. R. 1921 Bom. 219=45 B. 360. Where the words are clearly susceptible of more than one interpretation the High Court will not interfere in revision on a mere question of interpretation of words in a document. A. I. R. 1923 All. 269=80 Ind. Cas. 313.

An order of remand can not be revised. A. I. R. 1913 All. 464=76 Ind. Cas. 525. In revision from decision of Small Cause Court, High Court can question decision on facts, if such decision is not justified by evidence. A. I. R. 1923 Nag. 292=9 N. L. R. 72. Revision does not necessarily lie on score of exercise of jurisdiction. A. I. R. 1927 Nag. 161=100 Ind. Cas. 37. Order of insufficiency of security furnished is not revisable. A. I. R. 1926 Oudh 160=90 Ind. Cas. 1051. Decision of the Rangoon Small Cause Court under the Rangoon Municipal Act, 1922, are revisable. A. I. R. 1925 Rang. 367=4 Bur. L. J. 161=92 Ind. Cas. 780. Dismissal of suit for pleader's default is not open to revision. A. I. R. 1927 Lah. 791=28 P. L. R. 204=9 Lah. 80=101 Ind. Cas. 444. Application against appellate order sought to be revised can be regarded as application against order of trial Court. A. I. R. 1927 Mad. 687=38 M. L. T. 358=26 L. W. 899=102 Ind. Cas. 700. Order granting extension of time if benefit of order has been already availed of, need not be set aside for legal point in upsetting order would be of use for further proceedings only. A. I. R. 1927 Mad. 598=52 M. L. J. 595=101 Ind. Cas. 646. Whether the Court will interfere or not in revision is entirely for the Court, which hears the application, to decide on the particular circumstances of the case before it. A. I. R. 1925 Bom. 341=49 B. 535=27 Bom. L. R. 423=87 Ind. Cas. 910. Order rejecting review is not revisable. A. I. R. 1925 Oudh 594=12 O. L. J. 443=2 O. W. N. 419=88 Ind. Cas. 582. Order granting application made to set aside abatement is order that suit has not abated and is not meant to give or take away the right to continue suit and is therefore subject to revision. A. I. R. 1928 Mad. 914=51 M. 701=28 L. W. 164=(1928) M. W. N. 434=55 M. L. J. 253 (F. B.)=112 Ind. Cas. 116.

Revision will lie in a case of mistake by the lower Court upon the fact or law on its merits, occasioned by not directing proper attention to Order XXI, r. 60, to find out whether the attached property was in the judgment-debtor's possession and whether objector was entitled to resist the claim of the decree-holder. A. I. R. 1929 Cal. 225=49 C. L. J. 51=115 Ind. Cas. 362. Order refusing to correct arithmetical error is subject to revision. A. I. R. 1930 Mad. 421=114 Ind. Cas. 635. Granting instalment is matter of discretion. Omission to give reasons is irregularity but no revision lies on that ground. A. I. R. 1925 All. 218=83 Ind. Cas. 133. The Court can extend the time for payment fixed by compromise decree if in its discretion it thinks that time is not of the essence of the contract and such an order is not subject to revision. A. I. R. 1924 Pat. 387=7 Pat. 906=82 Ind. Cas. 505.

**Case.**—The word "case" in s. 115 has a wider connotation and includes more than a suit. A. I. R. 1936 Sind 205. In the case of a suit, it is the suit itself and not any branch of it which can be regarded as a "case" within the meaning of s. 115. 1935 O. W. N. 1158 (F. B.)=158 Ind. Cas. 949.

**Record of any case which has been decided, etc.**—"No definition is to be found in the Code of the word 'case.' It cannot, in their Lordships' view, be confined to a litigation in which there is a plaintiff who seeks to obtain particular relief in damages or otherwise against a defendant who is before the Court. It must, they think, include an *ex parte* application, such as that made in this case praying that persons in the position of trustees or officials should perform their trust or discharge their official duties." *Per Lord Atkin's in Balakrishna v. Vasudeva*, 40 Ind. Cas. 650=15 A. L. J. 545=2 P. L. W. 101=33 M. L. J. 69=26 C. L. J. 143=19 Bom. L. R. 715=40 M. 793 (P. C.)=22 C. W. N. 50. It includes proceedings under s. 10 of Act XX of 1863. *Ibid.* The word "case" in this section covers an interlocutory order. A. I. R. 1931 Nag. 17=130 Ind. Cas. 145 ; 14 C. 768 ; 72 P. W. R. 1910=6 Ind. Cas. 939. The word "case" is wider than "suit" or "appeal." 40 B. 86=17 Bom. L. R. 1097=33 Ind. Cas. 358. The use of the word "case" instead of "suit" in s. 115 indicates that the section contemplates legal proceedings which are not suits in the strict sense but which are governed by the provisions of the C. P. Code. A. I. R. 1930 Cal. 744=34 C. W. N. 730=129 Ind. Cas. 367. "Case" is more comprehensive than "suit." Whereas all cases are not suits, every suit is at least a case. Case in section 115 is a case which has been decided. A. I. R. 1930 All. 750=1930 A. L. J. 901=52 A. 927=126 Ind. Cas. 1 ; see also 9 O. W. N. 339 ; A. I. R.

1931 Lah. 644=132 I. C. 850. "Case" can mean a proceeding. If any proceeding in a suit has terminated, it is a case decided. A. I. R. 1929 All. 743=1929 A. L. J. 918=51 A. 1010=122 Ind. Cas. 685.

"Case decided by a Court" means a matter disposed of effectually by the Court and not merely for the time being. A purely *ad interim* order that does not effectually dispose of the matter before the Court would not be "case decided". A. I. R. 1929 All. 531=51 A. 957=(1929) A. L. J. 911=121 Ind. Cas. 267. Where the Court below decides that it should proceed with a suit, it does not decide a case within the meaning of s. 115 and no revision lies. The question whether that a trial of a particular suit or issue should go on or should be stayed, is no question on the merits of the case but relates to a matter of procedure. A. I. R. 1929 All. 957=(1930) A. L. J. 235=121 Ind. Cas. 97. Refusal to issue a commission is not a case decided within the meaning of this section. A. I. R. 1929 Sind 92=23 S. L. R. 403=116 Ind. Cas. 97. The word "decided" in s. 622 of the old Code, is similar in its purport to the word "decided" in section 115. A. I. R. 1922 Cal. 58=70 Ind. Cas. 484. The High Court will not generally interfere with interlocutory order unless an irreparable injury will be done and a miscarriage of justice will inevitably ensue. 38 C. W. N. 1945=60 C. L. J. 91; 1935 O. W. N. 1158 (F. B.)=158 Ind. Cas. 949. An order setting aside an *ex parte* decree is a case and is not an interlocutory order during the pendency of the suit. A. I. R. 1921 All. 294=(1931) A. L. J. 377; see also A. I. R. 1926 Lah. 379=7 Lah. 161=8 Lah. L. J. 267=27 P. L. R. 321=95 Ind. Cas. 124; A. I. R. 1926 Lah. 344=8 Lah. L. J. 870=27 P. L. R. 710=94 Ind. Cas. 117. Where in a suit against a firm an order refusing permission to a partner to file a written statement to resist the claim was passed: Held that as the order passed was not appealable and the partner would have no right of appeal from decree passed against the firm in his absence, the case is "case decided" within this section. A. I. R. 1930 All. 701=(1930) A. L. J. 1212=52 A. 951=132 Ind. Cas. 38. Where the original Court having no jurisdiction sends the suit to District Judge for transfer, and the District Judge passes an illegal order for transfer there is a case decided and revision lies. A. I. R. 1930 Lah. 195=31 P. L. R. 302=125 Ind. Cas. 334. But the order of Court overruling the contention that according to the law governing the parties on oral will is not valid and directing further evidence to be produced with respect to the oral will is not tantamount to the decision of a 'case' and cannot be revised. A. I. R. 1930 Lah. 418=127 Ind. Cas. 215. No revision is competent from an order refusing to take up and decide an issue of law before evidence is commenced. A. I. R. 1934 All. 986=1934 A. L. J. 1024. But an order of Court refusing to allow an amendment of the plaint amounts to a "case decided" under this section. 1935 A. L. J. 989; 1935 A. L. J. 309; 1935 M. L. J. 100; A. I. R. 1936 All. 686 (F. B.)=1936 A. L. J. 923. High Court interferes with great reluctance orders allowing application under Order 9, rule 9, C. P. Code. A. I. R. 1934 Oudh 497=11 O. W. N. 1373. Where a Court grants an application for a certain amendment it can not be said that the case has been decided within the meaning of s. 115. A. I. R. 1934 All. 785=1934 A. L. J. 757. An order rejecting an application for leave to sue in *forma pauperis* is a complete decision. 11 O. W. N. 1356=152 Ind. Cas. 417. A mere decision as to the amount of Court-fees payable does not amount to a case decided. A. I. R. 1934 All. 620 (F. B.)=1934 P. L. J. 381=149 Ind. Cas. 1183. An interlocutory order rejecting the application for examination of witnesses on commission cannot be said to amount to a 'decision' of the case. A. I. R. 1934 All. 37. The Court in framing issues or refusing to frame issues is in the language of s. 115 deciding a case, if the onus of proof is involved in the form of issues. A. I. R. 1936 Mad. 526. An order relating to an application for restoration of proceedings dismissed in default constitute a "case" within the meaning of s. 115. A. I. R. 1936 Lah. 618. An order remitting issues for decision under Order 41, r. 25, C. P. Code, is not a "case decided". A. I. R. 1935 Oudh 333=1935 O. W. N. 352. A case cannot be said to be decided when an order disallowed questions to be put to witness. A. I. R. 1935 All. 599=1935 P. L. J. 549=156 Ind. Cas. 805 (F. B.).

An order for transfer of a case is revisable. A. I. R. 1925 Lah. 189=78 Ind. Cas. 614. The proceeding to set aside an *ex parte* decree and the Court deciding it is a case within the section. (1931) A. L. J. 377=A. I. R. 1931 All. 293=133 Ind. Cas. 129 (F. B.). A finding on an issue whether a suit is barred by *res judicata* is not a case decided within the meaning of this section. 33 Bom. L. R. 1596. [18 B. 35; 22 Bom. L. R. 801; 26 B. 550; 47 A. 721; 5 Lah. 288 (F. B.); 11 I. A. 237; 44 I. A. 261; 47 A. 916; 43 A. 564 (F. B.) Foll; 40 B. 86; 5 R. 742; 48 B. 43; 25 A. 509; 29 Bom. L. R. 1551 Dist.]. Refusal of a Court to try the plea of *res judicata* as a

preliminary issue cannot be revised. A. I. R. 1925 Oudh 129=80 Ind. Cas. 628. An order granting or refusing leave to sue in *forma pauperis* is capable of revision. A. I. R. 1924 Nag. 44=19 N. L. R. 165=75 Ind. Cas. 993 ; A. I. R. 1931 Rang. 318 ; but see A. I. R. 1931 All. 659=1931 A. L. J. 659.

An order staying a suit under s. 10 of the C. P. Code is not a decision of a case. 73 Ind. Cas. 247=A. I. R. 1923 Lah. 615. But proceedings relating to question of stay can be treated as a case. A. I. R. 1931 Lah. 503=132 Ind. Cas. 222.

Finding on an interlocutory matter followed by an order is not a case decided. 33 Bom. L. R. 1596=135 Ind. Cas. 815=A. I. R. 1932 Bom. 81=A. L. R. 1932 B. 155. An order setting aside an arbitration award disposes of a proceeding during the pendency of the suit, and the decision of the question whether the award is valid or not does not amount to the decision of a case within the meaning of this section. 53 A. 1006=136 Ind. Cas. 568=A. I. R. 1932 All. 452.

An order under s. 104, cl. (1), is a case decided in which no appeal lies within this section and is revisable. 17 Bom. L. R. 1097=40 B. 86=33 Ind. Cas. 358. Order resuming proceedings is "case decided" under this section. A. I. R. 1928 Oudh 355=5 O. W. N. 604=3 Luck. 650 (F. B.)=111 Ind. Cas. 161. Proceedings under Order IX, r. 13, C. P. Code, is a case and revision lies. A. I. R. 1925 All. 610=48 A. 175=24 A. L. J. 56=90 Ind. Cas. 180. Interlocutory orders of deciding case on preliminary issue or admission of evidence are not revisable. A. I. R. 1926 Oudh 185=89 Ind. Cas. 772. No application under s. 10 (Act XX of 1863) and Court's adjudication thereon constitutes a case. 40 Ind. Cas. 650 ; see also 40 M. 793=44 I. A. 261=15 A. L. J. 615=2 Pat. L. W. 108=33 M. L. J. 69=19 Bom. L. R. 715=(1917) M. W. N. 628=6 L. W. 501=22 C. W. N. 50=11 Bur. L. T. 48=26 C. L. J. 143 (P. C.)=40 Ind. Cas. 650. Application under s. 10 for the stay of a suit is not a case and an order for stay passed therein is not revisable. A. I. R. 1922 Lah. 54=4 Lah. L. J. 425=67 Ind. Cas. 870 ; 18 A. L. J. 131=42 A. 409=58 Ind. Cas. 90. An order under s. 10 of Act XIV of 1920 asking defendant to deposit money in Court is a case and revision lies. A. I. R. 1924 Lah. 408=69 Ind. Cas. 658. The refusal to issue interrogatories for the examination of witnesses is not a case decided within the meaning of s. 115. A. I. R. 1923 Lah. 282=69 Ind. Cas. 417. Revision does not lie against decision of a preliminary issue as to jurisdiction of Court to entertain a suit. A. I. R. 1923 Lah. 414=5 Lah. L. J. 140=11 P. W. R. 1923=71 Ind. Cas. 487. An order refusing to adjourn the case for enabling the defendant to pay Court-fee fixed on his counter-claim is not revisable. A. I. R. 1923 All. 118=20 A. L. J. 1005=45 A. 218=69 Ind. Cas. 921. An order of the Court determining the question of jurisdiction is not a decision of a case. A. I. R. 1921 Lah. 184=45 P. L. R. 1921=59 Ind. Cas. 680. Capability of person for appointment of next friend is subsevient to suit and decision is open to revision. A. I. R. 1929 Lah. 257=30 P. L. R. 17=11 Lah. L. J. 130=113 Ind. Cas. 901. Appellate Court's order striking out relief as not tenable is decision and order not being necessary in the ends of justice can be interfered in revision. A. I. R. 1925 Oudh 604=85 Ind. Cas. 703. An incidental order fixing the remuneration of a Commissioner appointed to examine accounts cannot be revised. A. I. R. 1924 Oudh 348=76 Ind. Cas. 503. An order refusing leave to sue in *forma pauperis* is capable of revision. A. I. R. 1924 Nag. 44=19 N. L. R. 165=75 Ind. Cas. 993. No revision lies against an order refusing to stay a suit under s. 10. A. I. R. 1924 Lah. 567=75 Ind. Cas. 101. The word "case" in every case does not mean the whole case but may mean a particular branch of a case for which an independent remedy or a different procedure is provided by the Code. A. I. R. 1923 Lah. 615=73 Ind. Cas. 247. Decision of a preliminary issue as to territorial jurisdiction against the defendant by a formal order in that behalf in not a case decided within the meaning of s. 115 and no revision lay against the order. A. I. R. 1921 All. 1 (F. B.)=43A. 564=19 A. L. J. 558=63 Ind. Cas. 15 (F. B.). An order requiring the plaintiff to pay certain damages on condition of getting an adjournment with an order that the case is not be taken up unless the amount is paid is not a case and no revision lies therefrom. 24 O. C. 215=64 Ind. Cas. 211.

The appointing an arbitrator and referring the case to him when it had no power to do so is a case decided. 1931 A. L. J. 632=A. I. R. 1931 All. 761. Where a case is referred to arbitration, an application to supersede the reference is allowed, the order superseding and terminating the reference is an order deciding a case and is open to revision. 32 P. L. R. 391=A. I. R. 1931 Lah. 318 ; see also A. I. R. 1931 All. 721=133 Ind. Cas. 416. An order refusing to stay under Order 19 of the Arbitration Act may properly be held to have decided finally and separately and a

revision can be preferred to the High Court against that order. A. I. R. 1931 Lah. 644=132 Ind. Cas. 850. An order setting aside an award disposed of during the pendency of a suit and the decision of the question whether the award was valid or invalid do not amount to the decision of a 'case'. 1931 A. L. J. 842.

A finding on an interlocutory matter followed by an order is not a "case decided". 33 Bom. L. R. 1596=A. I. R. 1932 Bom. 81=135 Ind. Cas. 815. The term 'case' is no doubt wider than a suit but the decision of the lower Courts on a preliminary issue relating to the maintainability of a claim for *mesne* profits cannot be regarded as a case. 138 Ind. Cas. 30=9 O. W. N. 339=A. I. R. 1932 Oudh 271.

The dismissal of an application by the defendant to have the issue relating to jurisdiction of the Court decided in the first instance amounts to a case decided. A. I. R. 1933 All. 753=1933 A. L. J. 707=146 Ind. Cas. 792. The order of the trial Court asking the plaintiff to pay additional Court-fee amounts to a decision of the case. 55A. 274=1933 A. L. J. 311=A. I. R. 1933 All. 350. Effect of the order refusing amendment of plaint, is to have the case decided. 55 A. 256=145 Ind. Cas. 859=(1933) A. L. J. 268=A. I. R. 1933 All. 374; see also A. I. R. 1933 Sind. 279 (F. B.)=146 Ind. Cas. 777. By an order restoring a suit which had been previously dismissed, a case is decided. 1933 A. L. J. 4=114 Ind. Cas. 141=A. I. R. 1933 All. 41. An application for permission to sue as a pauper is a case. 141 Ind. Cas. 570=34 P. L. R. 557; but see 55 A. 216=145 Ind. Cas. 436=A. I. R. 1933 All. 295. An order allowing the plaintiff in a suit against his commission agent to amend his plaint from one for the recovery of sums due on three specified transactions into one for a general rendition of accounts is not a case. 55 A. 169=A. I. R. 1933 All. 189=1933 A. L. J. 27=146 Ind. Cas. 491. Order refusing stay of suit connected with pending appeal should be looked upon as a case. 144 Ind. Cas. 107=A. I. R. 1933 Lah. 50. An order staying proceedings in a suit under s. 10 of the C. P. Code is of an interlocutory nature and no revision lies from it. 141 Ind. Cas. 177=34 P. L. R. 96=A. I. R. 1933 Lah. 191. Proceedings for temporary injunction must be deemed to be a case. A. I. R. 1933 Lah. 1046. An order of remand under Order 41, rule 23, for decision on merits, does not decide a case and no revision lies from the remand order. A. I. R. 1933 Pesh. 48. So also an order refusing documentary evidence does not decide the case. 145 Ind. Cas. 810=10 O. W. N. 637=A. I. R. 1933 Oudh 345. An order of the Small Cause Court returning the plaint for presentation to the proper Court purporting to have been passed under s. 23 of the Provincial Small Cause Courts Act is a 'case decided'. 54 A. 1048=143 Ind. Cas. 464=1932 A. L. J. 1068=A. I. R. 1933 All. 106. Decision on a preliminary issue on Court-fee is case decided and open to revision. A. I. R. 1934 Oudh 212; but see 1934 A. L. J. 381=3 A. W. R. 677 (F. B.). Where an order sought to be revised marks the termination of a proceeding in a suit a "case" should be deemed to have been decided. Where in a suit on a mortgage instituted against the mortgagor and the subsequent alienee of a part of the mortgaged property who was dead at the time the Court refused to add the heirs of the dead person as parties under Order 1, rule 10, case is decided. A. I. R. 1934 All. 25.

**Court.**—Collector acting under s. 18 of the Land Acquisition Act is not a Court. A. I. R. 1934 Rang. 118=150 Ind. Cas. 1049=12 Rang. 275; but see 38 C. W. N. 844=60 C. L. J. 184=A. I. R. 1934 Cal. 758. A Judge holding an enquiry under s. 19 (3) (b) of the Bombay Local Boards Act is not a Court. A. I. R. 1934 Sind 110=151 Ind. Cas. 89. Collector acting exercise of revisionary powers under the Madras Estates Land Act is a Court. 68 M. L. J. 441=A. I. R. 1935 Mad. 367=157 Ind. Cas. 783=1935 M. W. N. 377=41 L. W. 589. A Commissioner under the Workmen's Compensation Act is not a subordinate Court for the purpose of s. 115. A. I. R. 1937 Sind 6.

**In any Court Subordinate to High Court.**—The Civil Procedure Code is applicable only to Courts of civil jurisdiction and section 3 enumerates the Courts which are subordinate to the High Court and over which the High Court is empowered by s. 115 to exercise revisional jurisdiction. 49 Ind. Cas. 11 (14)=42 M. 76 (79)=35 M. L. J. 632=9 L. W. 26=(1918) M. W. N. 107. For the purposes of s. 115, C. P. Code, a Court subordinate to High Court is one over which the High Court has appellate jurisdiction. 1936 O. W. N. 116=A. I. R. 1936 Oudh 132. A single Judge of the Oudh Chief Court is not a Court subordinate to the High Court. A. I. R. 1935 Oudh 72=11 O. W. N. 1533=153 Ind. Cas. 267. No revision by a High Court lies to reverse proceedings before a Land Acquisition officer. 20 M. L. T. 688=(1916) 2 M. W. N. 348=4 L. W. 535=36 Ind. Cas. 621; see also A.

I. R. 1930 Lah. 242=31 P. L. R. 158=127 Ind. Cas. 711. It must be an essential characteristic of a "Court" within the meaning of s. 115 that it should have power to determine questions in dispute between litigants upon the merits. 1932 A. L. J. 769= A. I. R. 1932A. 568. With regard to the questions under s. 8, Aden Courts Act (II of 1864) the Resident's Court is subordinate to the High Court and the application for revision under s. 115 would lie against the order of the Resident declining to make a reference under that section. A. I. R. 1929 Bom. 190=31 Bom. L. R. 225=115 Ind. Cas. 407. Decision under the Madras Village Courts Act is open to revision. A. I. R. 1927 Mad. 786=53 M. L. J. 131=(1927) M. W. N. 420=104 Ind. Cas. 415.

An order passed by District Munsiff under s. 73 of the Madras Village Courts Act is open to revision. 34 Ind. Cas. 503. Under s. 10, Bengal and Madras native Religious Endowments Act, Civil Court acts as a Court of law subordinate to High Court and revision lies from its order. 40 Ind. Cas. 650. Order of District Judge under s. 4 of the Public Accountants Default Act is not by Court subordinate to the High Court and therefore not open to revision. 40 B. 119=19 Bom. L. R. 926=43 Ind. Cas. 465. A Court holding an election enquiry is a Court subordinate to the High Court. A. I. R. 1923 Mad. 254=44 M. L. J. 69=46 M. 123=16 L. W. 898=(1922) M. W. N. 813=72 Ind. Cas. 902; see also A. I. R. 1923 Mad. 192=16 L. W. 848=1923 M. W. N. 133=44 M. L. J. 1=46 M. 536=71 Ind. Cas. 1039; A. I. R. 1927 Mad. 921=54 M. L. J. 269=(1927) M. W. N. 646=26 L. W. 323=105 Ind. Cas. 216; but see A. I. R. 1923 Mad. 169=44 M. L. J. 39=(1922) M. W. N. 818=16 L. W. 827=70 Ind. Cas. 780; A. I. R. 1926 Bom. 344=50 B. 357=94 Ind. Cas. 660. No decision of a single Judge of the High Court, sitting alone can be revised under s. 115. 43 C. 90=33 Ind. Cas. 745; see also A. I. R. 1927 Oudh 59=2 Luck. 1=99 Ind. Cas. 547. The High Court cannot revise matters coming under the Agra Tenancy Act. 41 A. 28=16 A. L. J. 859=46 Ind. Cas. 338. High Court has no revisional jurisdiction to revise orders of Board of Revenue passed under Chapter II, or under s. 205, Madras Estates Law Act. A. I. R. 1928 Mad. 1032=55 M. L. J. 798=114 Ind. Cas. 161 (F. B.); see also A. I. R. 1926 Mad. 1047=51 M. L. J. 500=24 L. W. 416=97 Ind. Cas. 921; A. I. R. 1924 Mad. 119=45 M. L. J. 735=18 L. W. 849=47 M. 250=35 M. L. T. 92=79 Ind. Cas. 372; A. I. R. 1922 Mad. 337=14 L. W. 548=(1921) M. W. N. 757=41 M. L. J. 577=66 Ind. Cas. 566; 61 Ind. Cas. 890. An order of a Revenue Court under s. 476 of the Cr. P. Code is open to revision under s. 115. A. I. R. 1921 Pat. 240=6 P. L. J. 178=2 P. L. T. 609=61 Ind. Cas. 643. An order by the Collector refusing to make a reference on the ground that the applicant has no interest under s. 18 of the Land Acquisition Act is open to revision under s. 115. 36 M. L. J. 95=42 M. 231=49 Ind. Cas. 659; 1934 A. L. J. 32=A. I. R. 1934 All. 260 (F. B.); but see A. I. R. 1923 Bom. 290=47 B. 699=25 Bom. L. R. 398=73 Ind. Cas. 354. A revision against interlocutory orders passed by Revenue Courts in suit from which no appeal lies against the final decree lies to High Court and not to the Board of Revenue. 42 M. 76=33 M. L. J. 632=9 L. W. 26=(1918) M. W. N. 107=49 Ind. Cas. 11. A Rent Court in the exercise of cases in which the course of appeal lies to High Court is a Court subordinate to that Court within the meaning of s. 115. A. I. R. 1923 Oudh 18=9 O. L. J. 543=72 Ind. Cas. 394; A. I. R. 1926 Cal. 708=30 C. W. N. 236=93 Ind. Cas. 56; 80 Ind. Cas. 327=27 O. C. 89=11 O. L. J. 77.

Orders of District Magistrate under part 2 of the Lunacy Act with respect to reception, care and treatment of the lunatic are not revisable by the High Court. A. I. R. 1924 Lah. 55=4 Lah. 1=24 Cr. L. J. 664=73 Ind. Cas. 696. Controller of Rents under Rangoon Rent Act is not a Civil Court. A. I. R. 1926 Rang. 33=3 Rang. 410 (F. B.)=91 Ind. Cas. 627. Decision of a Judge under s. 33, Bombay City Municipal Act, is not open to revision under s. 115. A. I. R. 1923 Bom. 421=25 Bom. L. R. 463=73 Ind. Cas. 133. High Court of Kumaun is not a Court subordinate to Allahabad High Court for purpose of revision. A. I. R. 1923 All. 291=45 A. 383=71 Ind. Cas. 991. Where a Collector in a land acquisition proceeding refuses to make a reference to the District Court on the question of the apportionment of the compensation, the High Court has no power to interfere with the order in the exercise of its revisional jurisdiction. A. I. R. 1923 Bom. 290=47 B. 699=25 Bom. L. R. 398=73 Ind. Cas. 354. The Madras High Court has no jurisdiction to entertain a revision against the order of the Chief Judge of the Small Cause Court acting under the Madras City Municipal Act and rules framed under it. A. I. R. 1927 Mad. 93=50 M. 121=51 M. L. J. 728=24 L. W. 773=(1926) M. W. N. 986 (F. B.)=99 Ind. Cas. 148; see also A. I. R. 1927 Rang. 1=4 Rang. 304=5 Bur. L. J. 117 (F. B.)=98 Ind. Cas. 902;

A. I. R. 1926 Rang. 25=3 Rang 560=4 Bur. L. J. 202 (F. B.)=91 Ind. Cas. 550 ; A. I. R. 1928 Mad. 475=54 M. L. J. 595=51 M. 245=27 L. W. 346=(1928) M. W. N. 101=109 Ind. Cas. 180. The following Courts are subordinate to the High Court :—The Calcutta Improvement Trust Tribunal (139 Ind. Cas. 180=36 C. W. N. 370=A. I. R. 1932 Cal. 660), the District Court acting under s. 198 of the Bombay City Municipal Act, 1925 (55 Bom. 544=134 Ind. Cas. 1240=33 Bom. L. R. 1067=A. I. R. 1931 Bom. 582), the judicial Assistant at Aden. (35 Bom. L. R. 271=A. I. R. 1933 Bom. 194=144 Ind. Cas. 705, and. District Judge acting under s. 70, Burma Rural Self-Government Act, 1921. A Collector when he acts under s. 18 of the Land Acquisition Act is not subordinate to High Court. 54 A. 282=A. I. R. 1932 All. 598. Board of Revenue acting under s. 172 of the Madras Estates Land Act is also not subordinate to High Court. 56 M. 883=140 Ind. Cas. 331=A. I. R. 1932 Mad. 612=63 M. L. J. 450 (F.B.). This section does not apply to Revenue Courts at all. 1932 A. L. J. 863=A. I. R. 1932 All. 589 ; see also 55 M. 942=1932 M. W. N. 524=63 M. L. J. 282=A. I. R. 1932 Mad. 529. Where a Sub-Judge passes an order on a certain petition in the capacity of an election Commissioner, no revision lies against such order. 138 Ind. Cas. 459=1932 M. W. N. 856=A. I. R. 1932 Mad. 560. The District Magistrate acting under s. 318, U. P. Municipalities Act, 1916, is not a subordinate Court. 140 Ind. Cas. 123=1932 A. L. J. 816=A. I. R. 1932 All. 651. Collector executing duty under s. 68 of the C. P. Code is not a Civil Court. 37 Bom. L. R. 761=A. I. R. 1933 Bom. 369. So also the District Judge hearing an election petition is not a Civil Court and his decision is not revisable by the High Court. 1933 A. L. J. 971 ; see also A. I. R. 1933 Rang. 41=11 Rang. 1 ; 35 Bom. L. R. 89=A. I. R. 1933 Bom. 105=142 Ind. Cas. 378.

**In which no appeal lies.**—Revision is not entertainable where an appeal lies either in the form of a first appeal or a second appeal from a decree or from an interlocutory order under s. 104 and order XLIII. A. I. R. 1931 All. 294=1931 A. L. J. 377 ; see also A. I. R. 1923 Pat. 223=4 P. L. T. 46=73 Ind. Cas. 373 ; 71 Ind. Cas. 911 ; 19 Ind. Cas. 736 ; 10 Ind. Cas. 471 ; 7 A. 681 ; 7 A. 914 ; 14 A. 520 ; 7 A. 42 ; 3 A. 108 ; 12 C. L. R. 449 ; 12 C. L. R. 148 ; 11 C. W. N. 112 ; 16 M. 20 ; 20 M. 155 ; A. I. R. 1933 Lah. 509=34 P. L. R. 262 ; A. I. R. 1926 All. 58 ; A. I. R. 1929 All. 793=118 Ind. Cas. 189 ; A. I. R. 1931 All. 294=29 A. L. J. 377=133 Ind. Cas. 129 ; A. I. R. 1933 Mad. 217=145 Ind. Cas. 766 ; A. I. R. 1933 Bom. 185 ; 49 C. L. J. 81=115 Ind. Cas. 368=A. I. R. 1929 Cal. 226. Revisional powers are available in the absence of other remedies only. Applicant's negligence to exercise right of appeal or other remedies does not give him right to apply for revision. 113 Ind. Cas. 409. Revision lies against non-appealable cases only. A. I. R. 1928 Mad. 794=112 Ind. Cas. 231 ; A. I. R. 1926 Bom. 139=50 B. 32=27 Bom. L. R. 1460=92 Ind. Cas. 367 ; A. I. R. 1925 Cal. 1237=85 Ind. Cas. 760 ; 49 Ind. Cas. 382. But the High Court may interfere in revision where an appeal or regular suit is open to party, if a party can obtain complete and effective relief in revision. 31 M. L. J. 827=5 L. W. 472=38 Ind. Cas. 373 ; 55 A. 256=145 Ind. Cas. 859=1933 A. L. J. 268=A. I. R. 1933 All. 374.

**Appeal can be converted into an application for revision.**—Where no appeal lies, but Court's error is one specified in s. 115. High Court can treat Memorandum of Appeal as petition for revision. A. I. R. 1929 Mad. 205=119 Ind. Cas. 705 ; see also A. I. R. 1927 Cal. 850=55 C. 219=47 C. L. J. 69=103 Ind. Cas. 864 ; A. I. R. 1927 All. 563=49 A. 812=25 A. L. J. 606=102 Ind. Cas. 236 ; A. I. R. 1923 Cal. 612=37 C. L. J. 395=27 C. W. N. 720=74 Ind. Cas. 575 ; A. I. R. 1923 Oudh 177=26 O. C. 10=10 O. L. J. 36=73 Ind. Cas. 591 ; 64 Ind. Cas. 712 ; A. I. R. 1921 Mad. 612=41 M. L. J. 54=14 L. W. 85=63 Ind. Cas. 730 ; 33 C. L. J. 384=63 Ind. Cas. 520 ; 9 L. W. 596=50 Ind. Cas. 931 ; 41 Ind. Cas. 125=4 O. L. J. 374. Unless facts are peculiar and order manifestly unjust a revision filed after the expiry of the period of limitation cannot be changed into an appeal. 2 Lah. L. J. 739. Where a lower Court had made an order without jurisdiction, High Court treating the appeal from that order as revision set it aside. 25 M. L. T. 153=9 L. W. 81=49 Ind. Cas. 629. The High Court has power to convert an appeal into a revision under s. 115, especially when the question in issue is one of jurisdiction. 41 M. 554=34 M. L. J. 309=23 M. L. T. 251=7 L. W. 508=(1918) M. W. N. 327=45 Ind. Cas. 471 ; 9 C. W. N. 504.

**Application for revision may be treated as a memorandum of appeal.**—An application for revision may be regarded as Memorandum of Appeal.

A. I. R. 1927 Cal. 581=31 C. W. N. 653=102 Ind. Cas. 513. Where a first appellate Court entertains an appeal when no appeal is competent remedy is by way of revision. A. I. R. 1921 Mad. 612=41 M. L. J. 54=63 Ind. Cas. 730. High Court is not entitled indirectly to allow an appeal not provided for by Code by converting it into a revision. 43 Ind. Cas. 180. When the revision petition is converted into second appeal the second appeal will be in time if at the date of filing of revision, second appeal was not barred. 10 Bur. L. T. 10=34 Ind. Cas. 264. The High Court in a proper case treat an application for revision as in fact an appeal. 33 Bom. L. R. 1593.

**High Court may call for the record without application.**—Application by a party is not condition precedent for exercising revisional jurisdiction. A. I. R. 1928 Mad. 528=55 M. L. J. 274=51 M. 672=28 L. W. 297=110 Ind. Cas. 632. When no appeal is possible to High Court it has jurisdiction in a fit case to deal with the matter under s. 115, even without an application on that behalf. 23 C. L. J. 235=31 Ind. Cas. 812; see also 5 A. 42; 28 A. 72=2 A. L. J. 749; 9 Ind. Cas. 806; 3 A. 208 (F. B.); 28 C. 680=6 C. W. N. 114; 4 C. W. N. 695; 7 C. L. R. 191; 21 B. 806; 38 B. 638; A. I. R. 1933 Sind 200=144 Ind. Cas. 883; A. I. R. 1933 Lah. 327=146 Ind. Cas. 258; 139 Ind. Cas. 167=36 L. W. 646=1932 M. W. N. 1244=A. I. R. 1932 Mad. 714.

**Revisional Court whether can go into question of facts.**—Concurrent findings of fact of the lower Court based on evidence cannot be interfered with. A. I. R. 1936 Pat. 558. A finding of fact by the appellate Court cannot be interfered in revision. 161 Ind. Cas. 21=A. I. R. 1936 Lah. 725; 161 Ind. Cas. 417=1936 O. W. N. 334=A. I. R. 1936 Oudh 264; A. I. R. 1934 Cal. 795=59 C. L. J. 417=151 Ind. Cas. 1088; A. I. R. 1934 Rang. 306=150 Ind. Cas. 1055; A. I. R. 1934 Lah. 67=15 Lah. 305; 151 Ind. Cas. 385=A. I. R. 1934 All. 550. An erroneous finding of facts will not be interfered with in revision unless it has been caused by not taking into account a material fact in evidence. 39 Ind. Cas. 494; see also 22 C. W. N. 627=27 C. L. J. 418=44 Ind. Cas. 763; A. I. R. 1930 All. 531=125 Ind. Cas. 578; 22 P. L. R. 1919=50 Ind. Cas. 805; 33 C. W. N. 569; 94 Ind. Cas. 85. An error of judgment in exercise of jurisdiction vested in Court is not a matter upon which revision can lie. A. I. R. 1922 All. 441=66 Ind. Cas. 509; see also 77 Ind. Cas. 336=A. I. R. 1922 Lah. 200=3 Lah. 79. Where lower Court having jurisdiction decides point the High Court will not interfere with decision on a question of fact though it was wrong. A. I. R. 1931 Mad. 83=60 M. L. J. 191=130 Ind. Cas. 177. A finding directly opposed to evidence justifies interference in revision, on ground of material irregularity A. I. R. 1924 Nag. 44=19 N. L. R. 165. In 19 C. W. N. 84=20 C. L. J. 213. *Mr. Mukherjee J.* said: "We may in this connection observe that it is competent to the Court to investigate the facts in revision, if the Court is satisfied that such step is needed in the ends of justice, as was done in the case of *Kailash Chandra Halder v. Biswanath Paramanick*, 1 C. W. N. 67. But we must guard against the possible assumption that the Court may, in a matter like this, in the exercise of its revisional jurisdiction assume appellate powers. One aspect of the fundamental distinction between the exercise of appellate and revisional powers was explained in the case of *Shivanath v. Jooma Kashinath*, 7 B. 341. A Court in the exercise of its appellate jurisdiction investigates the facts and if necessary substitute its own appreciation of the evidence for that of the primary Court. But when the Court as a Court of revision looks into the evidence, it does so with a view to determine whether the subordinate Court has assumed jurisdiction which it did not possess, or declined a jurisdiction which it did possess or has in the exercise of its jurisdiction acted illegally or with material irregularity. If this distinction were overlooked, the superior Court might, in the name of revisional jurisdiction, exercise appellate powers."

**High Court will not interfere where another remedy is open.**—High Court will not interfere in revision when remedy by suit is open. A. I. R. 1930 Cal. 348=34 C. W. N. 577=127 Ind. Cas. 552; A. I. R. 1930 Bom. 375=32 Bom. L. R. 619=54 B. 479=125 Ind. Cas. 703; A. I. R. 1936 Oudh 185=1936 O. W. N. 262; A. I. R. 1936 Oudh 132; A. I. R. 1936 Rang. 306; A. I. R. 1934 Pat. 664; 148 I. C. 333; A. I. R. 1935 Lah. 971; A. I. R. 1935 Lah. 934; 18 N. L. J. 72; 39 C. W. N. 733; A. I. R. 1934 Lah. 119; A. I. R. 1934 Rang. 243; A. I. R. 1934 Rang. 230; 1935 M. W. N. 1300=69 M. L. J. 908; A. I. R. 1936 Rang. 12=161 Ind. Cas. 258; A. I. R. 1936 Rang. 306=14 Rang. 516; A. I. R. 1935 Mad. 399=41 L. W. 490; but see A. I. R. 1935 Rang. 395. Relief should not be granted in



revision under s. 115 to a person whose suit has been dismissed under s. 9, Specific Relief Act, as remedy lies by way of a regular suit. A. I. R. 1937 Oudh 183. Extraordinary powers of the High Court should not be invoked without exhausting the ordinary powers of the Court below which may give him all he wants. 117 Ind. Cas. 905; see also 118 Ind. Cas. 193 (Sind); A.I.R. 1929 Nag. 66=115 Ind. Cas. 167. The High Court under s. 115, C. P. Code has no jurisdiction to interfere in revision with an order which is subject to appeal. 1935 P. L. J. 995=A. I. R. 1935 All. 873; A. I. R. 1935 Pat. 385=14 Pat. 488=155 Ind. Cas. 976. But this section does not provide that it cannot interfere in a case where an appeal lies to an inferior Court. A. I. R. 1935 Pat. 86=154 Ind. Cas. 103; A. I. R. 1936 Cal. 786=63 C. L. J. 105. The word "appeal" does not mean first appeal only. A. I. R. 1928 Mad. 794=112 Ind. Cas. 231. In the presence of other remedies application for revision is barred. 9 P. L. T. 659=108 Ind. Cas. 804; see also A. I. R. 1926 Cal. 1149=53 C. 767=30 C. W. N. 907=98 Ind. Cas. 615; 31 C. W. N. 615=A. I. R. 1927 Cal. 114=45 C. L. J. 213=98 Ind. Cas. 89; 94 Ind. Cas. 70=A. I. R. 1926 Nag. 90=22 N. L. R. 30; 93 Ind. Cas. 868 (Lah); A. I. R. 1926 Mad. 18=50 M. L. J. 102=92 Ind. Cas. 20; 91 Ind. Cas. 647=A. I. R. 1925 Oudh 665; 91 Ind. Cas. 334; A. I. R. 1925 All. 267=47 A. 140=85 Ind. Cas. 370; 80 Ind. Cas. 178=A. I. R. 1923 Bom. 395; 78 Ind. Cas. 604=A. I. R. 1924 Lah. 191; A. I. R. 1924 Lah. 471=6 Lah. L. J. 137=78 Ind. Cas. 350; A. I. R. 1930 Pat. 394=125 Ind. Cas. 575; A. I. R. 1929 Cal. 777=122 Ind. Cas. 477.

In special cases a revision will lie even in presence of other remedies. A. I. R. 1927 Lah. 911=28 P. L. R. 136=9 Lah. L. J. 19=103 Ind. Cas. 595; A. I. R. 1927 Mad. 799=26 L. W. 76=104 Ind. Cas. 371; A. I. R. 1927 Cal. 578=31 C. W. N. 739=103 Ind. Cas. 644; A. I. R. 1928 Mad. 416=55 M. L. J. 345=51 M. 664=27 M. L. W. 286=108 Ind. Cas. 539; A. I. R. 1929 Nag. 356=120 Ind. Cas. 735; A. I. R. 1929 Cal. 513=49 C. L. J. 425=33 C. W. N. 572=119 Ind. Cas. 371; A. I. R. 1929 Lah. 175=118 Ind. Cas. 393; A. I. R. 1928 All. 588=51 A. 338=(1929) A. L. J. 62=114 Ind. Cas. 741; A. I. R. 1928 Mad. 794=112 Ind. Cas. 231; A. I. R. 1927 Pat. 316=100 Ind. Cas. 32=8 P. L. T. 677; A. I. R. 1926 Lah. 612=8 Lah. L. J. 423=27 P. L. R. 644=96 Ind. Cas. 359; A. I. R. 1926 All. 58=48 A. 162=90 Ind. Cas. 353; A. I. R. 1925 All. 610=48 A. 175=24 A. L. J. 56=90 Ind. Cas. 180 (F. B.); A. I. R. 1924 Nag. 298=79 Ind. Cas. 123; A. I. R. 1923 Mad. 663=18 L. W. 105=(1923) M. W. N. 354=72 Ind. Cas. 688; A. I. R. 1924 Pat. 176=71 Ind. Cas. 911; A. I. R. 1924 Nag. 38=69 Ind. Cas. 719; A. I. R. 1922 Lah. 63=4 Lah. L. J. 71=67 Ind. Cas. 945; 65 Ind. Cas. 476 (Cal); A. I. R. 1922 Nag. 115=5 N. L. J. 151=65 Ind. Cas. 351. The exercise of revisional powers is discretionary, and High Court will be unwilling or slow to interfere where an aggrieved party has other remedy open to him. A. I. R. 1922 Pat. 315=1 Pat. 68=3 P. L. T. 406=65 Ind. Cas. 135; see also A. I. R. 1924 Pat. 134=4 P. L. T. 718=74 Ind. Cas. 474; A. I. R. 1925 Nag. 31=76 Ind. Cas. 46; A. I. R. 1924 Lah. 400=71 Ind. Cas. 160; A. I. R. 1922 Sind 1=15 S. L. R. 165=65 Ind. Cas. 50; A. I. R. 1922 Mad. 3=41 M. L. J. 378=(1921) M. W. N. 507=15 L. W. 245=64 Ind. Cas. 493; 64 Ind. Cas. 459; 63 Ind. Cas. 809; 99 P. R. 1915=207 P. W. R. 1915=32 Ind. Cas. 250; 19 M. L. T. 364=30 M. L. J. 486=(1916) 1 M. W. N. 301; 37 Ind. Cas. 348; 38 Ind. Cas. 299. High Court can not interfere under s. 115 where judgment-debtor has his remedy by review of judgment. 22 C. W. N. 627=27 C. L. J. 418=44 Ind. Cas. 763. As the exercise of the power of revision is discretionary it must be adopted to the circumstances of each particular case and where necessary interference may be made even though other remedy is available. A. I. R. 1925 Nag. 17=79 Ind. Cas. 903. The High Court ought not to interfere unless the particular point can be shortly and conveniently be disposed of by way of revision. 58 M. 771=157 Ind. Cas. 589=A. I. R. 1935 Mad. 282=1935 M. W. N. 172=68 M. L. J. 218.

High Court will not interfere ordinarily in revision with orders passed under Order XXI, r. 63. A. I. R. 1929 Rang. 297=7 Rang. 466=120 Ind. Cas. 231. Where a plaint presented to the first class Subordinate Judge is returned for presentation to the proper Court and on appeal the District Judge affirms the order a revision does not lie against the appellate order. 31 P. L. R. 178=128 Ind. Cas. 51. The order rejecting a plaint is a decree. An order passed in appeal from that order that no appeal lies amounts to dismissal of the appeal. Even such order is a decree and is open to a second appeal and revision does not lie. A. I. R. 1929 Cal. 226=49 C. L. J. 81=115 Ind. Cas. 368; see also 118 Ind. Cas. 193. In the absence of any great injustice or inconvenience that would follow from refusal to interference, High Court

will not interfere in revision whether another remedy by suit is open to the aggrieved party. 48 Ind. Cas. 415 ; 49 Ind. Cas. 150=4 P. L. J. 94=(1919) Pat. 1 (F. B.)=49 Ind. Cas. 150 ; 47 Ind. Cas. 190 ; A. I. R. 1921 Nag. 17=4 N. L. J. 55=63 Ind. Cas. 46 ; A. I. R. 1921 Pat. 204=57 Ind. Cas. 432 ; 57 Ind. Cas. 421=A. I. R. 1921 Pat. 401=(1921) Pat. 204 ; 1 P. L. T. 296=5 P. L. J. 415=57 Ind. Cas. 421 ; A. I. R. 1929 Pat. 141=8 Pat. 717=10 P. L. T. 95=115 Ind. Cas. 695 ; 134 Ind. Cas. 160=12 P. L. T. 613 ; 53 A. 466=A. I. R. 1931 All. 333=1931 A. L. J. 181=131 Ind. Cas. 548 ; 1931 M. W. N. 1012 ; A. I. R. 1933 Sind 329=27 S. L. R. 190 ; A. I. R. 1933 Pat. 625 ; A. I. R. 1933 Pat. 604 ; 14 Lah. 51=142 Ind. Cas. 738=34 P.L.R. 289=A. I. R. 1933 Lah. 317.

It is not the invariable rule of the Court to refuse to give relief in the exercise of its revisional powers under s. 115 when there is another legal remedy by way of regular suit. Whether the High Court should interfere or not depends upon the circumstances of each case. 58 C. 55=132 Ind. Cas. 631=A. I. R. 1931 Cal. 385 ; 132 Ind. Cas. 665=A. I. R. 1931 Lah. 666 ; 53 A. 532=132 Ind. Cas. 801=A. I. R. 1931 All. 663 ; 55 Bom. 411=1931 Bom. 319=131 Ind. Cas. 895=33 Bom. L. R. 476=A. I. R. 1931 Bom. 284 ; 132 Ind. Cas. 311=33 L. W. 210=A. I. R. 1931 Mad. 1=60 M. L. J. 713 ; 1931 A. L. J. 974 ; 33 P. L. R. 975 ; 33 P. L. R. 53=A. I. R. 1932 Lah. 176=135 Ind. Cas. 199 ; 143 Ind. Cas. 87=A. I. R. 1933 Pesh. 52 ; 55 A. 256=145 Ind. Cas. 859=1933 A. L. J. 268=A. I. R. 1933 All. 374 ; A. I. R. 1933 Rang. 259. 142 Ind. Cas. 628=14 Pat. L. T. 70=A. I. R. 1933 Pat. 158 ; 11 Rang. 134=144 Ind. Cas. 163=A. I. R. 1933 Rang. 64 ; A. I. R. 1934 Lah. 119.

**Clause (a)—Exercise of jurisdiction not vested.**—"The particular events which justify interference are, first, where the Court has exercised a jurisdiction not vested in it by law ; secondly, where the Court has failed to exercise a jurisdiction which is vested in it by law ; and thirdly, where the Court has acted in the exercise of its jurisdiction illegally or with material irregularity." *Per Jenkins C. J.* in *Shew Prosad v. Ramchandur*, 41 C. 323=23 Ind. Cas. 977 (79). "There is no doubt that there is some variance of opinion as to the meaning of the term 'jurisdiction' in s. 115. According to one view the term 'jurisdiction' is here used in ordinary sense, that is a jurisdiction local, pecuniary, personal or with reference to the subject-matter of the suit. According to another view, the term may mean the legal authority of a Court to do certain things namely, to make a particular order in a case over which it has jurisdiction in the sense stated. According to my own view the former construction is the preferable one." *Per Woodroff J.* in *ibid.* But in *Hur Prosad v. Jufor Ali*, 7 A. 345, *Mahmood J.* observed : "The term jurisdiction as used by their Lordships of the Privy Council in *Amir Husain Khan v. Shew Baksh Singh*, 11 C. 6=11 I. A. 237, in its broad legal sense may be taken to mean the power of administering justice according to the means which the law has provided, and subject to the limitations imposed by that law upon the judicial authority." The High Court can set aside the order of the lower appellate Court for erroneously entertaining an appeal where none is competent. 5 Pat. L. J. 97=55 Ind. Cas. 15. The High Court can also interfere in revision when a Civil Court wrongly assumes jurisdiction to try a suit cognizable by a Revenue Court. 23 O. C. 281=56 Ind. Cas. 946. Where a Court entertains and decides an appeal which in law does not lie and is incompetent, the High Court will interfere in revision. 62 C. L. J. 530 ; see also A. I. R. 1936 Pesh. 176=164 Ind. Cas. 856 ; 35 P. L. R. 431=A. I. R. 1934 Lah. 540. Section 115 of the Code clearly refers the clauses (a) and (b) to jurisdiction, which means the jurisdiction of the Court and not the competence of any party to sue. A finding that a party is not competent to sue is not therefore a finding affecting the Court's jurisdiction. A. I. R. 1935 Lah. 783=165 Ind. Cas. 228. Allowing an application which is on its face time-barred ignoring s. 3 of the Limitation Act amounts to acting without jurisdiction so as to call for plaintiff the revisional powers of the High Court. 9 L. B. R. 711=11 Bur. L. T. 73=39 Ind. Cas. 154 ; A. I. R. 1931 Cal. 319=52 C. L. J. 23. But in all cases to justify interference by the High Court under this section, on the ground of want of jurisdiction the facts ousting the jurisdiction must be patent on the face of the record. A. I. R. 1922 Sind 1=15 S. L. R. 165=65 Ind. Cas. 50.

An appellate Court can order a subordinate Court not competent to do so to try a suit and dispose of it. If it does so, it acts without jurisdiction. A. I. R. 1930 All. 713=(1930) A. L. J. 1233=127 Ind. Cas. 434. Where no appeal is maintainable but the lower Court entertains an appeal, the High Court can interfere in revision and hold that appeal is not competent. 12 Lah. 89=132 Ind. Cas. 180 ; 53 Ind. Cas.

41. Dismissing suit for want of prosecution sent for effecting partition ordered by High Court is acting without jurisdiction and revision lies. A. I. R. 1924 P. C. 198 = 4 Pat. 61 = 51 A. 321 = 22 A. L. J. 990 = 29 C. W. N. 391 = 81 Ind. Cas. 747 = 47 M. L. J. 441 = 26 Bom. L. R. 1129 (P. C.). No revision lies unless it is shown that appellate Court without jurisdiction had made order for remand. A. I. R. 1927 Mad. 1111 = 39 M. L. T. 120 = 109 Ind. Cas. 287. An order allowing an appeal against an order of dismissal of a suit by the First Court for plaintiff's not securing service on defendant can be set aside in revision. 15 A. L. J. 520 = 39 Ind. Cas. 464. Where a subordinate Court decides the suit on a point not in issue between the parties, the order is without jurisdiction and can be revised. 4 U. P. L. R. 47. Where the Court wrongfully cancels a lease granted by a guardian which was perfectly within his competence, the order is made without jurisdiction and must be set aside. A. I. R. 1930 Lah. 1017 = 12 Lah. 167 = 31 P. L. R. 984 = 132 Ind. Cas. 203. Issue of commission is a question of jurisdiction and not one of mere discretion. A. I. R. 1924 Cal. 971 = 39 C. L. J. 598 = 84 Ind. Cas. 9; see also A. I. R. 1927 Mad. 524 = (1927) M. W. N. 218. A decision by the Judge based on private opinion is without jurisdiction. A. I. R. 1926 Mad. 116 = 22 L. W. 837 = 91 Ind. Cas. 651. *Ex parte* decree set aside as matter of grace is ground for revision. A. I. R. 1925 Mad. 209 = 20 L. W. 829 = 48 M. L. J. 152 = 85 Ind. Cas. 499; see also 64 Ind. Cas. 303 = A. I. R. 1921 Oudh 141 = 24 O. C. 282.

The High Court will not interfere in revision on mere ground of wrong decision; but want of jurisdiction is a good ground for revision. A. I. R. 1923 Rang 199 = 76 Ind. Cas. 504; see also A. I. R. 1929 Pat. 747 = 11 P. L. T. 59 = 119 Ind. Cas. 555. An order dismissing an execution application without notice to decree-holder is without jurisdiction. 68 Ind. Cas. 337 = A. I. R. 1923 Pat. 180 = 4 P. L. T. 204. High Court can interfere with the lower appellate Court whereby it erroneously decides that the Court of first instance has jurisdiction to entertain a suit. A. I. R. 1929 Mad. 396 = 55 M. L. J. 394 = 29 M. L. W. 584 = 119 Ind. Cas. 35; see also A. I. R. 1930 Mad 216 = 58 M. L. J. 104 = 122 Ind. Cas. 337; A. I. R. 1927 Sind 239 = 104 Ind. Cas. 342; A. I. R. 1922 Lah. 100 = 4 Lah. L. J. 176 = 29 P. L. R. 1922 = 65 Ind. Cas. 282.

Issuing notice by the District Judge under Reg. XVII of 1806, which was not in force, is exercise of jurisdiction not vested in him by law and revision will lie. A. I. R. 1929 Pat. 537 = 10 P. L. T. 787 = 112 Ind. Cas. 822. Assumption of jurisdiction not vested in law is a ground for interference under section 115. A. I. R. 1929 Pat. 528 = 11 P. L. T. 384 = 122 Ind. Cas. 153; see also A. I. R. 1926 Bom. 266 = 50 B. 215 = 21 Bom. L. R. 443 = 94 Ind. Cas. 742; A. I. R. 1929 Lah. 369 = 11 Ind. Cas. 145; A. I. R. 1926 All. 401 = 94 Ind. Cas. 1; 41 A. 602 = 17 A. L. J. 718 = 51 Ind. Cas. 331; A. I. R. 1923 Mad. 192 = 44 M. L. J. 1 = 16 L. W. 848 = 46 M. 536 = 71 Ind. Cas. 1039; A. I. R. 1923 Mad. 490 = 18 L. W. 299 = 44 M. L. J. 344 = 72 Ind. Cas. 449 = (1923) M. W. N. 199.

Decision of the lower appellate Court that a party's remedy is in an application and not by a separate suit is revisable if it is wrong. A. I. R. 1929 Nag. 388 = 94 Ind. Cas. 566. An order of the appellate Court directing the re-hearing of the suit without any finding as to the sufficiency of the cause for the non-appearance of the defendant is illegal and without jurisdiction. 1 P. L. T. 69 = 54 Ind. Cas. 965. Where the lower Court without jurisdiction has set aside an *ex parte* decree and returns the plaint for presentation to a proper Court for trial *de novo* revision will lie. A. I. R. 1930 All. 873 = (1930) A. L. J. 597 = 52 A. 947 = 132 Ind. Cas. 35. A right of appeal is a substantive right and an applicant in an application for revision is entitled to urge, that a Court without jurisdiction should not take up a matter and dispose of it itself, depriving the applicant of his right of appeal. A. I. R. 1930 All. 873 = (1930) A. L. J. 997 = 52 A. 947 = 132 Ind. Cas. 35. Where the appellate Court decides correctly but without jurisdiction that appeal lies where appeal does not lie, High Court will not interfere in revision. A. I. R. 1929 Rang. 198 = 120 Ind. Cas. 693. Fixing valuation is sale proclamation in date earlier than that fixed for hearing parties in that respect without hearing the parties amounts to acting without jurisdiction. A. I. R. 1923 Pat. 102 = 3 P. L. T. 342 = 65 Ind. Cas. 360. An order refusing decree-holder's application for withdrawal of execution application and proceeding to sell properties notwithstanding such application can be set aside in revision. A. I. R. 1922 Pat. 525 = 65 Ind. Cas. 122. Extension of time for payment after decree for same is passed against s. 63 (3), B. T. Act and can be set aside in revision only. A. I. R. 1929 Cal. 140 = 112 Ind. Cas. 124. According to the

compromise the plaintiff should have been granted a decree realizable from the assets of a deceased person in the hands of A. But the Court in passing the decree made A personally liable if the decree could not be realized from the assets. As the Court had no jurisdiction to pass such a decree its order is revisable. A. I. R. 1929 Lah. 254=116 Ind. Cas. 706. Where execution is taken out one year after decree and arrest is ordered without complying with the provisions of Order 41, rule 22, the whole of the proceedings are without jurisdiction and the High Court will interfere by way of revision even when the aggrieved party had only filed an appeal from the order from which no appeal was in fact maintainable. A. I. R. 1929 Rang. 161=7 R. 110=117 Ind. Cas. 245.

Admitting an application after it is barred is without *jurisdiction* and hence open to revision. A. I. R. 1927 Lah. 342=100 Ind. Cas. 936. Order, where jurisdiction is assumed without making enquiry for the same can be upset in revision. A. I. R. 1927 Mad. 188=24 L. W. 839=99 Ind. Cas. 383. Where appellate Court entertains an appeal against non-appealable order, High Court should interfere in revision. A. I. R. 1926 Cal. 123=97 Ind. Cas. 306. Court granting a prayer contained in a time-barred application acts with illegal assumption of jurisdiction and the order is revisable. A. I. R. 1926 Lah. 326=7 Lah. 161=8 Lah. L. J. 267=27 P. L. R. 321=95 Ind. Cas. 124. Where a suit dismissed for default was resorted to the file in exercise of the inherent powers of the Court under section 115, *held* that the case was a proper one for revision as the question was whether the Court has jurisdiction to make the order. A. I. R. 1930 Nag. 48=26 N. L. R. 30=121 Ind. Cas. 659. Where lower appellate Court through mistake of law assumed jurisdiction and upsets decision of the lower Court, the order of reversal of decision is open to revision. A. I. R. 1927 Mad. 786=53 M. L. J. 131=(1927) M. W. N. 420=39 M. L. T. 25=104 Ind. Cas. 415. Where in spite of the decision that the application is time-barred, Court decides in favour of the applicant treating the application as one within time, the Court assumes jurisdiction illegally. A. I. R. 1926 Lah. 344=8 Lah. L. J. 170=27 P. L. R. 710=94 Ind. Cas. 117.

Admission of appeal in non-appealable cases is revisable. A. I. R. 1926 All. 55=48 A. 27=23 A. L. J. 891=89 Ind. Cas. 404 ; A. I. R. 1925 Pat. 525=4 Pat. 718=6 P. L. T. 795=94 Ind. Cas. 217 ; A. I. R. 1923 Bom. 214=25 Bom. L. R. 147=72 Ind. Cas. 256 ; L. R. 2 A. 166 (Rev.).

By entertaining an objection under Order 21, rule 58, in execution of a mortgage decree a Court assumes a jurisdiction not vested in it and the order of Court is open to revision. 58 P. R. 1918=23 P. W. R. 1918=113 P. L. R. 1918=44 Ind. Cas. 986. The High Court has jurisdiction to interfere with the wrong exercise by the Courts below of power vested in them under Order 21, rules 89 to 92 dealing with confirmation or setting aside of auction sale. 67 Ind. Cas. 286 (Cal). Where an order is impeachable on merits even though Court might have acted illegally or with material irregularity and the only result of allowing a petition of revision would be to deprive parties to another suit, it should not be set aside on revision. A. I. R. 1921 Oudh 168=8 O. L. J. 307=36 Ind. Cas. 545. No revision lies against a wrong decision on a question of *res judicata*. A. I. R. 1921 Oudh 54=24 O. C. 213.

As to revision in case of decision as to jurisdiction under s. 20, each case must be decided on its own merits. Ordinarily, interference in revision is inadmissible in such cases and should only be exercised in exceptional cases to remedy an injustice. A. I. R. 1923 Lah. 565=77 Ind. Cas. 764. Where under the Bengal Tenancy Act the executing Court allows the reversioners to deposit the decretal amount in satisfaction of a decree for rent obtained against a Hindu widow, he exercises a jurisdiction not vested in him by law or he is acting in the exercise of his jurisdiction illegally or with material irregularity and an order allowing such deposit is revisable. A. I. R. 1922 Cal. 95=26 C. W. N. 167=70 Ind. Cas. 127. Where a lower appellate Court erroneously decides in the exercise of its admitted jurisdiction as an appellate Court that the Court of first instance has or has not jurisdiction to entertain a suit, High Court can revise the order. A. I. R. 1923 Bom. 412=76 Ind. Cas. 1010. No revision lies from the decision on a preliminary issue, regarding the jurisdiction of the trying Court to entertain the suit. A. I. R. 1921 Oudh 176=24 O. C. 231=64 Ind. Cas. 92. Where the lower appellate Court has not exceeded its jurisdictions High Court would not revise its decision. 4 L. W. 411=35 Ind. Cas. 74. A declaration not necessary for the suit and made beyond what is prayed for can be expunged in revision. A. I. R. 1923 Cal. 321=68 Ind. Cas. 626.

When after passing of a preliminary decree for accounts the case is transferred to another Court to deal with further proceedings of the case, the former Court having no jurisdiction to pass a decree for the amount founded due, the latter Court can by its discretion consider the question of a *de novo* trial, but the preliminary decree that has been passed must be taken into consideration as it cannot be set aside except in due course of law (*i.e.*, by an appellate Court) and the latter Court can exercise its discretion to hold a *de novo* trial only from the stage after the passing of the preliminary decree, but cannot go behind it. Order holding trial *de novo* from the commencement is revisable. A. I. R. 1929 Lah. 109=118 Ind. Cas. 537.

Where security has been filed but there is a clerical error as to the description of the property and the appellant has applied for its correction, the Court cannot by rejecting the application, reject the appeal. In such a case revision will lie. A. I. R. 1925 Oudh 402=12 O. L. J. 83=86 Ind. Cas. 759. Reopening of the time-barred *ex parte* decree by lower Court can be interfered in revision. 144 Ind. Cas. 980=A. I. R. 1933 Rang. 110. Facts ousting jurisdiction must be patent on the face of the record before it can be predicated of a Court that it has exercised a jurisdiction not vested in it by law. 27 S. L. R. 261=A. I. R. 1933 Sind 229. Where a Court appoints a fresh arbitrator without complying with the formalities prescribed in Sch. II, para 5 (2), the appointment is without jurisdiction or at least tainted with material irregularity and the order appointing the arbitrator can be set aside. 146 Ind. Cas. 493=A. I. R. 1933 Oudh 540.

Where no appeal lies against an order, the erroneous order of the appellate Court can be interfered. 33 P. L. R. 463=A. I. R. 1932 Lah. 416=140 Ind. Cas. 48; see also 36 L. W. 636=A. I. R. 1932 Mad. 714=1932 M. W. N. 1244. Decree passed against wrong person can be set aside in revision. 53 C. L. J. 415=A. I. R. 1931 Cal. 673=134 Ind. Cas. 305.

**Clause (b)—Failure or decline to exercise jurisdiction.**—When a Court has jurisdiction to make an order and refuses to make it on the ground that it has no jurisdiction, that is a good ground for interfering the revision under s. 115. A.I.R. 1934 Bom. 252=36 Bom. L. R. 499=58 B. 485=151 Ind. Cas. 78; A. I. R. 1934 Pat. 641; A. I. R. 1934 Rang. 263; 38 C. W. N. 720=61 C. 903=A. I. R. 1934 Cal. 812=59 C. L. J. 441; see also 1934 A. L. J. 126=A. I. R. 1934 All. 25=147 Ind. Cas. 782; A. I. R. 1934 Oudh 352=11 O. W. N. 550=8 Luck. 734=150 Ind. Cas. 791; A. I. R. 1934 Pat. 425=15 Pat. L. T. 602=148 Ind. Cas. 347. Where the Subordinate Judge has failed to exercise jurisdiction vested in him by law by refusing to accept the plaint, and the District Judge on appeal has erred in law in confirming the decision of the first Court the High Court should interfere in revision. A. I. R. 1929 Lah. 605=11 Lah. L. J. 282=119 Ind. Cas. 481. Erroneous order of returning plaint where suit ought to be dismissed is ground for revision. A. I. R. 1926 All. 58=48 A. 168=24 A. L. J. 83=90 Ind. Cas. 353. Refusing to admit application for wrong reasons is open to revision. A. I. R. 1927 Lah. 134=99 Ind. Cas. 690. Refusal to exercise jurisdiction under s. 10, C. P. Code is open to revision. A. I. R. 19:8 Oudh 355=5 O. W. N. 604=3 Luck. 650. Failure to exercise jurisdiction vested by the Calcutta Rent Act is contemplated by this section. A. I. R. 1922 Cal. 514=26 C. W. N. 711=49 C. 928=86 Ind. Cas. 727. Whereon an erroneous view of law a Court refuses to exercise powers vested in it or exercise powers not vested in it under wrong assumption that it has got them, High Court can interfere in revision. A. I. R. 1923 Mad. 230=44 M. L. J. 80=72 Ind. Cas. 839; see also 115 Ind. Cas. 862; A. I. R. 1928 Lah. 811. A revision lies against an order of an appellate Court rejecting a suit on the erroneous ground of its not being maintainable. A. I. R. 1925 Lah. 174=78 Ind. Cas. 444. Failure to decide the claim as laid and deciding it on other grounds not laid is irregularity and hence revision lies. A. I. R. 1921 Sind 159=16 S. L. R. 207 (F. B.). Interlocutory order in matter of Court-fees and jurisdiction is revisable. A. I. R. 1925 Cal. 320=29 C. W. N. 76=52 C. 128=85 Ind. Cas. 870. Refusal to exercise inherent powers vested under ss. 151 and 152 amounts to a refusal to exercise jurisdiction. A. I. R. 1925 Cal. 420=79 Ind. Cas. 586. Refusal to receive evidence in support of application for restoration of a suit dismissed under Order XVII, rule 2, is a refusal to exercise jurisdiction. A. I. R. 1923 Pat. 530=1 Pat. L. R. 281=74 Ind. Cas. 693. Failure to entertain a plea of illegality *suo motu* amounts to failure to exercise jurisdiction vested. A. I. R. 1924 Mad. 169=(1923) M. W. N. 566=45 M. L. J. 551=76 Ind. Cas. 306. A refusal to accept deposit tendered for the purpose of setting aside a sale under Order 21, r. 89, is a refusal to exercise jurisdiction. A. I. R. 1923 Pat. 490=2 Pat. 715=741

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Ind. Cas. 102. An erroneous order based on misconstruction of the provisions of the law amounts to refusal to exercise jurisdiction and is revisable. A. I. R. 1924 Pat. 506=83 Ind. Cas. 559=5 P. L. T. 107=75 Ind. Cas. 856; see also 70 Ind. Cas. 888=A. I. R. 1923 Mad. 435=44 M. L. J. 100=17 L. W. 705=46 M. 938. A palpably erroneous decision amounts to improper refusal to exercise jurisdiction prejudicing the party can be revised. A. I. R. 1924 All. 263=46 A. 73=21 A. L. J. 861=79 Ind. Cas. 605.

Order refusing to extend time to pay costs rightly ordered to be paid before restoration of suit cannot be interfered in revision. A. I. R. 1926 All. 142=48A. 199=24A. L. J. 120=90 Ind. Cas. 243. Where the lower Court refuses to order partition at the instance of any of the defendants in a partition suit as such a refusal amounts to a failure to exercise jurisdiction, a revision lies. A. I. R. 1926 Cal. 184=86 Ind. Cas. 765. Refusal to entertain an application under Order 21, rule 89, on the ground that the petitioner has no *locus standi*, amounts to failure to exercise a jurisdiction vested in it by law. A. I. R. 1921 Mad. 157=44M. 554=40 M. L. J. 497=13 L. W. 498=(1921) M. W. N. 272 (F.B.)=63 Ind. Cas. 937. Where a Court having jurisdiction to entertain an application refuses to look upon it upon an erroneous assumption which is not warranted by facts, a revision lies. A. I. R. 1930 All. 477=(1930) A. L. J. 1166=126 Ind. Cas. 14. Staying execution proceedings by wrongly applying Civil Procedure Code, s. 10, is refusing to exercise jurisdiction and a revision will lie. A. I. R. 1929 Lah. 694=119 Ind. Cas. 488. Revision will lie where the Judge thinks an appeal is untenable. A. I. R. 1930 Nag. 207=13 N. L. J. 4=121 Ind. Cas. 668. Where a Court refuses to exercise a jurisdiction vested in it by law upon a misapprehension of the law or an erroneous construction of statute, the High Court will interfere in revision. 31 C. W. N. 733; see also 47A. 140=A. I. R. 1925 All. 267=85 Ind. Cas. 470. But holding that certain piece of evidence is not admissible is not failing to exercise jurisdiction. A. I. R. 1929 Pat. 633=11 P. L. T. 581=122 Ind. Cas. 581.

Dismissal of an application for setting aside an *ex parte* decree under Order 34, rule 6, on the erroneous ground that the application is not maintainable, amounts to failure of exercise of jurisdiction vested in the Court by law and a revision will lie. A. I. R. 1930 All. 841=(1930) A. L. J. 1200=52 A. 829=124 Ind. Cas. 729. In a suit by a co-sharer landlord for his share of the rent or in the alternative for the whole rent, refusal to consider whether the plaintiff was entitled to a decree for the whole rent amounts to refusal to exercise a jurisdiction vested in it and a revision lies. A. I. R. 1923 Pat. 41=4 P. L. T. 39. Jurisdiction means power to decide. Wrong decision on admission of application that it does not lie is not refusal to exercise jurisdiction. A. I. R. 1927 Cal. 928=46 C. L. J. 182=31 C. W. N. 818=103 Ind. Cas. 468. Remanding a case under Order LXI, r. 23 instead of under Order LXI, r. 25, does not create a point of jurisdiction as to justify revision. 64 Ind. Cas. 436.

The failure to decide a plea amounts to a refusal to exercise a jurisdiction justifying a revision. 54 Ind. Cas. 662. The refusal by a Court having jurisdiction to entertain an application for review on the ground that an appeal has been filed subsequently amounts to a refusal to exercise jurisdiction and the order is open to interference by High Court in revision. 43 A. 288=19 A. L. J. 24=61 Ind. Cas. 334. Revision lies against a general order of remand by an appellate Court which misunderstands its own duties and in substance declines jurisdiction. 63 Ind. Cas. 858. The refusal of a Court to entertain an application under Order 21, rule 89, C. P. Code, properly presented amounts to a refusal to exercise jurisdiction. 16 A. L. J. 717=40 A. 674=48 Ind. Cas. 14. Refusal to try issues raised before a Court amounts to declining to exercise a jurisdiction vested in him by law so as to justify a revision. 18 Cr. L. J. 303=15 A. L. J. 161=39 A. 297=38 Ind. Cas. 335. A wrong order under s. 10 staying a suit is a refusal to exercise jurisdiction and is open to revision under s. 115. 6 O. L. J. 96=50 Ind. Cas. 212. Declining to accept a deposit by the debtor under Order XXI, rule 89, on the ground that he has sold his interest to a third party amounts to declining to exercise jurisdiction justifying revision. 52 Ind. Cas. 344. Wrongly refusing to entertain an application on the ground that it did not lie at all, amounts to declining of jurisdiction and order can be revised. 38 M. L. J. 322=27 M. L. T. 99=11 L. W. 225=55 Ind. Cas. 267. Where a day is fixed for evidence under Order XXXIII, rule 6, but Court disposes of application thinking the case to be too weak on merits before date for production of evidence the order of Court amounts to refusal to exercise jurisdiction. A. I. R. 1930 All. 758=(1930) A. L. J. 901=126 Ind. Cas. 1. Dismissal of a suit on plaintiff's failure to amend the

plaint without giving him an opportunity to continue the trial with the plaint as it was, amounts to refusal to exercise jurisdiction so as to justify revision. 4 Pat. L. J. 277=51 Ind. Cas. 189. An order of an appellate Court in dismissing the execution application allowed by lower Court on the ground that it was made to a Court not having jurisdiction amounts to declining jurisdiction within the meaning of s. 115. A. I. R. 1924 Mad. 32=45 M. L. J. 210=18 L. W. 17=(1923) M. W. N. 406=73 Ind. Cas. 956. Where a Receiver appointed to take charge of certain jewels in a pending suit applies for an enquiry and orders alleging that some jewels were in possession of a third person and the Court directs him to file suit in that behalf, but postpones trial of it till the decision of pending suit, the action of the Court in so doing amounts to refusal to exercise jurisdiction. 8 L. W. 436=48 Ind. Cas. 139. Where a Court passes a preliminary decree for rendition of account when it has such jurisdiction but its jurisdiction is ousted to deal with further proceedings *i. e.*, to pass a final decree, the proper order for the appellate Court is to transfer the case to the Court having jurisdiction to try the suit and not to return the plaint for presentation to proper Court. Order returning the plaint is revisable. A. I. R. 1929 Lah. 107=118 Ind. Cas. 537. Where an applicant for probate alleges that certain properties have been erroneously included in the Schedule and that they are trust properties and not part of the estate of the deceased and should therefore be excluded from the valuation, it is the duty of the District Judge in such a case to go into the matter and his failure to do so amounts to a refusal to exercise a jurisdiction in him by law and a revision lies. 78 Ind. Cas. 901. If there is failure on the part of the lower Court to exercise its jurisdiction so as to let a party take advantage of a particular procedure to which he is entitled the fact that it has held that another procedure is open to him is no reason for not setting it right in revision. A. I. R. 1929 Nag. 179=123 Ind. Cas. 432. The refusal to entertain an application under Order I, rule 8, without proceeding in accordance with law come under s. 115. 145 Ind. Cas. 387=14 Pat. L. T. 361=A. I. R. 1933 Pat. 302. Where the Judge refuses to consider the objections to an award though filed within time, he refuses to exercise a jurisdiction vested in him. 142 Ind. Cas. 835=A. I. R. 1933 Rang. 38. Refusal to proceed with the execution by taking wrong view of law is revisable. A. I. R. 1933 Oudh 225=10 O. W. N. 263. Where an order refusing to re-open a suit decreed *ex parte* is set aside on appeal, the latter order is open to revision. A. I. R. 1933 Rang. 156=145 Ind. Cas. 370. High Court can interfere when the lower Court allowed an application barred by limitation without at all applying its mind to the question of limitation and deciding the question. A. I. R. 1933 Pat. 132=144 Ind. Cas. 147. The High Court can interfere where the lower Court has failed to exercise a jurisdiction vested in him. 28 N. L. R. 54=A. I. R. 1932 Nag. 70=137 Ind. Cas. 88; see also 133 Ind. Cas. 407=A. I. R. 1931 All. 756; 131 Ind. Cas. 303=32 P. L. R. 737; 31 P. L. R. 984=132 Ind. Cas. 203=12 L. L. J. 167=A. I. R. 1930 Lah. 1017; A. I. R. 1931 All. 332=130 Ind. Cas. 299.

**Clause (c)—Exercise of jurisdiction illegally or with material irregularity.**—Exercise of jurisdiction in a proper manner bars a revision. 19 A. L. J. 47=60 Ind. Cas. 899; see also A. I. R. 1928 Mad. 984=112 Ind. Cas. 710; A. I. R. 1922 Pat. 38. This clause cannot be invoked "when the question of jurisdiction is not involved" or at least a question of procedure, for example, proceeding in the absence of a necessary party to the suit. It must be something independent of the decision itself an irregularity or illegality in the manner of arriving at it, not in the conclusion reached. A good working test is whether if the decision had been the other way, would the illegality still be there? If not, the flaw must lie in the decision, and not in the manner in which it is reached. Consequently, if it would not be revisable, the test would not work in every case. But where it does, it could be decisive. A. I. R. 1936 Nag. 157=164 Ind. Cas. 848. The High Court can interfere in revision under section 115, C. P. Code, where the Court by misinterpretation of a statute assumed jurisdiction in respect of a matter over which it would not have had jurisdiction if the statute had been rightly interpreted. 39 C. W. N. 915. Clause (c) has a distinct meaning from that of the other two clauses; it does not relate merely to irregularities in procedure; it has been advisedly left in indefinite language in order to empower the High Court to interfere and correct gross and palpable errors of subordinate Courts in the ends of justice. 38 C. W. N. 1146. This section applies to jurisdiction alone and High Court will not interfere in revision unless a grave injustice will otherwise be the result. A. I. R. 1931 All. 72=(1931) A. L. J. 13. Where the Courts below have wholly disregarded a High Court decree through an accident, the act though involuntary is an illegal

exercise of jurisdiction within the meaning of this section. A. I. R. 1931 Cal. 27=58 C. 111=34 C. W. N. 515=129 Ind. Cas. 308. Where the appellate Court has not been informed that the suit was stayed under s. 10 and it orders to take it up forthwith, thinking it to be pending without adequate cause the Court below if it proceeds with the suit acts improperly. A party aggrieved can ask the Court below to reconsider its order, although no revision is maintainable. A. I. R. 1929 All. 957=1930 A. L. J. 235=121 Ind. Cas. 97.

Judgment not properly expressed due to inexperience is no ground for revision. A. I. R. 1926 Oudh 183=88 Ind. Cas. 577. Mere defect of jurisdiction is not a ground for revision unless failure of justice has directly resulted from such a defect. A. I. R. 1921 Lah. 265=82 P. L. R. 1922=67 Ind. Cas. 278. Erroneous decisions by the lower Courts on points of law and fact are not open to revision if no question of jurisdiction is involved. 116 Ind. Cas. 660; see also A. I. R. 1930 Sind 170=24 S. L. R. 145=121 Ind. Cas. 161; A. I. R. 1926 Lah. 47=26 P. L. R. 746=90 Ind. Cas. 1042.

In considering cl. (c) all that the legislature requires is, that the Court should consider whether the Court below having jurisdiction in the matter, did in the exercise of its jurisdiction acted illegally or with material irregularity. Any illegality or material irregularity may be a basis for revising the order of the lower Court, and it is left entirely to the Revision Court to determine whether there has been such illegality or material irregularity as will dispose it to interfere. If a question of jurisdiction is involved, the Court may act under clause (a) or (b). 1932 A. L. J. 801 (805, 807), *Per Boys J.* A mere error of law in deciding a case cannot be said to be an illegal or irregular exercise of jurisdiction. If the Court is competent to determine the question of law and determines it, the High Court cannot interfere in revision because it considers that decision to be erroneous in point of law. *Per Niamatulla J.* in *Ibid*; see also A. I. R. 1935 Lah. 120; A. I. R. 1935 Lah. 602; A. I. R. 1935 Pat. 385=16 Pat. L. T. 311=155 Ind. Cas. 976=14 Pat. 488; A. I. R. 1935 Pat. 267=155 Ind. Cas. 419; A. I. R. 1935 Pat. 488=157 Ind. Cas. 474; 38 C. W. N. 1001=A. I. R. 1934 Cal. 861; A. I. R. 1934 Rang. 306=150 Ind. Cas. 1055; A. I. R. 1934 Rang. 230=151 Ind. Cas. 668. Where the lower Court entirely disregards the most important piece of evidence in the case, namely, the original grant in favour of the charity, and bases its order on irrelevant documents, the procedure amounts to an illegality or material irregularity. 58 B. 623=152 Ind. Cas. 781=36 Bom. L. R. 687=A. I. R. 1934 Bom. 343. Where the order of the District Judge vacating the decree of a Union Court is not in accordance with s. 88 of the Bengal Self-Government Act, the High Court may in revision interfere and set aside the order vacating the decree. 60 C. L. J. 19. Where there is a wilful disregard or conscious violation by a Judge of a rule of law or procedure the High Court will have jurisdiction to interfere in revision. 34 Bom. L. R. 1273=A. I. R. 1932 Bom. 584=140 Ind. Cas. 381=A. L. R. 1933 Bom. 23; see also A. I. R. 1932 Mad. 217=138 Ind. Cas. 136=1932 M. W. N. 53; 11 Pat. 616=140 Ind. Cas. 572=A. I. R. 1932 Pat. 346; 54 A. 394; I. R. 1931 Lah. 646; 13 P. L. T. 726; 54 C. L. J. 555=A. I. R. 1932 Cal. 349=137 Ind. Cas. 474; A. I. R. 1932 Mad. 603=1932 M. W. N. 290; 140 Ind. Cas. 325=1932 M. W. N. 1338; 156 Ind. Cas. 1098.

**Acting illegally.**—When a Judge delivers a perverse judgment he is exercising his jurisdiction illegally. A. I. R. 1930 Rang. 324=128 Ind. Cas. 848. What is illegal or materially irregular act must be decided on the merits of each case. A. I. R. 1921 (U. B.) 27=4 U. B. R. 16=63 Ind. Cas. 838. Refusal to issue a certificate on remand is illegal and open to revision. 42 B. 363=20 Bom. L. R. 348=45 Ind. Cas. 552. Joinder of persons claiming adversely to each other under an order of Court is an illegality justifying interference in revision. 57 Ind. Cas. 784. An order directing a pauper appellant to furnish security for costs, under Order 41, rule 10, is illegal and can be set aside in revision. A. I. R. 1922 Lah. 27=3 Lah. 30=68 P. L. R. 1922=67 Ind. Cas. 256. Where appellate Court decides on a point of fact not at all raised in the trial Court, the order is illegal and irregular and is revisable. A. I. R. 1926 Rang. 214=4 Rang. 202=98 Ind. Cas. 1029. Where the decision is not based on merits but on question not supported by law, it shows illegal exercise of jurisdiction. 44 C. L. J. 565=99 Ind. Cas. 946. The contravention of an express provision of law is not merely an erroneous decision but is an illegality. A. I. R. 1930 Oudh 9=118 Ind. Cas. 805. Where the lower Court applies its mind to the question of law and follows authority, it does not act illegally or with material irregularity. 59 M. L. J. 354=32 L. W. 317=128 Ind. Cas. 875. Lower



Court has not acted illegally or with material irregularity only because it follows one view of law rather than another and the High Court will not interfere with it in revision. A. I. R. 1929 Bom. 198=31 Bom. L. R. 331=116 Ind. Cas. 249. Erroneous decision about admissibility or otherwise of document is no ground for revision. A. I. R. 1924 Rang. 212=2 Bur. L. J. 275=83 Ind. Cas. 334. In the absence of injustice or hardship though the order of the lower Court may be illegal it can not be revised. A. I. R. 1924 Nag. 293=78 Ind. Cas. 746.

Acting illegally does not merely imply the committing of an error of procedure such as acting with material irregularity does and the High Courts can interfere and correct gross and palpable errors of subordinate Courts under s. 115 (e). A. I. R. 1924 Cal. 633=83 Ind. Cas. 438=51 C. 690=28 C. W. N. 559=39 C. L. J. 431=78 Ind. Cas. 958 ; see also 61 Ind. Cas. 967=29 M. L. T. 95 ; A. I. R. 1921 U. B. 27=4 U. B. R. 16=63 Ind. Cas. 838 ; 76 Ind. Cas. 125 ; A. I. R. 1924 Lah. 662=76 Ind. Cas. 139 ; A. I. R. 1925 Nag. 236=83 Ind. Cas. 257 ; 97 Ind. Cas. 1025=A. I. R. 1926 Rang. 205=4 Rang. 221 ; 90 Ind. Cas. 285=23 A. L. J. 948 ; A. I. R. 1926 Cal. 530=91 Ind. Cas. 839 ; A. I. R. 1930 All. 843=128 Ind. Cas. 818 ; A. I. R. 1929 All. 593=(1929) A. L. J. 769=51 A. 910=119 Ind. Cas. 103 ; A. I. R. 1929 Rang. 115=7 Rang. 339=120 Ind. Cas. 899.

The contravention of an express provision of law is not merely an erroneous decision but is an illegality. A. I. R. 1930 Oudh 9=118 Ind. Cas. 805 ; 10 Bur. L. T. 29=35 Ind. Cas. 426. Error caused by appeal disposed of by the inferior Court where parties are prejudiced can be corrected in revision. 114 Ind. Cas. 440. If there is misinterpretation of the document the concurrent findings of the lower Courts are open to revision by High Court. A. I. R. 1933 Pesh. 67=146 Ind. Cas. 363.

Order passed by illegal procedure consented by the opposite party cannot be interfered in revision. 135 Ind. Cas. 230=1931 A. L. J. 1087=A. I. R. 1932 All. 154. Execution against an exonerated party is an illegality. A. I. R. 1933 Mad. 508=144 Ind. Cas. 30. But order causing great inconvenience to the public does not involve illegality or material irregularity. 143 Ind. Cas. 143=1933 A. L. J. 759=A. I. R. 1933 All. 343. Refusal to confirm a sale held in execution of a decree is an illegality. A. I. R. 1933 Lah. 90=13 Lah. 761=142 Ind. Cas. 687. Where two different suits for rent are hit at by Order 2, rule 2, the High Court will interfere in revision. 146 Ind. Cas. 351=37 C. W. N. 730=A. I. R. 1933 Cal. 831. If the construction of the terms of a compromise by the Full Bench of the Presidency Small Cause Court on an application made in that behalf happen to be wrong, the Court could not be held to have acted illegally within the meaning of cl. (c). s. 115, C. P. Code and a revision therefore is not competent. 1934 M. W. N. 160. A Judge confirming an execution sale on the very day on which it is held by acceptance of a bid acts in the exercise of his jurisdiction illegally or with material irregularity and the order can be set aside under the revisional powers of the High Court. A. I. R. 1934 Oudh 25. The order of a Judge refusing to issue a commission for examination of witnesses though wrong is not without jurisdiction or failure to exercise a vested jurisdiction or an exercise of it illegally or with material irregularity and is no ground for revision. A. I. R. 1934 All. 37.

**Mere error of law.**—Errors in conclusion of law or fact not involving questions of jurisdiction are not open to correction in revision. 30 P. L. R. 230=113 Ind. Cas. 539 ; see also 111 Ind. Cas. 141=Ind. Rul. (1929) Pat. 493 ; A. I. R. 1929 Rang. 187=119 Ind. Cas. 749 ; A. I. R. 1927 Cal. 928=40 C. L. J. 182=31 C. W. N. 818=103 Ind. Cas. 468 ; 66 P. R. 1915=146 P. W. R. 1915=31 Ind. Cas. 80 ; 23 C. L. J. 557=34 Ind. Cas. 667 ; 22 C. L. J. 564=33 Ind. Cas. 346 ; 27 C. L. J. 294=41 Ind. Cas. 919 ; 37 Ind. Cas. 19=3 O. L. J. 459 ; 45 C. 519=26 C. L. J. 325=22 C. W. N. 446=42 Ind. Cas. 711 ; 45 Ind. Cas. 761=16 A. L. J. 441 ; 48 Ind. Cas. 38=35 M. L. J. 604=24 M. L. T. 482=(1918) M. W. N. 716=8 L. W. 592 ; 35 M. L. J. 251=48 Ind. Cas. 128 ; 54 Ind. Cas. 757 ; 23 C. W. N. 759=52 Ind. Cas. 767 ; 52 Ind. Cas. 641 ; 48 Ind. Cas. 614 ; 48 Ind. Cas. 160 ; 65 Ind. Cas. 512 ; 65 Ind. Cas. 355=A. I. R. 1923 Pat. 90=3 P. L. T. 314 ; 65 Ind. Cas. 50=15 S. L. R. 165 ; A. I. R. 1922 Pat. 376=(1922) P. 76=3 P. L. T. 29=1 Pat. 48=62 Ind. Cas. 927 ; 9 Rang. 71=A. I. R. 1931 Rang. 136 ; 63 Ind. Cas. 838=(1921) 4 U. B. R. 16 ; 65 Ind. Cas. 696=A. I. R. 1923 Cal. 322 ; A. I. R. 1923 Cal. 280=68 Ind. Cas. 430 ; A. I. R. 1921 Cal. 749=35 C. L. J. 327=70 Ind. Cas. 541 ; 71 Ind. Cas. 472=A. I. R. 1923 All. 465 ; A. I. R. 1922 Nag. 264=71 Ind. Cas. 31 ; A. I. R. 1924 All. 691=78 Ind. Cas. 434 ; 95 Ind.

Cas. 838 ; 91 Ind. Cas. 379 (Lah) ; A. I. R. 1933 Sind 279 (F.B.)=146 Ind. Cas. 777 ; 55 A. 216=145 Ind. Cas. 436=1933 A. L. J. 110=A. I. R. 1933 All. 295 ; A. I. R. 1933 Oudh 534=10 O. W. N. 1145 ; A. I. R. 1933 All. 557=1933 A. L. J. 1269 ; A. I. R. 1933 Mad. 231=115 Ind. Cas. 380 ; 33 P. L. R. 391=137 Ind. Cas. 804 ; 137 Ind. Cas. 513=33 P. L. R. 330 ; A. I. R. 1932 Mad. 472=138 Ind. Cas. 146 ; 1932 A. L. J. 418=A. I. R. 1932 All. 379 ; 53 A. 519 ; 134 Ind. Cas. 463 ; A. I. R. 1931 Oudh 408 ; A. I. R. 1931 All. 667 ; 40 C. W. N. 698 ; A. I. R. 1936 Lah. 521=38 P. L. R. 800=163 Ind. Cas. 584 ; A. I. R. 1936 Cal. 706 ; 35 P. L. R. 177 ; A. I. R. 1934 Rang. 233 ; A. I. R. 1934 Lah. 825=152 Ind. Cas. 620=35 P. L. R. 670 ; 35 P. L. R. 683 ; A. I. R. 1935 Lah. 972 ; A. I. R. 1935 Lah. 951 ; A. I. R. 1935 Rang. 158=156 Ind. Cas. 615 ; A. I. R. 1935 Pat. 191 ; A. I. R. 1937 Oudh 108.

Erroneous decision on a question of law is no ground for revision if the Court had jurisdiction to try the case. A. I. R. 1926 Oudh 31=90 Ind. Cas. 430 ; A. I. R. 1926 Oudh 373=90 Ind. Cas. 373 ; A. I. R. 1936 Pat. 119=161 Ind. Cas. 26 ; 1936 O. W. N. 344=161 Ind. Cas. 424 ; A. I. R. 1936 Sind 205. Mistake regarding the question of limitation is not necessarily a ground for revision. A. I. R. 1928 Cal. 189=47 C. L. J. 62=107 Ind. Cas. 733 ; A. I. R. 1927 Oudh 615=4 O. W. N. 1123=107 Ind. Cas. 191 ; A. I. R. 1928 Cal. 202=32 C. W. N. 98=106 Ind. Cas. 561 ; A. I. R. 1927 Nag. 389=103 Ind. Cas. 113 ; A. I. R. 1927 Mad. 660=26 L. W. 15=101 Ind. Cas. 514 ; A. I. R. 1927 Lah. 43=98 Ind. Cas. 892 ; A. I. R. 1924 Pat. 37=2 Pat. 800=4 P. L. T. 491=1 Pat. L. R. 361=75 Ind. Cas. 430 ; A. I. R. 1922 Pat. 308 ; 55 Ind. Cas. 871=2 U. P. L. R. All. 72 ; 3 Pat. L. J. 376=46 Ind. Cas. 176 ; 32 Ind. Cas. 982 ; 133 Ind. Cas. 439=32 P. L. R. 410 ; 32 Ind. Cas. 3=19 M. L. T. 24. A mere error of law such as for example on question of limitation is not necessarily an illegality or exercise by a Court of jurisdiction not vested in by law so as to entitle the person aggrieved to apply for a revision. A. I. R. 1924 Lah. 666=76 Ind. Cas. 14. The High Court will not interfere under this section merely because the lower Court had wrongly decided that a suit was barred by limitation or that it was barred by *res judicata* or because the lower Court had proceeded upon an erroneous construction of the sections of an Act or had misunderstood the effect of a document in evidence or had excluded evidence which it ought to have admitted. A. I. R. 1924 Cal. 493=28 C. W. N. 292=80 Ind. Cas. 205. An erroneous decision on a question of limitation can be revised if the order results is an improper refusal to exercise jurisdiction, *e. g.*, to execute a decree. A. I. R. 1924 All. 263=21 A. L. J. 861=46 A. 73=79 Ind. Cas. 605 ; see also A. I. R. 1930 Lah. 112=123 Ind. Cas. 571. If limitation for setting aside abatement is not considered it is a ground for interference. A. I. R. 1926 Cal 444=87 Ind. Cas. 173. Where the order of the lower appellate Court overlooks the question of limitation in deciding the appeal a revision will lie. A. I. R. 1929 Rang. 304=124 Ind. Cas. 260.

Where a Court with jurisdiction to hear an appeal hears it, and while disposing of the appeal comes to a wrong conclusion on point of law, it does not amount to acting in the exercise of jurisdiction "illegally or with material irregularity." A. I. R. 1929 Pat. 633=11 P. L. T. 581=122 Ind. Cas. 581 ; see also A. I. R. 1930 Nag. 88=120 Ind. Cas. 414. So a revision does not lie against a mistake of law apart from a question of jurisdiction. A. I. R. 1929 Lah. 26=116 Ind. Cas. 221 ; 117 Ind. Cas. 727 ; A. I. R. 1928 Lah. 284=107 Ind. Cas. 273 ; A. I. R. 1927 Cal. 965=46 C. L. J. 527=106 Ind. Cas. 851 ; A. I. R. 1928 Lah. 102=106 Ind. Cas. 829 ; A. I. R. 1927 All. 358=49 A. 454=25 A. L. J. 399=100 Ind. Cas. 638 ; 100 Ind. Cas. 76 ; A. I. R. 1927 Rang. 90=5 Bur. L. J. 206=100 Ind. Cas. 327 ; A. I. R. 1927 Lah. 573=100 Ind. Cas. 3 ; A. I. R. 1926 Nag. 472=96 Ind. Cas. 251 ; 93 Ind. Cas. 855=A. I. R. 1926 Lah. 355 ; 26 P. L. R. 783=92 Ind. Cas. 46 ; 75 Ind. Cas. 472=A. I. R. 1923 All. 465 ; A. I. R. 1923 Oudh 18=9 O. L. J. 543=72 Ind. Cas. 394. But when the Court below does not judicially consider what it ought to have considered and decides something that it is not called upon to decide there is illegal and irregular exercise of jurisdiction. 155 Ind. Cas. 1088=1935 P. L. J. 527=A. I. R. 1935 All. 310. Revision is allowed where onus of proof was wrongly placed on wrong party. 61 C. L. J. 18=A. I. R. 1935 Cal. 710.

Error of law unless it involves a want or refusal of jurisdiction or any illegality or material irregularity of procedure is not revisable. 13 N. L. R. 116=41 Ind. Cas. 883 ; 58 Ind. Cas. 182=18 A. L. J. 378. A. I. R. 1925 Oudh 373=12 O. L. J. 111=86 Ind. Cas. 918. Error of law involving question of jurisdiction can be ground for revision. A. I. R. 1928 Bom. 548=30 Bom. L. R. 1931=112 Ind. Cas. 734. This section applies to cases of material irregularity. It is wrong to utilize the section to

correct errors of law and not merely to errors of procedure. A. I. R. 1926 Cal. 1112 = 30 C. W. N. 928 = 98 Ind. Cas. 751.

A revision is competent where there has been an entire misapprehension as to the law on the subject in Courts below. A. I. R. 1930 Lah. 572 = 31 P. L. R. 284 = 128 Ind. Cas. 56. Where a Court has overlooked the canon of interpretation that any statutory provision in the nature of taxation clause should be interpreted literally in favour of the subject the High Court will interfere in revision. A. I. R. 1929 Rang. 210 = 120 Ind. Cas. 698. Whereby an error of law the Court excludes the main evidence in the case from consideration that there is such material irregularity in the exercise of jurisdiction as may by the judgment open to revision. A. I. R. 1930 Lah. 177 = 119 Ind. Cas. 417. An error of law amounting to an usurpation of authority in the act of rejection of a petition for review of order confirming auction sale calls for interference under s. 115. A. I. R. 1929 Nag. 305 = 116 Ind. Cas. 65. Decision without impleading necessary party on mistaken notion of law is subject to revision. A. I. R. 1928 Lah. 414 = 10 Lah. L. J. 161 = 108 Ind. Cas. 391. Decision that application to set aside award is barred without reference to article or its wordings can be set aside. A. I. R. 1927 Mad. 436 = 52 M. L. J. 357 = 100 Ind. Cas. 634. Where the lower Court has failed to decide the pleas of jurisdiction and limitation raised, revision lies. 95 Ind. Cas. 4. Finding arrived independently of inadmissible documents is not vitiated. A. I. R. 1926 Pat. 29 = 90 Ind. Cas. 329. Section 115 applies to jurisdictions alone, the irregular exercise or non-exercise or it or the illegal assumption of it. A mere error of law is not an illegality within the meaning of this section. 142 Ind. Cas. 616 = 10 O. W. N. 259 = A. I. R. 1933 Oudh 240. But the wrong application of the section of an Act can be revised. 34 P. L. R. 440 = A. I. R. 1933 Lah. 335. Wrong finding on a question of law cannot be upset in revision. 13 L. L. T. 12.

**Material irregularity.**—Material irregularity consists in misake of fact or law occasioned by wrong assumption or refusal of jurisdiction or in refusal to exercise of jurisdiction or exercising it illegally and irregularly ; decision as to what is material irregularity depends upon fact of each case. A. I. R. 1923 Mad. 254 = 44 M. L. J. 69 = 44 M. 123 = (1922) M. W. N. 813 = 16 L. W. 898 = 72 Ind. Cas. 902. To show that there has been irregularity which can be remedied in revision the applicant should show that either the procedure for sale is entirely illegal, or he must show that there had been irregularity in the proceeding which has caused damage of a serious kind to his interest. A. I. R. 1931 Pat. 63 = 130 Ind. Cas. 265. Where there is a wilful disregard or conscious violation of a rule of law or procedure, the case is one of material irregularity calling for interference in revision under s. 115, C. P. Code. 59 B. 430 = 156 Ind. Cas. 662 = 37 Bom. L. R. 241 = A. I. R. 1935 Bom. 222 ; see also A. I. R. 1935 Pesh. 186 ; 158 Ind. Cas. 250. An order for new trial on the basis of private information is tainted for material irregularity. 62 C. 289. Where Court fails to exercise judicially discretion vested under s. 72, C. P. Code, revision can be granted. A. I. R. 1935 Lah. 964. Where a Judge deals with an application to be added as party to a suit summarily and dismisses it, totally misapprehending the nature of the application he acts with material irregularity. A. I. R. 1935 P. C. 185 = 39 C. W. N. 1249 = 42 L. W. 554 = 37 Bom. L. R. 861 = 1935 P. L. J. 1124 = 1935 M. W. N. 1251 = 1935 O. W. N. 997. Where a Court refuses to allow an amendment under Order 6, rule 17, it acts with material irregularity. A. I. R. 1935 All. 651 = 157 Ind. Cas. 112. It is a material irregularity when the finding is based on guess. A. I. R. 1934 Rang. 214 ; 1936 O. W. N. 237. Failure to issue notice to Government in pauper appeal is material irregularity. A. I. R. 1934 All. 424 = 1934 A. L. J. 827 = 148 Ind. Cas. 624. Refusal to go into question of jurisdiction before proceeding to hear the suit on the merits amounts to material irregularity. A. I. R. 1934 Mad. 617 = 152 Ind. Cas. 369. An appellate Court acts with material irregularity if it goes beyond the pleadings and the grounds of appeal and remands a suit for the trial of issues which do not arise in the case. 152 Ind. Cas. 133 = A. I. R. 1934 Lah. 708. But a wrong decision on a question of limitation is not a material irregularity. A. I. R. 1934 Pesh. 103. Wrongly placing burden of proof is not material irregularity. 35 P. L. R. 334 = 151 Ind. Cas. 548. Decreeing suit on a case which is inconsistent with pleadings, amounts to material irregularity. A. I. R. 1936 Rang. 235 = 163 Ind. Cas. 668 = 14 Rang. 511. It is material irregularity if the appellate Court fails to notice on important ground of appeal. 162 Ind. Cas. 416 = A. I. R. 1936 Pesh. 97 ; see also 38 P. L. R. 431. The misconstruction of a section of a statute by the lower

Court in deciding a matter which it has jurisdiction to decide does not amount to exercising jurisdiction illegally or with material irregularity so as to afford a ground for revision. 39 C. W. N. 910=62 C. L. J. 349. An error in arriving at the conclusion can not be set right by taking up the matter in revision, for error is not irregularity. A. I. R. 1930 All. 702=(1930) A. L. J. 1043=132 Ind. Cas. 33; see also A. I. R. 1930 All. 831=125 Ind. Cas. 578; A. I. R. 1923 Pat. 90=3 P. L. T. 314=65 Ind. Cas. 355. Failure of appellate Court to adjudicate upon a plea of limitation not pressed before it is not a material irregularity justifying revision. 42 Ind. Cas. 536; see also 32 Ind. Cas. 785=3 L. W. 176.

An error of procedure resulting in a failure of justice amounts to material irregularity in the exercise of jurisdiction under section 115. 2 U. P. L. R. Pat. 29=1 P. L. T. 188=55 Ind. Cas. 445; see also 24 C. W. N. 288=46 C. 962=54 Ind. Cas. 439; A. I. R. 1922 Mad. 63=1922 M. W. N. 130=16 L. W. 760=65 Ind. Cas. 732. Decision without impleading necessary party is material irregularity and revision lies. A. I. R. 1926 P. C. 142=54 C. 338=53 I. A. 271=25 A. L. J. 61=25 L. W. 90=3 O. W. N. 989=1927 M. W. N. 84=29 Bom. L. R. 755=45 C. L. J. 274=31 C. W. N. 413=28 P. L. R. 113=52 M. L. J. 368 (P. C.)=99 Ind. Cas. 749; A. I. R. 1929 All. 761 (1930) A. L. J. 223=122 Ind. Cas. 753. Where permission is given to withdraw a suit with liberty to bring a fresh suit, without adopting proper procedure, the order is tainted with material irregularity and as such should be vitiated. 130 Ind. Cas. 142=A. I. R. 1931 Cal. 107=34 C. W. N. 912.

Where decree once made in a suit, the suit cannot be dismissed unless reversed in appeal. And if a trial Court, having fixed a date for further proceedings under directions of appellate Court modifying the preliminary decree, dismiss the suit on that date under Order IX, rule 9, such a dismissal is wrong and a revision will lie over it. A. I. R. 1930 Mad. 158=30 L. W. 979=123 Ind. Cas. 351. Revision lies on findings of facts when not properly arrived at, that is scrutinizing all relevant evidence. It is material irregularity. A. I. R. 1929 Cal. 736=33 C. W. N. 569=120 Ind. Cas. 451; see also A. I. R. 1928 Mad. 815=51 M. 860=55 M. L. J. 565=(1928) M. W. N. 49=28 L. W. 513=110 Ind. Cas. 490; A. I. R. 1927 Rang. 283=6 Bur. L. J. 152=104 Ind. Cas. 316. A finding not based on the evidence on record amounts to material irregularity and is revisable. A. I. R. 1926 Lah. 566=96 Ind. Cas. 247. Not considering material evidence being material irregularity is open to revision. A. I. R. 1927 Rang. 302=6 Bur. L. J. 147=104 Ind. Cas. 321.

Decision under serious error of procedure is material irregularity. A. I. R. 1927 Rang. 134=6 Bur. L. J. 16. Rejecting application for restoration without considering record or without taking evidence being material irregularity is revisable. A. I. R. 1927 Lah. 239=100 Ind. Cas. 677. Failure to decide question raised being material irregularity is open to revision. 108 Ind. Cas. 604 (Lah). Misapplication of evidence can be ground of revision. A. I. R. 1929 Mad. 204=113 Ind. Cas. 36. Failure to take cognizance of important points is good ground for revision. A. I. R. 1928 Lah. 299=29 P. L. R. 633=106 Ind. Cas. 226. Revision lies when numerous and various mistakes are committed. A. I. R. 1925 Mad. 614=48 M. L. J. 268=21 L. W. 654=87 Ind. Cas. 216.

Where a Judge arrived at a decision by following an obsolete ruling acts with material irregularity. A. I. R. 1929 Lah. 824=11 Lah. L. J. 491=117 Ind. Cas. 96. High Court should not interfere in revision with decision, however erroneous it may be, when it has no far reaching consequences. 56 M. L. J. 273=29 L. W. 600=115 Ind. Cas. 351. Ignoring rule of estoppel is material irregularity. A. I. R. 1911 Sind 159=16 S. L. R. 407=83 Ind. Cas. 360. Deciding issue not arising out of pleading is irregularity and hence revision lies. A. I. R. 1921 Sind 159 (F. B.)=16 S. L. R. 207=83 Ind. Cas. 360. A finding directly opposed to evidence, justifies interference in revision on ground of material irregularity. A. I. R. 1924 Nag. 44=19 N. L. R. 165=75 Ind. Cas. 993. Order of refusal to confirm a sale without application under r. 89, or r. 91, is revisable. A. I. R. 1927 Lah. 71=98 Ind. Cas. 866. Setting aside sale as being illegal under s. 90 without substantial injury owing to irregularity is revisable. A. I. R. 1924 All. 698=22 A. L. J. 413=83 Ind. Cas. 1028. If the lower Courts have thrown out the plaintiff's suit on a question not arising in the case and having referred to certain provisions of law which had no application to it, revision will lie. A. I. R. 1929 Lah. 294=117 Ind. Cas. 229.

Overruling an objection as to the judicial misconduct on the part of an arbitrator without enquiry and without admitting proper evidence material to the

issue is material irregularity. 22 C. L. J. 237=31 Ind. Cas. 33. Wrong allocation of the onus of proof amounts to material irregularity, justifying interference in revision. A. I. R. 1921 Lah. 166=3 Lah. L. J. 417=64 Ind. Cas. 91. Entirely altering a judgment after once it has been delivered in Court even though orally amounts to material irregularity. A. I. R. 1923 Mad. 663=(1923) M. W. N. 354=18 L. W. 105=72 Ind. Cas. 688. An order of a Sub-judge on an election petition can be revised if he has acted with material irregularity or illegality. A. I. R. 1923 Mad. 360=44 M. L. J. 161=32 M. L. T. 114=(1923) M. W. N. 78=17 L. W. 656=70 Ind. Cas. 987. Order for written statement is specific. Order requiring written pleas to be filed is discretionary and decree passed in default of which is open to revision. A. I. R. 1927 Mad. 1007=53 M. L. J. 504=39 M. L. T. 273=105 Ind. Cas. 288. The Court commits a material irregularity in the exercise of its jurisdiction if either (a) it appears that it did not apply its mind judicially to the question before it, or (b) if the materials before it, were not such as could reasonably be held to be materials on which the Court might, rightly or wrongly, hold that there was a formal defect or other sufficient reason *ejusdem generis* with formal defects under Order XXIII, rule 2. A. I. R. 1929 All. 683=(1929) A. L. J. 961=119 Ind. Cas. 859. Where a Court imports into a case its alleged knowledge of witnesses as habitual givers of false evidence, etc., Court acts improperly and with material irregularity. 39 Ind. Cas. 424.

The rejection of application for adjournment under Order XXII, rule 1, without giving reasons is material irregularity justifying a revision. 14 A. L. J. 425=33 Ind. Cas. 30. Omission to consider the question of estoppel is a material irregularity justifying a revision. A. I. R. 1921 Lah. 60=3 Lah. L. J. 181=60 Ind. Cas. 716. A premature order discharging a surety can be revised under this section. 41 B. 402=19 Bom. L. R. 112=39 Ind. Cas. 88.

Misapprehension as to the nature of the contract entered into by the plaintiff is a material irregularity and a revision will lie. 56 Ind. Cas. 489. Arriving at a conclusion of law of fact without having considered the law or a material part of the evidence, or by misunderstanding or erroneously reconsidering the statement, and depositions of witness is a ground for revision, provided petitioner has suffered injustice thereby. 9 L. B. R. 263=12 Bur. L. T. 5=47 Ind. Cas. 781; see also 56 Ind. Cas. 982; A. I. R. 1925 Mad. 456=21 L. W. 21=86 Ind. Cas. 178. Where appellate Court sets up a new case, a revision lies from its decision. A. I. R. 1927 Lah. 73=98 Ind. Cas. 866. Where decree has once been made in a suit, a suit cannot be dismissed unless reversed in appeal. And if a trial Court, having fixed a date for further proceedings under directions of appellate Court modifying the preliminary decree, dismisses the suit on that date under Order IX, rule 9, such a dismissal is wrong and a revision will lie over it. A. I. R. 1930 Mad. 158=30 L. W. 979=53 M. 395=57 M. L. J. 781=124 Ind. Cas. 605. Court cannot set aside election on mere ground of non-compliance with provisions of Act or Rules. It must further find that its result would have been different, had that irregularity not occurred. Failure of the Court to come to this finding is material irregularity and therefore revisable. A. I. R. 1929 Mad. 257=119 Ind. Cas. 145.

Decision of suit on grounds not raised by parties and to which no evidence is directed amounts to substantial error or defect of procedure and revision lies. A. I. R. 1924 Pat. 341=73 Ind. Cas. 41. A decision based not merely on a forced and impossible construction of the facts but on importation of facts admitted by both parties not to exist falls under this section. A. I. R. 1923 Nag. 108=65 Ind. Cas. 881. Amendment of sale-certificate at the instance of auction-purchaser without notice to judgment-debtor amounts to acting with material irregularity. A. I. R. 1922 Mad. 63=63 L. W. 760=65 Ind. Cas. 732=(1922) M. W. N. 130. Remand of the whole case by an appellate Court after a finding on one issue only amounts to material irregularity. A. I. R. 1923 Mad. 113=16 L. W. 593=30 M. L. T. 314=70 Ind. Cas. 655. Where the lower Court does not pay heed to the provisions of s. 99, it acts with irregularity in the exercise of its jurisdiction. A. I. R. 1926 Lah. 402=93 Ind. Cas. 938. Where lower Appellate Court has misread a ruling of the Court and refused to entertain an application of a party which is really maintainable, material irregularity is committed. A. I. R. 1926 All. 305=48 A. 286=24 A. L. J. 286=92 Ind. Cas. 567. An order refusing to set aside an order of dismissal of suit for default without considering the existence of sufficient cause for non-appearance of the plaintiff is open to revision. A. I. R. 1923 Mad. 177=(1922) M. W. N. 822=18 L. W. 837=70 Ind. Cas. 38. Where defendant is alleged to be of unsound mind but the plaintiff

denies the fact, appointment of a guardian *ad litem* of the defendant only after an interview by him by the Court, amounts to a material irregularity and the order is revisable. A. I. R. 1922 Cal. 86=70 Ind. Cas. 307.

Reversing judgment of a lower Court on a new question not raised by the parties and without sufficient material for so doing amounts to acting with material irregularity. A. I. R. 1925 Mad. 357=80 Ind. Cas. 724. Order of dismissal of suit for absence of plaintiff at defendant's evidence is not material irregularity. A. I. R. 1925 Oudh 933=2 O. W. N. 432=89 Ind. Cas. 418. Ordinarily when a Court acts on evidence which has not been proved or which is inadmissible in evidence, it does not act without jurisdiction but acts with material irregularity or illegality in exercising its jurisdiction. A. I. R. 1926 All. 161=23 A. L. J. 961=89 Ind. Cas. 22. Where the lower appellate Court has misread entirely the findings submitted to it by remand, Court acts with material irregularity. A. I. R. 1925 Oudh 933=2 O. W. N. 432=89 Ind. Cas. 418. Where the defendant objects to the valuation of the plaint it is a material irregularity for the Court to refuse to frame an issue and decide it. The High Court can set aside the order in revision. A. I. R. 1923 Mad. 134=(1922) M. W. N. 692=69 Ind. Cas. 542. In a pre-emption suit assuming, as the value for purposes of jurisdiction, the market value at the time of the suit instead of that at the time of the sale is a material irregularity and revision lies. A. I. R. 1924 Lah. 380=69 Ind. Cas. 650. Non-joinder of Receiver in execution proceedings for sale amounts to material irregularity and justifies revision. A. I. R. 1923 Mad. 144=43 M. L. J. 211=(1922) M. W. N. 745=16 L. W. 322=31 M. L. T. 290=47 M. 47=71 Ind. Cas. 293. Coming to certain conclusion without evidence and omitting to consider point of law required by law to decide, amounts to material irregularity. A. I. R. 1923 Mad. 503=(1923) M. W. N. 159=32 M. L. T. 293=44 M. L. J. 409=72 Ind. Cas. 137. An order granting sanction to prosecute based on evidence which is legally inadmissible is open to revision. A. I. R. 1923 All. 601=21 A. L. J. 399=24 Cr. L. J. 900=75 Ind. Cas. 148. An order to furnish security for *mesne* profits is not without jurisdiction but passing such an order amounts to material irregularity within s. 115. A. I. R. 1927 Oudh 11=10 O. L. J. 209=74 Ind. Cas. 335.

Where a Court does not purport to act under s. 151 an order for sale without a prayer can be revised. A. I. R. 1924 Mad. 911=20 L. W. 488=1924 M. W. N. 547. An improper order passed after investigation or failure to investigate a claim under Order 21, rule 63 amounts to material irregularity and revision lies. A. I. R. 1923 Rang. 195=2 Bur. L. J. 134=76 Ind. Cas. 677. Transfer by a District Judge of cross suits pending in two different Courts, on application of one party, and without notice to the other amounts to material irregularity. 2 U. P. L. R. 162=23 O. C. 216=7 O. L. J. 523. Where there is an application for entering up satisfaction put in by the decree-holder the Court in allowing the application to be withdrawn acts with material irregularity especially when the judgment-debtor pleads discharge. 35 M. L. J. 252=51 Ind. Cas. 411. Reversing order of reference after the submission of award and setting aside the award on the ground of some supposed defect in the order amounts to material irregularity and revision lies. 43 A. 305=19 A. L. J. 33=60 Ind. Cas. 857. If on erroneous view of law as to limitation Court shuts out evidence offered, it acts with material irregularity justifying revision. A. I. R. 1921 Cal. 251=48 C. 119=60 Ind. Cas. 801. A Court deciding objection to an award without notice to the objector of the date of hearing acts with material irregularity and its order is liable to be revised. 64 Ind. Cas. 394. But where instead of allowing additional evidence under Order XLI, rule 27, C. P. Code an appellate Court remands the case for re-trial, the irregularity in procedure is not such as to justify interference in revision. 31 M. L. T. 182 (H. C.)=16 L. W. 515=69 Ind. Cas. 826. An order directing further evidence to be taken by trial Court in an appeal against dismissal of suit under Order XVII, rule 3, without expressly setting aside the decree passed by lower Court amounts to acting with material irregularity. A. I. R. 1924 Rang. 117=1 Rang. 656=79 Ind. Cas. 482; see also A. I. R. 1925 Cal. 515=78 Ind. Cas. 149. Where both the plaintiff and defendant are residents of one place outside the jurisdiction and the plaintiff is examined on commission but defendant was not so examined, though he is served with summons at that place, omission to examine him amounts to material irregularity. A. I. R. 1924 Mad. 541=46 M. L. J. 131=34 M. L. T. 314=(1924) M. W. N. 191=78 Ind. Cas. 407.

Where in disposing of an objection under Order 21, rule 58, the Court failed to decide the question of possession it acts with material irregularity. A. I. R. 1931 Lah. 666=132 Ind. Cas. 666. The Judge is not obliged to refer to the evidence

under Order 20, rule 4, but if he does so and his reference indicates that he did not consider a material portion of the evidence, the High Court is entitled to interfere in revision. 35 C. W. N. 1242. In a pre-emption suit, order of the Court to distribute shares among pre-emptors on a wrong basis can be interfered in revision on the ground of irregularity. 35 C. W. N. 1058. Order in a redemption suit, illegally discharging the mortgagor defendant can be interfered in revision. 8 O. W. N. 1143=A. I. R. 1931 Oudh 410. Where a Court sets aside an order of dismissal without taking into consideration the evidence produced by the parties and without any reference to the pleadings involved in the case, the order in question is vitiated by a material irregularity and can be set aside in revision. 132 Ind. Cas. 431=1931 A. L. J. 962=A. I. R. 1931 All. 452. Where the application for leave to sue in *forma pauperis* was rejected by the lower Court on mere conjecture that the applicant is not a pauper, the order can be revised. A. I. R. 1931 Rang. 318. If the result of the amendment allowed by the lower Court to convert the suit into one of another and different character by the addition of the prayer for a relief barred by limitation at the date of the plaint, it is a case of material irregularity which should be put right by revision. 133 Ind. Cas. 497=33 L. W. 648=A. I. R. 1931 Mad. 542=61 M. L. J. 316. Where lower Court rejected an application for amendment of decree under s. 152, but the decree was not in accordance with the intention of the Judge who passed it, a revision lay against such an order. 8 O. W. N. 1121=A. I. R. 1931 Oudh 422. Where in a petition under Order 21, rule 100, the lower Court asked the decree-holder to begin his case and examine his witnesses before the examination of the claimant's witnesses, is a serious irregularity. A. I. R. 1931 Mad. 534=132 Ind. Cas. 301. Where the appeal is out of time and the lower Court dismissed it without considering extension of time, it acts with material irregularity. A. I. R. 1933 Lah. 260=145 Ind. Cas. 153. Where the Court confirms the sale before adjudicating upon applications under Order 21, rule 90, it acts with material irregularity. A. I. R. 1933 All. 137=145 Ind. Cas. 732. If the Court refuses a party a right to lead evidence on a matter on which the parties are at issue, it exercises its jurisdiction with such material irregularity as to vitiate its order. 144 Ind. Cas. 461=14 Pat. L. T. 300=A. I. R. 1933 Pat. 278. There is a material irregularity in the exercise of jurisdiction, if there is no proper consideration of pleadings and the evidence. 144 Ind. Cas. 834=29 N. L. R. 164=A. I. R. 1933 Nag. 188 ; see also 14 P. L. T. 338=A. I. R. 1933 Pat. 284. The conclusion of the Court that there has been an unnecessary delay for the claim would not, of course, be open to revision by the High Court. But the Court cannot come to the conclusion whether there has been an unnecessary delay without considering any explanation that might be offered on behalf of the objector. 145 Ind. Cas. 444=1933 A. L. J. 1177=A. I. R. 1933 All. 751. The refusal of the Court to allow an amendment in order to enable the controversial matter between the parties to be settled once for all amounts to failure to exercise a jurisdiction vested in it by law. 55 A. 256=145 Ind. Cas. 859=1933 A. L. J. 268=A. I. R. 1933 All. 374.

**Revision from interlocutory orders.**—It is not the practice of High Courts to allow revision of interlocutory orders which can not be questioned in appeal and revision will lie in such cases only when great inconvenience or injustice would otherwise result. A. I. R. 1930 Nag. 51 ; 121 Ind. Cas. 672 ; A. I. R. 1936 Lah. 569=165 Ind. Cas. 131 ; 1936 A. M. L. J. 4 ; A. I. R. 1935 Pat. 90=154 Ind. Cas. 615 ; A. I. R. 1935 Rang. 466=13 Rang. 595 ; A. I. R. 1935 Rang. 225=157 Ind. Cas. 814 ; A. I. R. 1935 Pat. 186=16 Pat. L. T. 158=155 Ind. Cas. 617 ; A. I. R. 1935 Rang. 122=156 Ind. Cas. 162 ; A. I. R. 1934 All. 986=1934 A. L. J. 1204 ; A. I. R. 1934 Cal. 479=149 Ind. Cas. 126. No revision lies from an order under s. 10, C.P. Code. A. I. R. 1929 Lah. 662 ; 113 Ind. Cas. 116 (Sind). Judicial Commissioner's Court cannot interfere in revision with interlocutory orders even in exceptional circumstances. A. I. R. 1930 Sind 265=24 S. L. R. 277=127 Ind. Cas. 673 (F. B.). According to Madras High Court, High Court is competent to revise interlocutory orders or proceedings. A. I. R. 1929 Mad. 121=113 Ind. Cas. 646. But High Court will interfere with an interlocutory order only when it is perverse or will result in irreparable injury to party. A. I. R. 1927 Mad. 524 ; (1927) M. W. N. 218 ; see also A. I. R. 1926 Mad. 1047 (F. B.)=51 M. L. J. 500=97 Ind. Cas. 921 ; A. I. R. 1924 Mad. 846=47 M. 934=47 M. L. J. 460=20 L. W. 533 ; (1924) M. W. N. 863=80 Ind. Cas. 604. An interlocutory order rejecting the claim of a person to be a legal representative of a deceased plaintiff is revisable. A. I. R. 1924 Mad. 813=47 M. L. J. 370=35 M. L. T. 82=(1924) M. W. N. 763=80 Ind. Cas. 942. The Court will also interfere in revision with an interlocutory order, only in such cases as

where the Court below has acted perversely or in a manner as to cause irreparable loss to plaintiff. A. I. R. 1923 Mad. 690=45 M. L. J. 703=18 L. W. 198=(1923) M. W. N. 403=76 Ind. Cas. 207. Where there is no direction as to *mesne* profits in the preliminary decree an order of the Court directing Commissioner to ascertain *mesne* profits before final decree cannot be revised. A. I. R. 1933 Mad. 43=16 L. W. 312=(1922) M. W. N. 562=31 M. L. T. 180=74 Ind. Cas. 591. In the case of a witness not under the control of the party asking for the commission, who resides beyond the jurisdiction fixed under Order XVI, rule 19(b), a commission should issue as a matter of right, unless the Court is satisfied that a party is merely abusing its authority to issue process; and any order refusing issue of commission as above, is liable to be set aside in revision. A. I. R. 1923 Mad. 321=46 M. W. N. 574=(1923) M. W. N. 157=17 L. W. 251=44 M. L. J. 202=71 Ind. Cas. 530. But there is no revision against an order granting temporary injunction. A. I. R. 1922 Mad. 172=(1922) M. W. N. 303=16 L. W. 238=70 Ind. Cas. 713.

The use of the revisional power would be justified where the lower Court has decided that the suit is not bad for misjoinder of parties and causes of action. A. I. R. 1922 Mad. 174=43 M. L. J. 277=(1922) M. W. N. 316=16 L. W. 186=70 Ind. Cas. 684. An order refusing to stay a suit where the same question is in issue between the parties in two different suits is revisable. A. I. R. 1923 Mad. 88=16 L. W. 607. So also an order refusing to stay the suit where the same question is in issue between the parties in two different suits is revisable. *Ibid.* But the High Court has the power in revision to interfere with an interlocutory order only in extreme cases. A. I. R. 1922 Mad. 321=15 L. W. 667=(1922) M. W. N. 521=68 Ind. Cas. 167.

High Court will not interfere in revision with interlocutory orders except in special circumstances. A. I. R. 1929 Cal. 831=125 Ind. Cas. 112. Where the lower Court decided wrongly the question of jurisdiction and on such wrong decision gave itself jurisdiction, the High Court will interfere. A. I. R. 1929 Cal. 159=116 Ind. Cas. 172. High Court will interfere in revision only when irreparable injury would be caused if revision is refused. A. I. R. 1927 Cal. 1149=53 C. W. N. 907=98 Ind. Cas. 615; A. I. R. 1925 Cal. 1118=85 Ind. Cas. 619; 82 Ind. Cas. 1008=40 C. L. J. 191=28 C. W. N. 991=A. I. R. 1925 Cal. 204. An order wrongly refusing to grant commission for examination of witnesses, is revisable. A. I. R. 1922 Cal. 42=35 C. L. J. 78=68 Ind. Cas. 9.

Interlocutory order according to Allahabad High Court is not subject to appeal. A. I. R. 1928 All. 97=50 A. L. J. 276=25 A. L. J. 991=108 Ind. Cas. 735; 39 A. 254=15 A. L. J. 227=38 Ind. Cas. 828; but see 18 A. L. J. 486=58 Ind. Cas. 729. An order of a Subordinate Judge allowing a plaintiff to put in an application conditional on the payment of a certain amount of costs is not revisable. 24 O. C. 215=64 Ind. Cas. 211. Interlocutory orders are open to attack in an appeal from final orders under s. 105 and therefore not revisable. 24 O. C. 215=64 Ind. Cas. 211. An order deciding preliminary issues in a suit is not open to revision where such order would be appealable after the final decision of the suit. 2 U. P. L. R. (All) 157=56 Ind. Cas. 248. Where a case is still pending interlocutory orders passed during the course of hearing cannot be made the subject of revision, unless they determine the case, so far as the party applying for revision is concerned, or concluded the claim otherwise in a manner not open to appeal. 5 O. L. J. 430=47 Ind. Cas. 676. An order of remand is not an interlocutory order for the purposes of revision. A. I. R. 1923 Oudh 177=26 O. C. 10=10 O. L. J. 36=73 Ind. Cas. 591. An interlocutory order made with the object of collecting materials upon which the case is to be determined thereafter is not revisable. A. I. R. 1925 Oudh 189=11 O. L. J. 692=28 O. C. 78=80 Ind. Cas. 612.

The Chief Court of Lahore will interfere with interlocutory orders only in exceptional cases. 26 P. L. R. 1917=40 Ind. Cas. 65; 64 Ind. Cas. 387; 42 Ind. Cas. 221=164 P. W. R. 1917; but see 149 P. W. R. 196=8 P. L. R. 1917=35 Ind. Cas. 608; A. I. R. 1923 Lah. 301=75 Ind. Cas. 107; 84 Ind. Cas. 259=6 Lah. 558. No revision lies against an interlocutory order save where irreparable loss would otherwise occur. 20 P. W. R. 1919=49 Ind. Cas. 470. No revision lies against an interlocutory order when the applicant has another remedy open to him. 120 P. W. R. 1918=46 Ind. Cas. 189; 95 Ind. Cas. 173 (Lah.). No revision lies to the Chief Court from an interlocutory order, where the final decree to be passed would be appealable. 76 P. L. R. 1916=36 Ind. Cas. 57. The power of revision in the case of interlocutory order should be exercised in a case where *inter*



*alia*, the waste of time, money and trouble involved by the re-opening of the proceedings could never be repaired. 77 P. R. 1919=52 Ind. Cas. 859. An order allowing a party to produce fresh evidence on an issue after closing the case was held as not open to revision. 17 P. W. R. 1931=59 Ind. Cas. 450. Revision lies in the case of interlocutory orders where otherwise irreparable damage would result to the parties. A. I. R. 1922 Lah. 100=4 Lah. L. J. 176=29 P. L. R. 1922=65 Ind. Cas. 282. Entertaining an appeal from an interlocutory order amounts to assumption of jurisdiction not vested in the Court. 2 Lah. L. J. 673=67 Ind. Cas. 278. Even when the order is not of an interlocutory nature the High Court should not interfere except in cases where the order is not a final order such as one under Order 41, rule 25. 2 Lah. L. J. 662=67 Ind. Cas. 269. Interlocutory order deciding a question as to place of trial can be interfered in revision. A. I. R. 1927 Lah. 72=86 Ind. Cas. 395. Where suits for declaration that certain documents are void and for injunction to restrain opposite party from proceeding to arbitration under arbitration clause are filed the order of Court staying suit and asking parties to proceed with arbitration is final and revision lies from it. A. I. R. 1931 Lah. 66=130 Ind. Cas. 769. Orders refusing amendment of plaint or refusing permission to withdraw suit on the ground that it is defective in form are not open to revision being interlocutory orders. A. I. R. 1930 Lah. 589=31 P. L. R. 456=122 Ind. Cas. 105.

An interlocutory order is not capable of revision except where the order complained against is such as is calculated to cause irreparable loss to the injured party and there is no right of appeal and no remedy available to the party. A. I. R. 1924 Pat. 673=5 P. L. T. 425=3 Pat. 930=80 Ind. Cas. 667; see also A. I. R. 1926 Pat. 575=97 Ind. Cas. 353; 72 Ind. Cas. 148=A. I. R. 1923 Pat. 518=4 P. L. T. 401; A. I. R. 1923 Pat. 598=3 P. L. T. 638. Where the record of a case has been sent for by the High Court, it would not be exercising a wise discretion to refuse to interfere on the mere ground that the order is an interlocutory one. A. I. R. 1922 Pat. 359=4 Pat. L. J. 195=(1922) Pat. 79=50 Ind. Cas. 470. The High Court will interfere with an interlocutory order directing the trial of certain issues in a case before trying others. 2 P. L. T. 154=60 Ind. Cas. 528. Revision from erroneous preliminary decision is bad and should be permitted in special circumstances only. 110 Ind. Cas. 78.

Court in appeal is not to revise an order which though not appealable can be called into question in appeal. A. I. R. 1927 Bom. 599=29 Bom. L. R. 1355=107 Ind. Cas. 50. Rejection of evidence as inadmissible is no ground of revision. A. I. R. 1927 Bom. 664=29 Bom. L. R. 304=101 Ind. Cas. 385. The High Court has the power to call for the record of a case in which the question of jurisdiction is involved, even if it be in an interlocutory stage. A. I. R. 1924 Bom. 67=48 B. 43=25 Bom. L. R. 992=77 Ind. Cas. 241. The High Court will not interfere with interlocutory orders passed by a Court while a suit is pending. 22 Bom. L. R. 801=44 B. 619=57 Ind. Cas. 556. Interlocutory orders will not be interfered with in revision unless for most cogent reasons and to prevent immediate injuries. 43 Ind. Cas. 684. An interlocutory order passed in an appealable case cannot be revised. 41 Ind. Cas. 942.

An interlocutory order is open to revision if it goes to the root of the case and allows the continuance of a litigation which the lower Court has no jurisdiction to allow. 15 N. L. R. 21=49 Ind. Cas. 34; see also 55 Ind. Cas. 739; 60 Ind. Cas. 481. The High Court can interfere with order on interlocutory application by way of setting it aside when no appeal lies directly from an order and when sufficient grounds exist preemptorily calling for its interference even though the substance of the order may be one that could be brought up on appeal from the final decree in the suit. A. I. R. 1921 L. B. 6=11 L. B. R. 65=64 Ind. Cas. 821. Where the interests of justice requires the amendment which was refused, the High Court may interfere in revision. 67 Ind. Cas. 335. A wrongly passed order staying a suit in contravention of s. 10 though interlocutory is open to revision. A. I. R. 1923 Lah. 69=33 P. W. R. 1922=69 Ind. Cas. 111. Order of refusal to stay suit under s. 10, C. P. Code, is also revisable. A. I. R. 1925 Lah. 144=82 Ind. Cas. 234. But no revision lies against an interlocutory order if the decree that might be passed in suit is appealable. 71 Ind. Cas. 911. The determination of one of the issues in the case does not afford a ground for revision unless the decision goes to the root of the jurisdiction of the trial Court to determine the remaining issues. A. I. R. 1924 Pat. 673=5 P. L. T. 425=(1924) Pat. 254=3 Pat. 930=80 Ind. Cas. 667.

It is not usual to interfere in revision in the case of interlocutory order. A. I. R. 1925 Nag. 62=79 Ind. Cas. 911. Interlocutory orders against which no appeal can lie but the correctness of which can be challenged in an appeal against the final decree on the suit can be revised. A. I. R. 1925 Nag. 108=80 Ind. Cas. 375. Where the only interlocutory order passed is to adjourn the matter to give the defendant time to reply, even if the order was inexpedient, the Court cannot interfere. A. I. R. 1924= Nag. 417=7 N.L.J. 183=78 Ind. Cas. 969. Orders not passed in the course of proceedings in the suit or orders passed in separate proceedings after the suit has terminated one way or the other are revisable. A. I. R. 1926 Lah. 642=96 Ind. Cas. 830. Interlocutory order which involves principle and question of jurisdiction is open to revision. A. I. R. 1938 Nag. 131=106 Ind. Cas. 57. Order of restoration of suit dismissed for default not being interlocutory order is subject to revision. 107 Ind. Cas. 395. Refusal to grant temporary injunction is no ground for revision. A. I. R. 1925 Nag. 222=107 Ind. Cas. 908. No revision lies against an order staying the trial of suit. A. I. R. 1923 Lah. 69=33 P. W. R. 1922=69 Ind. Cas. 111. Declining to entertain objection of defendant, before passing a decree absolute under Order XXXIV, r. 5 (2) does not call for a revision. 5 P. L. J. 342. No revision lies against an order issuing a warrant of attachment against the properties of witness. 4 O. L. J. 450=42 Ind. Cas. 42.

An order refusing to extend time for setting aside an abatement under Order XXII, rule 9, or for an application for review is not open to revision. 25 M. L. T. 116=(1918) M. W. N. 883=9 L. W. 166=49 Ind. Cas. 268. Declining to entertain objection of defendant, before passing a decree absolute under Order 34, rule 5 (2), does not call for revision. 5 P. L. J. 342. Where an objection to the place of suing is overruled and embodied in a formal order the High Court has power to revise the order. 41 A. 602=17 A. L. J. 718=1 U. P. L. R. (H. C.) 120=51 Ind. Cas. 331. An order refusing a claim under Order 21, rule 58, to property, which has been ordered to be sold under a mortgage decree is not revisable. 26 C. W. N. 50=68 Ind. Cas. 271. Where a Court dismisses a suit under Order IX, r. 8, C. P. Code before the receipt of the report of a Commissioner appointed in the suit, the order of dismissal can be set aside in revision under s. 115. 54 Ind. Cas. 568. Where a judgment-debtor deposits money under Order XXI, r. 89, without an application to set aside the sale and the sale is confirmed and the Court gives notice to the judgment-debtor to take away the money, High Court cannot entertain an application in revision to set aside that order. 43 B. 735=21 Bom. L. R. 835=53 Ind. Cas. 135. An order by a trial Court, enforcing on application the order made by a liquidator under s. 47 (2) (b) cannot be revised. A. I. R. 1929 Rang 113=118 Ind. Cas. 403. An order setting aside an abatement cannot be interfered in revision on the ground of want of sufficient cause to pass the order. 63 Ind. Cas. 230 (All). An order of a Court deciding that it has jurisdiction to entertain a suit is not revisable. 40 P. W. R. 1926=59 Ind. Cas. 680. An order setting aside an order rejecting an appeal for failure of the appellant to give security for costs, is not open to revision when it is made in the interest of the justice. 18 A. L. J. 838=2 U. P. L. R. 283 (All)=42 A. 626=60 Ind. Cas. 81. Where the lower Court dismissed for default an application for setting aside an *ex parte* decree without considering whether there was sufficient cause for the non-appearance of the petitioner, High Court set aside the order and directed restoration of the application. 49 Ind. Cas. 745; see also A. I. R. 1922 Oudh 14. An application for probate of a Will was opposed by the daughter's son's son of the grand-father of the testator and the propounder was a perfect stranger to the family. The High Court held, that the order of the District Judge could be revised under s. 115. 24 C. W. N. 316=31 C. L. J. 81=56 Ind. Cas. 122. The High Court has jurisdiction under this section to revise an interlocutory order passed by a subordinate Court from which no appeal lies to the High Court. But it is only when irremediable injury will be done and a miscarriage of justice inevitably will ensue that the Court will intervene. 11 Rang. 36=143 Ind. Cas. 525=A. I. R. 1933 Rang. 49; 134 Ind. Cas. 118; A. I. R. 1931 Rang. 193=131 Ind. Cas. 503. The word 'case' is wide enough to include an interlocutory order and even though there may be an appeal from the final decree, that consideration will not prevent interference in revision. 134 Ind. Cas. 744=9 Rang. 71=A. I. R. 1931 Rang. 136.

**New plea.**—A plea of estoppel cannot be entertained for the first time in revision. A. I. R. 1925 Nag. 77=22 N. L. R. 118=80 Ind. Cas. 946. Point as to *res judicata* cannot be raised for the first time in revision. A. I. R. 1921 Mad. 532=13 L. W. 289=62 Ind. Cas. 480. Objection as to non-joinder cannot be raised in the

first instance in a revision where right to objection accrued during the suit. 46 Ind. Cas. 648. So also fresh question of limitation cannot be raised. A. I. R. 1927 Cal. 381=45 C. L. J. 555=103 Ind. Cas. 69. Fresh question of jurisdiction cannot also be raised. A. I. R. 1927 Cal. 381=45 C. L. J. 229=102 Ind. Cas. 125 ; but see 162 Ind. Cas. 416=A. I. R. 1936 Pesh. 97. The general rule is that in revision fresh point cannot be considered, whether it be of law or of fact. A. I. R. 1925 Pat. 461=6 P. L. T. 295=87 Ind. Cas. 381 ; 40 C. L. J. 197=A. I. R. 1924 Cal. 1036=84 Ind. Cas. 685 ; 62 Ind. Cas. 952=A. I. R. 1922 Bom. 149=47 B. 56=23 Bom. L. R. 802 ; but see 110 Ind. Cas. 63=51 M. 672=A. I. R. 1928 Mad. 528=55 M. L. J. 274=28 L. W. 297 ; 35 P. L. R. 109 ; A. I. R. 1934 Lah. 230=35 P. L. R. 109=150 Ind. Cas. 357 ; A.I.R. 1934 Pesh. 50 ; A.I.R. 1936 Pesh. 157=164 In l. Cas. 189.

From what order revision is competent.—Order refusing to restore an application for review dismissed in default is revisable. A. I. R. 1925 Cal. 430=81 Ind. Cas. 1017. Order refusing to restore a case dismissed for default is revisable. A. I. R. 1926 Nag. 409=2 N. L. J. 145=95 Ind. Cas. 260. An order under s. 34 (d) is also open to revision by the High Court. A. I. R. 1923 Lah. 89=4 Lah. L. J. 272=79 Ind. Cas. 178. Order, bringing non-contesting defendants on record at the instance of contesting defendants on application to restore suit being wrong can be revised. A. I. R. 1924 Cal. 814=39 C. L. J. 367=83 Ind. Cas. 958. Order under s. 73, is not ordinarily revisable. 74 Ind. Cas. 140. The High Court will not interfere in revision ordinarily with order of lower Court determining that in its view there was no good ground for a review of its order rejecting an appeal under Order XLI, r. 10 (2). 32 Ind. Cas. 86. An error in the appointment of a guardian *ad litem* is not ordinarily revisable. 3 P. L. W. 92=46 Ind. Cas. 316. Order under s. 34 of the Guardians and Wards Act are open to revision. 55 Ind. Cas. 587. The order of the Court rejecting an application for restoration of suit dismissed under Order IX, rr. 2 and 3, is not open to revision. A. I. R. 1930 Lah. 440=129 Ind. Cas. 755.

An order setting aside an *ex parte* decree is not like a finding of the Court in a pending suit that it has jurisdiction to try the suit and cannot be set aside by High Court in revision. A. I. R. 1931 All. 294=(1931) A. L. J. 377 ; see also 96 Ind. Cas. 782=A. I. R. 1926 Lah. 637 ; 64 Ind. Cas. 527=A. I. R. 1922 All. 441=19 A. L. J. 907 ; but see A. I. R. 1921 Oudh 142=24 O. C. 282=64 Ind. Cas. 303.

Not an appeal but a revision lies on an order granting mortgagee interest on mortgage money for the time during which sale proceeds of mortgaged property are lying in Court. A. I. R. 1929 Rang. 127=118 Ind. Cas. 416. Order granting adjournment without fixing time for payment of process-fee followed by an order of dismissal for want of prosecution is a wrong order and can be set aside in revision. A. I. R. 1924 Nag. 298=79 Ind. Cas. 123. Where the lower Court has postponed the consideration of an application for review, there can be no appeal in as much as the order can not be construed as a final order. The only remedy is revision under s. 115. A. I. R. 1929 All. 375=119 Ind. Cas. 561. Order that application could be filed being no order at all can be revised. A. I. R. 1928 Mad. 215=51 M. 244=27 L. W. 320=54 M. L. J. 154=106 Ind. Cas. 660.

Orders as to (1) misjoinder of parties (2) non-joinder of parties and (3) misjoinder of parties and cause of action can be revised. A. I. R. 1922 Mad. 174=(1922) M. W. N. 316=16 L. W. 186=43 M. L. J. 277=70 Ind. Cas. 684. Ordinarily orders in rateable distribution cases are not revisable unless they involve any question of jurisdiction. 14 L. W. 582=(1921) M. W. N. 817=70 Ind. Cas. 20. An order refusing to restore a suit dismissed for default merely on the ground that it would fail on merits, is revisable under s. 115. A. I. R. 1923 Mad. 177=18 L. W. 837=(1922) M. W. N. 822=70 Ind. Cas. 38. Revision does not lie against an order rejecting an application for review except where an obvious injustice has to be denied. A. I. R. 1924 Lah. 400=71 Ind. Cas. 160. Where a suit was dismissed by the trial Court for want of jurisdiction and the lower appellate Court remanded the case for action under Order VII, r. 8, the order of remand is revisable. A. I. R. 1923 Lah. 524=73 Ind. Cas. 755.

Where decree-holder is prevented from reaping benefit of decree, revision is competent for the ends of justice. A. I. R. 1931 Mad. 534=132 Ind. Cas. 301. Where the trial Court extended time for paying deficit Court-fee after passing of the decree, the order can be set aside in revision. 129 Ind. Cas. 732=A. I. R. 1931 All. 318. The practice of the Lahore High Court is not to revise an order passed under s. 73, C. P. Code. 134 Ind. Cas. 195.

**Arbitration.**—No revision is maintainable from an order setting aside an award. A. I. R. 1925 All. 458=47 A. 121=85 Ind. Cas. 502. Filing award by Court having no jurisdiction is revisable. A. I. R. 1924 Sind 29=17 S. L. R. 164=83 Ind. Cas. 539. Order directing the award to be taken off the file is revisable. A. I. R. 1924 Sind 75=17 S. L. R. 133=83 Ind. Cas. 353. Where an award grants a joint decree against defendants as heirs of the deceased but the award is set aside, one defendant not being party to reference the High Court will not interfere. A. I. R. 1931 All. 242=(1931) A. L. J. 100=130 Ind. Cas. 291. Where an award is tainted with misconduct but has done substantial justice and a decree is passed in terms of the award the High Court will not interfere in revision. A. I. R. 1931 Cal. 53=129 Ind. Cas. 428=34 C. W. N. 689=58 C. 289; 157 Ind. Cas. 1017=A. I. R. 1935 All. 456. The High Court has power to interfere in revision and set aside an award, though it has been filed and confirmed as a decree of Court, of the arbitrators or the Court have exceeded their jurisdiction or acted with material irregularity in the conduct of proceedings. A. I. R. 1935 Mad. 184=1935 M. W. N. 263=41 L. W. 51. No revision lies against decree in accordance with award, after disallowing objection but declining that the arbitrator had excluded the terms of reference. 1935 O. W. N. 1036=158 Ind. Cas. 11; 1935 O. W. N. 920=157 Ind. Cas. 649; 38 P. L. R. 788. Where the order of the Court passed on an award of the arbitrator is an interlocutory order, no revision lies against it. A. I. R. 1936 Lah. 466=38 P. L. R. 725. Ordinarily an application under this section does not lie for setting aside an award but such an application is maintainable on question of jurisdiction. A. I. R. 1936 Sind 172=30 S. L. R. 271. A mistaken view as to what amounted to misconduct of arbitrators is no ground for revision. 117 P. R. 1916=107 P. W. R. 1916=70 P. L. R. 1917=34 Ind. Cas. 192. No revision lies against an order superseding an award on misconstruction of terms of reference. A. I. R. 1922 All. 64=20 A. L. J. 117=65 Ind. Cas. 779. Where case is referred to arbitration without party's consent and without permitting him to file objection, the decree can be set aside in revision for want of jurisdiction. A. I. R. 1929 Lah. 171=114 Ind. Cas. 712. Wrongful staying of suit for being referred to arbitration is open to revision. A. I. R. 1928 Bom. 275=52 B. 420=30 Bom. L. R. 661=111 Ind. Cas. 641. The High Court has power to interfere in revision in cases where reference to arbitration has been made contrary to the provisions of C. P. Code, Sch. II. A. I. R. 1930 Sind 256=24 S. L. R. 470=124 Ind. Cas. 374. Where the procedure or jurisdiction of the Judge is not attacked but only his findings as to misconduct of the arbitrator, no revision lies. A. I. R. 1929 Lah. 688=11 Lah. L. J. 275=119 Ind. Cas. 721. Superseding award on the ground of misconduct of the arbitrator because he had made 'private inquiries about subject-matter in dispute behind the back of the parties' notwithstanding that such power was conferred on arbitrator under reference, amounts to acting illegally and with material irregularity so as to attract revisional powers of High Court. A. I. R. 1922 All. 69=20 A. L. J. 125=64 Ind. Cas. 934. Where jurisdiction of the Court to make order of reference is attacked, High Court has power to revise. A. I. R. 1927 Cal. 52=44 C. L. J. 224=98 Ind. Cas. 803. Where the question whether the arbitration should be superseded or should be continued is settled by the Court directing that the arbitration should continue and another person is appointed to act as arbitrator the order is one deciding a case within the meaning of s. 115. A. I. R. 1929 All. 144=51 A. 501=(1929) A. L. J. 182=115 Ind. Cas. 611. An order under the last portion of rule 17 (4), Sch. II, directing a party to nominate an arbitrator passed without an order under earlier portion of the sub-rule ordering an agreement to be filed is liable to be revised. A. I. R. 1926 Lah. 505=94 Ind. Cas. 483.

Court helping arbitrators with advice and orders when they are placed in difficulty is not irregularity. 28 P. R. 1916=11 P. W. R. 1916=31 Ind. Cas. 700. Rejection of private award *in toto* where part of award is valid and is separable is at most an error of law. 66 P. R. 1915=146 P. W. R. 1915=31 Ind. Cas. 80. No revision will lie in respect of order setting aside an award by the arbitrators as it is an interlocutory order. A. I. R. 1929 Oudh 493=6 O. W. N. 813=5 Luck. 397=123 Ind. Cas. 224; but see A. I. R. 1929 Lah. 367=110 Ind. Cas. 302.

Revision lies from order refusing to set aside award. A. I. R. 1929 Lah. 369=111 Ind. Cas. 145; see also A. I. R. 1929 Lah. 688=11 Lah. L. J. 275=119 Ind. Cas. 721. In an arbitration award a revision lies when the Court has acted without jurisdiction or refused to exercise jurisdiction or proceeded illegally or with material irregularity. 117 P. R. 1916=107 P. W. R. 1916=70 P. L. R. 1917=34 Ind. Cas. 192. Refusal to hear objections to award, as being out of time when they are filed in time, is refusal to exercise jurisdiction vested in Court justifying revision under s.

115. 2 L. W. 1115=31 Ind. Cas. 535. Refusing opportunity to party objecting to award, to support his objections by appropriate evidence amounts to material irregularity. 3 O. L. J. 583=37 Ind. Cas. 400. High Court can interfere in revision with a decree passed in terms of the award without a notice as required by para 10. 63 Ind. Cas. 243. If award is impeached on reference being bad, proceedings are open to revision. A. I. R. 1938 All. 740=50 A. 955=26 A. L. J. 1009=110 Ind. Cas. 881. One of arbitrators refusing to sign award is no ground for revision of decree passed in accordance with award. A. I. R. 1927 All. 573=100 Ind. Cas. 76. The High Court has power to set aside a decree on an award under s. 115. 22 Bom. L. R. 1454=45 B. 832=59 Ind. Cas. 811. Proceedings after delivery of award to Court are open to revision. 9 S. L. R. 183=34 Ind. Cas. 845.

Where decision by arbitrators is on points not referred to, the decree is based on such decision is revisable. A. I. R. 1926 Mad. 201=49 M. L. J. 523=91 Ind. Cas. 745. Revision lies on award decree also. A. I. R. 1925 Bom. 341=49 B. 53=27 Bom. L. R. 423=87 Ind. Cas. 910. Refusing to hear objection to award calls for interference in revision. A. I. R. 1924 All. 788=46 A. 686=22 A. L. J. 676=82 Ind. Cas. 16. But refusal to pass decree on valid partial award being interlocutory order is no ground of revision. A. I. R. 1928 Cal. 174=106 Ind. Cas. 93. Order filing an award not appealable under para 16, Sch. II, is not revisable. A. I. R. 1927 Pat. 135=7 P. L. T. 739=95 Ind. Cas. 321. Order superseding an award in a pending case and directing the suit to proceed on the merits is not revisable. A. I. R. 1925 All. 566=47 A. 916=23 A. L. J. 656=89 Ind. Cas. 173.

Where a Court accepting an award has erroneously decided some of the mixed questions of law and of fact, as to the validity of an award delivered out of time, s. 115 would not apply. 4 Pat. L. J. 265=50 Ind. Cas. 52. Where the Court does not allow a party the time which the law allows him under para 16 to make objections, but proceeds to pass at once a decree in accordance with the award, the High Court may exercise its discretion under s. 115. A. I. R. 1921 Bom. 32=45 B. 832=59 Ind. Cas. 811. But if a Court has jurisdiction to decide objection to an award even if it has come to a wrong conclusion on a question of law or fact, his decision cannot be interfered with in revision. A. I. R. 1923 Lah. 194=73 Ind. Cas. 558; see also A. I. R. 1923 Oudh 235=26 O. C. 107=74 Ind. Cas. 401. An order refusing to pass a decree in terms of award but continuing the hearing of the suit by the Court, instead is an interlocutory order and is not revisable. A. I. R. 1923 Bom. 402=25 Bom. L. R. 443=47 B. 421=73 Ind. Cas. 464. If objection to an award on the ground of non-joinder is not taken Memorandum of objection to the award nor is it shown that parties not joined where necessary. High Court will not interfere in revision with the decision of lower Court on their points. A. I. R. 1923 Mad. 502=44 M. L. J. 359=17 L. W. 424=32 M. L. T. 298=(1923) M. W. N. 296=73 Ind. Cas. 202. A revision lies where Court which passed the decree on award has committed an error in procedure such for example as proceeding on misconception of evidence or has misused the jurisdiction prescribed by the Civil Procedure Code in procedure justifying the interference in revision. A. I. R. 1921 Lah. 396=22 P. L. R. 1922=64 Ind. Cas. 363. Where the applicant wishes to challenge the validity of the order of reference to arbitration, a revision is competent. 54 All. 297=A. I. R. 1932 All. 665; see also 26 P. L. R. 368=139 Ind. Cas. 596=A. I. R. 1932 Sind 128. In cases of awards a Court should not interfere unless it finds out not only an illegality committed but some substantial harm resulting from that illegality. 1931 M. W. N. 961=34 L. W. 725=61 M. L. J. 761. Where a Court accepts an award filed by the arbitrator without giving the parties time to file exceptions to the award, there is material irregularity in the exercise of discretion, and the order accepting the award can be set aside. A. I. R. 1933 All. 313=1933 A. L. J. 149=145 Ind. Cas. 403. Where only some of the arbitrators take part in the hearing, but no objection is then taken and the merits of the award are affected thereby, an order confirming such award is not open to revision on the ground. 65 M. L. J. 755=38 L. W. 927=A. I. R. 1933 Mad. 862. Where there has been long delay by the defendants in referring the matter to arbitration the Court was justified in refusing to enforce the clause as the matter was one of discretion and no sufficient reason was made out for the High Court to interfere. A. I. R. 1933 Lah. 1007. High Court would not interfere in revision with a decree based upon an award, when that decree does not disclose any excess or defect of jurisdiction or irregularity in the exercise of jurisdiction by the lower Court. A. I. R. 1933 Mad. 697=38 L. W. 330=65 M. L. J. 376=(1933) M. W. N. 831; see also

A. L. R. 1933 Mad. 1189. Where the party takes objection to the modification of the award by the Court in expunging the payment of compensation, which is inseparable from the other part of the award, held that the objection was valid and the Court committed an illegality or acted with material irregularity and the High Court could interfere in revision. 34 P. L. R. 34=A. I. R. 1933 Lah. 139=141 Ind. Cas. 72=A. L. R. 1933 Lah. 572. Where reference to arbitration is illegal and application to have award taken off the file was rejected, revision is competent. A. I. R. 1933 Sind 128=26 S. L. R. 368. Where objection to award is filed in time, refusal to consider objections as time-barred, amounts to failure to exercise of jurisdiction vested in Court. A. I. R. 1933 Rang. 38=142 Ind. Cas. 835. Where the award is just and proper, High Court will not interfere, even where minor son represented by his mother is no party to the reference. A. L. R. 1934 All. 87 ; see also A. I. R. 1933 All. 924. Where the validity of an award is impugned on the ground that the arbitrator held his enquiry in the absence of the objector and the latter applies to the Court to summon the arbitrator as a witness to substantiate his allegation, the refusal of the Court so to do is not only a material irregularity but is an illegality and the order passed by the Court filing an award and passing a decree on its basis is improper. 34 P. L. R. 397=145 Ind. Cas. 329=A. I. R. 1933 Lah. 538.

No revision lies, against an order passed under Sch. II, para 15, setting aside an award made on a reference to arbitration in the course of a suit and directing suit to proceed. 34 Bom. L. R. 376=A. I. R. 1932 Bom. 232=138 Ind. Cas. 215. An order setting aside an arbitration award disposes of a proceeding during the pendency of the suit, and the decision of the question whether the award is valid or invalid does not amount to a decision of a case within the meaning of s. 115. 53 A. 1006=1931 A. L. J. 842=136 Ind. Cas. 568=A. I. R. 1932 A. 452. Revision against a decree in accordance with award is not competent even when the validity of award is challenged on account of the invalidity of the reference. 136 Ind. Cas. 11=33 P. L. R. 163=A. I. R. 1932 Lah. 239 ; see also 9 O. W. N. 191=137 Ind. Cas. 151=A. I. R. 1932 Oudh 156 ; A. I. R. 1931 A. L. J. 1087=A. I. R. 1932 All. 154. *contra* ; 54 A. 297=A. I. R. 1932 All. 665. Where the ground of attack of an award has failed and the Court has refused to set aside the award under para 16 (1) of the second Schedule a decree must be passed in accordance with the award and a finality attaches to such a decree and the matter can not be allowed to be challenged in revision. 134 Ind. Cas. 30=1931 A. L. J. 906.

**Amendment of plaint.**—An order refusing leave to amend the plaint under Order VI, rule 17, is open to revision. 26 P. R. 1919=40 Ind. Cas. 65 ; 1 P. L. T. 188=2 U. P. L. R. (Pat) 29=55 Ind. Cas. 445 ; A. I. R. 1922 Lah. 394 ; A. I. R. 1925 Nag. 195=78 Ind. Cas. 510. An order of a Court improperly refusing to permit a plaintiff to amend his plaint can be revised. A. I. R. 1925 Mad. 188=88 Ind. Cas. 278 ; A. I. R. 1926 Mad. 1124=24 L. W. 400=(1927) M. W. N. 256 ; but see A. I. R. 1926 Cal. 112=30 C. W. N. 928=98 Ind. Cas. 751 ; A. I. R. 1927 Lah. 847=9 Lah. L. J. 357=103 Ind. Cas. 701 ; 37 C. W. N. 1093. An order directing that a plaint should be amended as being bad for misjoinder is revisable. 4 N. L. J. 58=63 Ind. Cas. 419. But where amendment of a plaint does not damage the character of the suit or involve any material injustice to the defendant an order allowing amendment is not revisable. A. I. R. 1922 Mad. 321=15 L. W. 667=(1922) M. W. N. 521=68 Ind. Cas. 167. Allowing amendment of plaint to include consequential relief is no ground for interference. A. I. R. 1925 Rang. 199=4 Bur. L. J. 1=86 Ind. Cas. 509. Revision lies in matter of procedure where the Court acted with material irregularity by granting leave to amend a plaint, where such leave should not have been granted. A. I. R. 1930 Mad. 322=30 L. W. 557=120 Ind. Cas. 887. The Court has power to grant leave to amend the plaint based on a *hundi* into one based on the original cause of action and an order allowing such amendment is not liable to be set aside in revision. A. I. R. 1930 Lah. 559=125 Ind. Cas. 329. Where amendment of a plaint was ordered subject to the payment of costs and the defendant after having drawn out the cost objected to the amendment in revision : *Held* the revision was unsustainable. 1932 M. W. N. 1118. Though an order refusing amendment of the plaint is an order made in the exercise of discretion by the lower Court and will not ordinarily be reviewed in revision, yet there is no hard and fast rule that in no circumstances will the discretion be exercised by a judicial officer be revised. A. L. R. 1934 Cal. 104=A. I. R. 1934 Cal. 102.

**Amendment of Decree.**—An order wrongly refusing amendment of decree under s. 152, and leading to gross injustice can be revised. A. I. R. 1924 Lah. 621=

76 Ind. Cas. 1933 ; see also 34 P. L. R. 802 ; A. I. R. 1929 Lah. 400. Refusal to order the amendment of a decree as being "uncalled for" is tantamount to a refusal to exercise the jurisdiction so as to justify revision. 16 A. L. J. 749=47 Ind. Cas. 830. Refusal of amendment of decree under s. 151, C. P. Code on the ground of latches is not to be interfered with, in revision. A. I. R. 1915 All. 187=47 A. 44=82 Ind. Cas. 1030. Order correcting mistake under s. 152 cannot be revised. A. I. R. 1923 Rang. 104=74 Ind. Cas. 1020. Allowing amendment on erroneous supposition that the Court cannot refuse is a ground for revision. A. I. R. 1925 All. 556=23 A. L. J. 518=88 Ind. Cas. 396. Where amended decree is appealable, order amending the decree is not revisable. A. I. R. 1927 Cal. 114=45 C. L. J. 213=31 C. W. N. 615=98 Ind. Cas. 89. Where in a mortgage suit, judgment contains two contradictory directions as regards decree and decree is drawn in accordance with earlier and operative part of the judgment, no application under s. 152 for the amendment of the decree lies. There is also no revision against an order rejecting such an application. The proper course for the decree-holder is to renew that application under Order XXXIV, rule 6. A. I. R. 1930 Lah. 589=125 Ind. Cas. 374. Where a Court grants an application for a certain amendment it cannot be said that the case has been decided within the meaning of s. 115. 3 A. W. R. 474.

**Addition of parties.**—Although High Court in revision should not interfere with trial Court's order refusing to add a defendant, still if such person is necessary to avoid likelihood of conflicting findings, High Court should set aside trial Court's order and add that person as defendant. A. I. R. 1929 Mad. 403=115 Ind. Cas. 812 ; see also A. I. R. 1929 Oudh 148=6 O. W. N. 418=116 Ind. Cas. 58 ; A. I. R. 1930 Pat. 592=11 P. L. T. 628=128 Ind. Cas. 790 ; A. I. R. 1928 Lah. 414=10 Lah. L. J. 161=108 Ind. Cas. 391 ; 50 Ind. Cas. 58 ; 38 Ind. Cas. 133=(1917) M. W. N. 550 ; but see A. I. R. 1930 Nag. 51=121 Ind. Cas. 672. Order refusing application to implead party as co-respondent under Indian Divorce Act is not open to revision. A. I. R. 1928 Cal. 114=54 C. 1038=107 Ind. Cas. 475. Where the lower Court refused in the exercise of its jurisdiction, to add a party as plaintiff, this section does not apply. 93 Ind. Cas. 932=4 Pat. 723=7 P. L. T. 499. An order rejecting an application under Order 1, rule 10, on the ground that it was too late cannot be revised. 64 Ind. Cas. 563. But an order under Order 1, rule 10, can be revised under s. 115, C. P. Code, when the Court fails to exercise a discretion vested in it and when its failure is due to error. A. I. R. 1937 Mad. 338. In a suit for partition among co-sharer landlords, if tenants are not made parties, the order is not open to revision. A. I. R. 1923 Mad. 690=18 L. W. 198=(1923) M. W. N. 403=45 M. L. J. 703=76 Ind. Cas. 207. But finding that heirs of *ex parte* decree-holder are not necessary parties to proceedings for setting aside decree cannot be interfered with. A. I. R. 1926 Pat. 20=90 Ind. Cas. 329. An order refusing to make a transposition of the parties is open to revision only when such refusal is expressly based on a supposed jurisdiction in the Court. 20 C. W. N. 752=34 Ind. Cas. 185 ; see also 39 Ind. Cas. 160=5 L. W. 207. An application under Order 1, rule 10, where it appears that the Court has exercised wrong discretion in rejecting application under Order 1, rule 10, the High Court can interfere, in revision. 47 Ind. Cas. 725. In a suit by a widow as the administratrix a person claiming as adopted son of her husband applied to be made a co-plaintiff on the ground that the widow was guilty of latches and collusion, and widow admits the fact of adoption but denies authority, refusal to join the person as a plaintiff entitles the person to revision under s. 115. 44 Ind. Cas. 564.

**Order as regards Court-fee.**—Lower Court's order that the Court-fee paid is correct cannot be revised. A. I. R. 1931 Mad. 8=32 L. W. 694=59 M. L. J. 953=129 Ind. Cas. 254. Decision regarding Court-fees in plaintiff's favour is not open to revision. A. I. R. 1929 Mad. 191=29 L. W. 42=56 M. L. J. 302=114 Ind. Cas. 842 ; see also A. I. R. 1929 Mad. 396=56 M. L. J. 394=29 L. W. 584=(1929) M. W. N. 286=119 Ind. Cas. 35 ; A. I. R. 1927 Mad. 1162=102 Ind. Cas. 877 ; A. I. R. 1926 Pat. 334=94 Ind. Cas. 103 ; A. I. R. 1925 Pat. 703=85 Ind. Cas. 538 ; 56 M. 744=144 Ind. Cas. 516=A. I. R. 1933 Mad. 506=65 M. L. J. 25. But revision lies to the High Court from an erroneous order for payment of additional Court-fee and plaintiff can move the High Court forthwith without waiting for dismissal. 36 Ind. Cas. 831 ; see also A. I. R. 1929 Pat. 427=10 P. L. T. 464=119 Ind. Cas. 78 ; A. I. R. 1928 Mad. 416=51 M. 664=55 M. L. J. 345=27 L. W. 286=108 Ind. Cas. 530 ; A. I. R. 1927 Nag. 256=10 N. L. J. 106=103 Ind. Cas. 268 ; A. I. R. 1926 Mad. 678=23 L. W. 581=51 M. L. J. 67=96 Ind. Cas. 129 ; A. I. R. 1925 Mad. 713=48 M. L. J. 688=21 L. W. 649=(1925) M. W. N. 276=87 Ind. Cas. 660 ; 71 Ind. Cas. 173=A. I. R.

1923 Mad. 270=(1922) M. W. N. 831=17 L. W. 623=71 Ind. Cas. 173; A. I. R. 1923 Mad. 270=17 L. W. 623=(1922) M. W. N. 831=71 Ind. Cas. 173; A. I. R. 1921 Pat. 180=(1921) Pat. 166=56 Ind. Cas. 649; but see 120 P. R. 1919=53 Ind. Cas. 427; 51 Ind. Cas. 581; 1 P. L. T. 5=55 Ind. Cas. 786; 56 Ind. Cas. 649=5 P. L. J. 400=1 P. L. T. 268; A. I. R. 1922 Nag. 128=65 Ind. Cas. 327; A. I. R. 1926 Mad. 768=23 L. W. 581=50 M. L. J. 497=94 Ind. Cas. 424; A. I. R. 1927 Mad. 1021=53 M. L. J. 452=39 M. L. T. 220=104 Ind. Cas. 145; 62 C. 417=39 C. W. N. 248=60 C. L. J. 469=A. I. R. 1935 Cal. 279=156 Ind. Cas. 431. Erroneous decision about Court-fee is revisable. A. I. R. 1924 Nag. 105=7 N. L. J. 91=81 Ind. Cas. 643. Questions of Court-fee involve questions of jurisdiction and hence are revisable. 134 Ind. Cas. 816=34 L. W. 252=A. I. R. 1931 Mad. 716. Revision is not competent against decision as to payment of additional Court-fee by the plaintiff in as much as he has another remedy open to him by way of appeal against the subsequent order rejecting his claim. 59 C. 388=138 Ind. Cas. 643=A. I. R. 1932 Cal. 482; A. I. R. 1935 Pat. 186=16 Pat. L. T. 158=155 Ind. Cas. 617. Order of Court below as regards Court-fee is liable to be set aside in revision in case of arbitrary valuation by plaintiff, based on factors which are purely speculative and not based on any evidence. 11 P. 161=133 Ind. Cas. 187=12 P. L. T. 556=A. I. R. 1932 Pat. 9; see also 142 Ind. Cas. 195=1933 M. W. N. 1128=A. I. R. 1933 Mad. 367. Where a Court has come to a reasonable finding as regards the insufficiency of Court-fees, it is not open to revision. 143 Ind. Cas. 84=16 N. L. J. 29=22 N. L. R. 125=A. I. R. 1933 Nag. 107 (F. B.). But where the decision on the Court-fee question also bears upon the valuation of the suit for purposes of jurisdiction and the suit may have to be filed in a higher Court if the Court-fee question should be decided in a different way, High Court is justified in interfering in revision. 43 L. W. 582=1936 M. W. N. 148=A. I. R. 1936 Mad. 411=70 M. L. J. 398; see also A. I. R. 1936 Pesh. 140=163 Ind. Cas. 462. An order made by the lower appellate Court before it dismisses the appeal for default, directing the appellant to make good deficient Court-fee is not open to revision. A. I. R. 1936 Oudh 396=11 O. W. N. 1040=151 Ind. Cas. 292. Where a preliminary issue as regards Court-fee has been fully decided, the order is an order deciding a case and as such is open to revision. A. I. R. 1934 Oudh 212=148 Ind. Cas. 908=11 O. W. N. 617; see also A. I. R. 1935 All. 455=1935 A. L. J. 376=154 Ind. Cas. 520; 1935 O. W. N. 1158 (F. B.)=158 Ind. Cas. 949.

**Sanction to prosecute.**—An order passed by a Civil Court under s. 476, Cr. Pro. Code can be revised only under s. 115. 16 N. L. R. 23=21 Cr. L. J. 270=55 Ind. Cas. 286; A. I. R. 1923 Oudh 119=9 O. & A. L. R. 103=24 Cr. L. J. 781=9 O. L. J. 593=74 Ind. Cas. 445. An order under s. 476, Cr. Pro. Code, directing the trial of a person under s. 193, I. P. Code is open to revision. A. I. R. 1926 All. 438=23 Cr. L. J. 291=66 Ind. Cas. 515. An order under s. 476, Cr. Pro. Code, passed by a Civil Court can be revised only if it fails to specify the charges. 38 A. 695=14 A. L. J. 814=18 Cr. L. J. 4=36 Ind. Cas. 836. Prosecution order of Collector under s. 476, while acting under s. 70 is not open to revision by High Court. 14 A. L. J. 1077=18 Cr. L. J. 307=38 Ind. Cas. 419. An order passed by a Civil Court under s. 195, Cr. Pro. Code can be revised under s. 115 only. 25 C. L. J. 401=18 Cr. L. J. 793=21 C. W. N. 654=41 Ind. Cas. 313; 19 Ind. Cas. 197=40 C. 477; but see 17 Cr. L. J. 184=33 Ind. Cas. 824. No revision lies against an order directing prosecution for an offence under s. 195. A. I. R. 1922 Oudh 220=24 O. C. 367=23 Cr. L. J. 228=66 Ind. Cas. 68; but see 32 Ind. Cas. 330=17 Cr. L. J. 42=18 M. L. T. 591. Sanction for prosecution under s. 182, Penal Code by an officer exercising Small Cause powers must be deemed to be of a civil nature and revision lies to the High Court under s. 115. 16 A. L. J. 921=20 Cr. L. J. 19=48 Ind. Cas. 499. Where there has been no excess of jurisdiction nor failure to exercise jurisdiction in refusing sanction under s. 195, Cr. Pro. Code, High Court will interfere in revision. A. I. R. 1923 Cal. 45=36 C. L. J. 265=26 C. W. N. 1016=23 Cr. L. J. 665=69 Ind. Cas. 153; A. I. R. 1924 Cal. 641=24 Cr. L. J. 179=71 Ind. Cas. 595; A. I. R. 1926 Sind 215=20 S. L. R. 90=27 Cr. L. J. 780=95 Ind. Cas. 316; but see A. I. R. 1923 All. 490=71 Ind. Cas. 617; 90 Ind. Cas. 445=A. I. R. 1926 Pat. 25=7 P. L. T. 199=26 Cr. L. J. 1565=90 Ind. Cas. 445. Where complaint is refused by trial Court but admitted in appeal, appellate order is revisable. A. I. R. 1927 All. 334=28 Cr. L. J. 296=25 A. L. J. 569=49 A. 536=100 Ind. Cas. 376; see also A. I. R. 1928 Cal. 237=55 C. 836=47 C. L. J. 277=109 Ind. Cas. 211. But where the appellate Court confirms the order of refusal by the trial Court to lodge complaint, High Court will not ordinarily interfere. A. I. R. 1927 Oudh 14=3 O. W. N. 905=28 Cr. L. J. 16=99 Ind. Cas. 48.



The parties are apt to say in their pleadings things not strictly true but by such statements they do not render themselves liable for prosecution for perjury. Where the Judge so misconceives the operation and function of a written statement as to imagine that because something is put in a written statement, which is in a sense not true and something is omitted from the written statement, that of itself constitutes offence under s. 193, Penal Code; the High Court is not only justified in exercising but is bound to exercise its power in revision to set aside the order. A. I. R. 1930 Cal. 639=32 Cr. L. J. 238=129 Ind. Cas. 111. If the act of the executing Court in enquiring under s. 476 is *ultra vires*, a revision is competent. 32 P. L. R. 46=131 Ind. Cas. 216=32 Cr. L. J. 647=A. I. R. 1931 Lah. 105.

**Leave to sue as pauper.**—An order admitting an application for leave to sue as *pauper* is not open to revision. A. I. R. 1922 All. 208=20 A. L. J. 471=67 Ind. Cas. 641; *contra*; A. I. R. 1926 Mad. 958=96 Ind. Cas. 175; A. I. R. 1923 Oudh 118=9 O. L. J. 610=74 Ind. Cas. 344. Order of rejection of application to sue as pauper if irregular is open to revision. A. I. R. 1927 Nag. 340=104 Ind. Cas. 198; see also A. I. R. 1927 Mad. 441=52 M. L. J. 330=101 Ind. Cas. 18; A. I. R. 1927 Lah. 56=98 Ind. Cas. 879; A. I. R. 1925 Pat. 30=3 Pat. 275=(1925) Pat. 134=6 P. L. T. 209=83 Ind. Cas. 871. An order refusing leave to sue *in forma pauperis* is not revisable. A. I. R. 1922 All. 1=20 A. L. J. 55=44 A. 248; A. I. R. 1926 All. 445=48 A. 493=24 A. L. J. 557; see also 52 Ind. Cas. 562. Disposal of pauper application without following correct procedure is without jurisdiction and hence open to revision. A. I. R. 1927 Cal. 464=100 Ind. Cas. 726. Order under Order 33, rule, 1, C. P. Code, is revisable. But erroneous decision is no ground where no material irregularity or illegality has been caused. A. I. R. 1925 Nag. 343=88 Ind. Cas. 157. If a Court after proper exercise of jurisdiction comes to a conclusion and reject the application to sue as pauper under order 33, no revision lies although the conclusion may be wrong. A. I. R. 1925 Oudh 74=11 O. L. J. 568=79 Ind. Cas. 922. Where on material before it Court finds that applicant under order 33, is not a pauper and refuses leave to sue as such order cannot be revised. A. I. R. 1924 Pat. 677=5 P. L. T. 606=2 Pat. L. R. 276=79 Ind. Cas. 56. An order rejecting application to sue *in forma pauperis* not being an interlocutory order is revisable. A. I. R. 1929 Lah. 498=117 Ind. Cas. 95. Where the lower Court perversely refuses to permit the plaintiff to sue as a pauper, the High Court will not interfere. A. I. R. 1930 Rang. 324=128 Ind. Cas. 848; see also A. I. R. 1929 Lah. 746=121 Ind. Cas. 381. Taking evidence from the parties upon the question of plaintiff's title before coming to the conclusion whether it would grant or refuse the application under rr. 5 and 6 of Order XXXIII, amounts exercising a jurisdiction not vested in it by law within s. 115. A. I. R. 1923 All. 577=45 A. 548=21 A. L. J. 441=73 Ind. Cas. 538. Where an applicant has been allowed to sue as a pauper, it is not a case decided and no revision lies. A. I. R. 1931 All. 659=(1931) A. L. J. 727; but an order refusing permission to bring a suit or to appeal as a pauper can be revised in an appropriate case. 9 Rang. 86=A. I. R. 1931 Rang. 129; 9 Rang. 92=132 Ind. Cas. 707=A. I. R. 1931 Rang. 131; A. I. R. 1931 Rang. 318. In a proper case, the High Court will interfere in revision against an order of a petition of an application for leave to sue as a pauper. 34 Bom. L. R. 1273=A. I. R. 1932 Bom. 584; but see A. I. R. 1934 Lah. 401.

**Decree under s. 9 of the specific Relief Act.**—A revision is competent from a decree passed in a suit under s. 9 of the Specific Relief Act. 53 A. 414=129 Ind. Cas. 559=A. I. R. 1931 All. 205; but see 8 O. W. N. 1341; A. I. R. 1934 All. 541.

**Insolvency proceeding.**—Where the lower appellate Court modified an order of conditional discharge in the absence of the official Receiver who had not been impleaded and the matter was taken up to the High Court but the official Receiver did not appear: *Held* that though the official Receiver was a necessary party to the appeal, the High Court need not interfere in revision in his absence and at the instance of the creditor who was given full opportunity to be heard. 132 Ind. Cas. 526=A. I. R. 1931 Lah. 647. In proceedings under s. 53, Provincial Insolvency Act, the fact that the wrong party was called upon to begin, taken alone, might not be sufficient ground for a new trial. But where the trial Judge has taken an erroneous view as to the law in regard to onus and where his mind is coloured by that view, and he is thereby disabled from weighing evenly the evidence and thus the said party is placed at a disadvantage as the direct result of the trial Judge's

error, the High Court can interfere. 36 L. W. 216 = A. I. R. 1932. Mad. 513. Order under s. 41 of the Provincial Insolvency Act is not open to revision. A.I.R. 1931 Lah. 672 = 31 P. L. R. 476 = 132 Ind. Cas. 525.

**Discretion, use of, by lower Court.**—An improper exercise of discretion by the lower Court cannot be a ground for revision 29 C. L. J. 362 = 51 Ind. Cas. 233. The discretion of a Judge granting or refusing review of his judgment cannot be revised. 40 Ind. Cas. 463 ; 9 O. L. J. 153 = 74 Ind. Cas. 351 = A. I. R. 1923 Oudh 153. It is not open to the High Court in revision to question the discretion exercised by the lower Court, unless it is apparent on the face of the record that the discretion has been arbitrarily and erroneously exercised. A. I. R. 1934 Lah. 807 = 150 Ind. Cas. 305 = 36 P. L. R. 5 ; see also A. I. R. 1934 Lah. 537 = 35 P. L. R. 459 = 140 Ind. Cas. 96 ; 35 P. L. R. 374 ; A. I. R. 1934 All. 214 = 1934 A. L. J. 821 = 147 Ind. Cas. 441 ; 59 C. L. J. 389 = A. I. R. 1934 Cal. 780 ; A. I. R. 1935 All. 740 = 1935 A. L. J. 983 = 157 Ind. Cas. 673. Where the trial Court makes an order under Order 23, rule 1, allowing the plaintiff to withdraw the suit without exercising its discretion judicially, that is without applying its mind to the matter before it with due reference to the provisions of the order, then it is open to the High Court to interfere in revision. A. I. R. 1935 All. 381 = 1935 A. L. J. 330 = 159 Ind. Cas. 147 ; see also A. I. R. 1935 All. 284 = 1935 A. L. J. 277 = 153 Ind. Cas. 684. Proper exercise of discretion under s. 5 of the Limitation Act cannot be interfered with. A. I. R. 1936 Pesh. 197 = 162 Ind. Cas. 416. Nor the High Court will interfere in revision with the discretionary power of the lower Court in permitting additional evidence under Order 41, rule 27. 33 P. L. R. 330 = 137 Ind. Cas. 513. No revision lies against discretionary power of the lower appellate Court under Order 23, rule 1. 13 Lah. 547 = 136 Ind. Cas. 1 = 33 P. L. R. 275 = A. I. R. 1932 Lah. 360. Exercise of discretion by Court in awarding compensation in breaches of contracts of service should not be questioned in revision. 39 Ind. Cas. 121. An error in the exercise of judicial discretion does not bring a case under s. 115. 25 C. W. N. 555 = 55 Ind. Cas. 228. No revision lies against an order granting adjournment on condition that plaintiff paid certain damages and that the case was not to be taken up unless amount was paid. A. I. R. 1921 Oudh 23 = 24 O. C. 215 = 64 Ind. Cas. 211. Order for payment of adjournment costs in contravention of provision of law is not open to revision except when the amount awarded is excessive or unreasonable. 57 Ind. Cas. 506. An order refusing to admit additional evidence offered three days after the argument was closed under Order 41, rule 27, is not revisable. 67 Ind. Cas. 252. Order extending time for payment of Court-fees and costs to defendant, on allowing amendment of plaint is not open to revision. 36 C. W. N. 869 = 140 Ind. Cas. 373. Order refusing to strike out plaint on satisfaction of the decree can not be revised. 56 C. L. J. 1 = A. I. R. 1932 Cal. 831. The High Court will not interfere unless the lower Court has exercised its discretion in such a manner that it was obviously wrong and unjust for it to make the order he did. The lower Court has a discretion to amend the decree under s. 152 or not, 10 O.W.N. 958 = A. I. R. 1933 Oudh 425. Where order under Order 23, rule 1, is passed in exercising discretion, the order cannot be revised. A. I. R. 1926 All. 548 = 24 A. L. J. 721 = 96 Ind. Cas. 480. A long delay by the defendants in referring the matter to arbitration justifies the Court in refusing to enforce the clauses of arbitration. A. I. R. 1933 Lah. 1007. It is for the trial Court to decide in what order it will decide the issues and the High Court will not interfere in revision. A. I. R. 1933 All. 749. Where the lower Court has passed an order upon a careful consideration by exercising discretion vested in it and upon judicial principles the order cannot be interfered with in revision. 14 P. L. T. 252 = A. I. R. 1933 Pat. 239. Where in the exercise of its discretion, the lower Court has admitted certain documents though at a late stage of the suit, the High Court cannot interfere. A. I. R. 1930 Pat. 603 = 129 Ind. Cas. 82. The High Court should not interfere in revision with a discretionary order under s. 43 of the Provincial Insolvency Act granting extension of time for applying for discharge. A. I. R. 1931 Mad. 10 = 32 L. W. 446 = 59 M. L. J. 710 = 129 Ind. Cas. 36. Amendment or alteration of issues made before passing of decree being discretionary cannot be made ground for revision. (1928) M. W. N. 836 = 113 Ind. Cas. 313. Order of refusal to appoint curator for delay can be no ground of revision, A. I. R. 1927 Nag. 253 = 102 Ind. Cas. 622. Where the Subordinate Judge refused to issue a commission because it was made too late, the order cannot be revised. 1933 M. W. N. 648. Where the Court in the exercise of its discretion appoints a person as a trustee of a public trust it cannot be said to have acted either without jurisdiction or with any illegality or material irregularity in the exercise of jurisdiction. 133 Ind. Cas. 401 = 1931 A. L. J. 1071 = A. I. R. 1931 All. 765.

Revision will lie against ignorant and perverse exercise of discretion. 20 C. W. N. 1080=1 Pat. L. J. 465=3 Pat. L. W. 55=37 Ind. Cas. 129; A. I. R. 1923 Lah. 506=75 Ind. Cas. 487; 80 Ind. Cas. 708=A. I. R. 1925 Cal. 293; A. I. R. 1931 Cal. 268=34 C. W. N. 578=127 Ind. Cas. 549. Entertaining application after time due, to incorrect exercise of discretion is open to revision. A. I. R. 1927 All. 386=100 Ind. Cas. 727. Order of extending time under s. 149, C. P. Code, is not revisable. A. I. R. 1926 Nag. 156=89 Ind. Cas. 419. Revision lies where there has been a mistake of law coupled with misunderstanding the nature of judicial discretion. A. I. R. 1922 Mad. 332=14 L. W. 642=(1921) M. W. N. 799=42 M. L. J. 97=30 M. L. T. 172=45 M. 194=69 Ind. Cas. 961. Order rejecting application to allow further evidence, without exercising judicial discretion can be set aside in revision. A. I. R. 1924 Rang. 318=3 Bur. L. J. 125. Order granting time for specific performance in wrongful exercise of discretion is alone open to revision. A. I. R. 1927 Rang. 311=5 Rang. 615=6 Bur. L. J. 216=105 Ind. Cas. 467. Order for security for the full amount of the decree under Order 21, r. 29, being within the discretion of the Court, no revision will lie unless the discretion was improperly used. A. I. R. 1929 Sind 110=116 Ind. Cas. 101. Exercise of jurisdiction in absence of circumstances supposed to exist is revisable. A. I. R. 1927 All. 704=25 A. L. J. 994=103 Ind. Cas. 229. Where discretion is given to a Court, it has to exercise judicially and not arbitrarily and it is open to the High Court to interfere in revision where such Court appears to have exercised this discretion without applying its mind to the case. A. I. R. 1933 All. 957.

**Cost.**—The question of costs is principally within the discretion of the Court below and unless the High Court is satisfied that this discretion has been exercised arbitrarily it will not interfere in revision with that discretion. 144 Ind. Cas. 76 C.; A. I. R. 1933 All. 311; A. I. R. 1937 Oudh 282. Mistake regarding costs is no ground for revision. A. I. R. 1928 Lah. 800=10 Lah. L. J. 401=109 Ind. Cas. 476.

**Ex parte decree.**—In a case where the order setting aside a decree has been passed by a Court in defiance of the provisions of Order 9, rule 13, the matter is a case decided under s. 115, C. P. Code, and the High Court is entitled to interfere in revision. 1931 A. L. J. 377=133 Ind. Cas. 129=A. I. R. 1931 All. 224 (F. B.); 107 Ind. Cas. 395. If material exists in the record and in the lower Court's order setting aside an *ex parte* decree of its own for drawing the conclusion that sufficient cause did exist for the defendants not appearing there will be no interference in revision although it may have been passed on incorrect grounds. 39 L. W. 653.

**Appeal.**—In all cases where the records have been called for *suo motu* or on the application of one of the parties, no appeal lies to a Division Court under cl. 10 from a decision of a Judge passed in the exercise of revisional jurisdiction irrespective of whether the assumption of jurisdiction is justified or not and whether the order is right or not on its merits. 12 P. L. T. 599=A. I. R. 1931 Pat. 292=133 Ind. Cas. 676=10 P. 428.

**Withdrawal of suit and revision.**—An order allowing the plaintiffs to withdraw their suits as against certain of the defendants can be revised. A. I. R. 1930 All. 863=128 Ind. Cas. 827. The High Court can interfere in revision where withdrawal of suit has been allowed without reasons justified by Order 23, rule 1 (2). 48 Ind. Cas. 1005; 117 P. W. R. 1918=46 Ind. Cas. 181; 5 Pat L. W. 104=3 Pat. L. T. 460=(1918) Pat. 220=46 Ind. Cas. 79; 4 P. L. W. 233=3 P. L. J. 630=44 Ind. Cas. 406; 43 Ind. Cas. 346; 6 L. W. 1=(1917) M. W. N. 719=41 Ind. Cas. 281; 32 Ind. Cas. 402; 15 A. L. J. 10=31 Ind. Cas. 617; 61 Ind. Cas. 584=A. I. R. 1922 Nag. 84=18 N. L. R. 30; A. I. R. 1922 Pat. 44 (F. B.)=3 P. L. T. 80=1 Pat. 90=64 Ind. Cas. 337; 61 Ind. Cas. 639=A. I. R. 1921 Pat. 42=6 P. L. J. 112=2 P. L. T. 634; 64 Ind. Cas. 948=A. I. R. 1922 All. 185=20 A. L. J. 90; A. I. R. 1923 Lah. 97=68 Ind. Cas. 753; 70 Ind. Cas. 484=A. I. R. 1922 Cal. 58; 9 O. & A. L. R. 3=72 Ind. Cas. 1034; A. I. R. 1924 Oudh 107=72 Ind. Cas. 1034; A. I. R. 1927 All. 701=25 A. L. J. 870=103 Ind. Cas. 229; A. I. R. 1926 Mad. 863=23 L. W. 525=94 Ind. Cas. 983; A. I. R. 1925 Oudh 140=11 O. L. J. 351=79 Ind. Cas. 1031; A. I. R. 1925 Oudh 61=78 Ind. Cas. 121. Where a Court can entertain an application under Order 23, rule 1, and come to the conclusion that there is some ground for allowing the suit to be withdrawn and direct the suit to be

withdrawn by safeguarding the interests of the defendants as to costs, the order cannot be challenged under s. 115, even if the Court exercised its discretion wrongly in favour of the plaintiff. (1930) A. L. J. 1209=125 Ind. Cas. 580; see also 40 A. 612; A. I. R. 1927 All. 750=25 A. L. J. 838=103 Ind. Cas. 372. An order granting leave to withdraw suit if improper it will be interfered with in revision. 64 Ind. Cas. 556; A. I. R. 1929 All. 683=1929 A. L. J. 961=119 Ind. Cas. 859; 39 C. L. J. 371=A. I. R. 1924 Cal. 751=84 Ind. Cas. 372; 50 A. 199=25 A. L. J. 943=A. I. R. 1928 All. 98=106 Ind. Cas. 435; 60 Ind. Cas. 899=A. I. R. 1921 All. 65=19 A. L. J. 47. Order permitting plaintiff to withdraw the suit with permission to bring a fresh suit cannot be revived if Court is acting with jurisdiction. 58 Ind. Cas. 131; see also 74 Ind. Cas. 112=A. I. R. 1924 All. 121; 92 Ind. Cas. 558=A. I. R. 1926 All. 294=24 A. L. J. 313; 46 Ind. Cas. 71=40 A. 612=16 A. L. J. 495; A. I. R. 1930 Cal. 424=34 C. W. N. 265=127 Ind. Cas. 71; 10 O. W. N. 311=A. I. R. 1933 Oudh 255=145 Ind. Cas. 222. An order allowing the plaintiffs to withdraw their suits as against certain of the defendants can be the subject of revision. 128 Ind. Cas. 827=A. I. R. 1930 All. 863.

**Delay**—A High Court will refuse to interfere in revision where there has been undue delay. A. I. R. 1921 Oudh 141=24 O. C 282=64 Ind. Cas. 303. Delay in applying for revision unless good cause is shown is fatal. A. I. R. 1929 Oudh 383; A. I. R. 1926 All. 228=92 Ind. Cas. 993; A. I. R. 1925 Oudh 6c8=86 Ind. Cas. 329; A. I. R. 1923 Oudh 272=10 O. L. J. 205=77 Ind. Cas. 115; see also A. I. R. 1936 Oudh 185=1936 O. W. N. 262=160 Ind. Cas. 814; A. I. R. 1935 Lah. 120. Delay for no fault of applicant is no bar to revision application. A. I. R. 1928 Mad. 528=51 M. 672=55 M. L. J. 274=28 L. W. 297=110 Ind. Cas. 63. A delay of three months has been excused by the High Court. A. I. R. 1922 Mad. 63=16 L. W. 760=(1922) M. W. N. 130=65 Ind. Cas. 732. A party aggrieved must come to the High Court for relief in revision at the earliest possible moment and with no ulterior purpose. 39 Ind. Cas. 570. An Application for revision can be refused on the ground of plaintiff's laches. 4 O. L. J. 551=43 Ind. Cas. 470; L. R. 2A. 248 Rev. Time for filing revision is 45 days in C. P. and Berar. A. I. R. 1926 Nag. 65=89 Ind. Cas. 933. Revision application should not be admitted beyond the time allowed for appeals except for special reasons. A. I. R. 1930 Oudh 496=7 O. W. N. 894=128 Ind. Cas. 739. Article 181 does not apply to an application made to the High Court in revision of an order of a Criminal Court of inferior jurisdiction. These powers of revision are exercised by the High Court quite irrespective of any right on the part of the aggrieved party to move the Court and no time limit is placed on the High Court's power of revision in either criminal or civil cases. A. I. R. 1930 Oudh 401=7 O. W. N. 663=126 Ind. Cas. 395.

It is not the usual practice of the High Court to interfere in revision after great delay *e.g.*, when the Court is moved more than one year after the date of the order in question. 142 Ind. Cas. 687=33 P. L. R. 1070=A. I. R. 1933 Lah. 175. Legally a revision is not governed by the laws of limitation. 144 Ind. Cas. 482=A. I. R. 1933 Pesh. 51. But it is a matter of uniform practice that civil revisions are entertained only if they are filed within three months of the date of the order sought to be revised. A. I. R. 1933 Pat. 582.

## PART IX.

### SPECIAL PROVISIONS RELATING TO [THE CHARTERED HIGH COURTS.]

**116. [S. 631.]** This Part applies only to High Courts which are or may Part to apply only to certain hereafter be "constituted by His Majesty by High Courts. Letters Patent."\*

**Amendment in Burma.**—In the heading to Pat. IX for "the Chartered High Courts" substitute "the High Court" and section 116 has been omitted in British Burma.—*Vide* G. B. Order of 1937.

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\* Substituted by G. I. Order of 1937.

Application of Code to High Courts.

**117. [S. 632.]** Save as provided in this Part or in Part X or in rules, the provisions of this Code shall apply to such High Courts.

**Amendment in Burma.**—For “such High Courts” substitute “the High Court” —*Vide* G. B. Order of 1937.

**Scope.**—Unless specifically excluded or superseded by rules provisions of Code apply to original jurisdiction of Chartered High Courts. A. I. R. 1928 Mad. 385=54 M. L. J. 263=27 L. W. 760=109 Ind. Cas. 173. Provisions of Code apply to Chartered High Courts in the exercise of civil jurisdiction including Letters Patent Appeal. A. I. R. 1931 All. 244=1931 A. L. J. 187 (F. B.)=132 Ind. Cas. 24. In the absence of any rule framed by the High Court in exercise of the power (save by s. 129 of the Code) to regulate its own procedure in its original side, Civil Procedure Code applies, by force of secs. 117, 120 and 121 of the Code, to the jurisdiction exercisable under cl. 15 of the Letters Patent, upon appeal from a judgment passed by a Judge of the High Court on its original civil side. 25 C. W. N. 557=48 I. A. 76=48 C. 481=33 C. L. J. 307=19 A. L. J. 281=23 Bom. L. R. 681=60 Ind. Cas. 274=40 M. L. J. 308 (P. C.) ; see also 43 C. 243=20 C. W. N. 140.

**118. [S. 634.]** Where any such High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the Court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs ; and, as to so much thereof as relates to the costs, that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

**Amendment in Burma.**—For “any such High Court” substitute “the High Court”.—*Vide* G. B. Order of 1937.

**119. [S. 635]** Nothing in this Code shall be deemed to authorise any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys.

**Amendment in Burma.**—In section 119 omit “vakils and attorneys”.—*Vide* G. B. Order of 1937.

**Scope.**—Section 119 is not restricted to admission on professional conduct. A.I.R. 1128 Mad. 472=109 I. C. 206. In the original side of the Calcutta High Court, advocate can appear instructed by attorney. The same rule is applicable so far as the original side of the Bombay High Court is concerned. In Madras, advocate can appear and plead on all sides of the High Court. In Allahabad High Court, an advocate can perform all the duties that may be performed by a pleader. 9A. 617. A vakil is not entitled to be heard on the original side of the Calcutta High Court. 30 C. 986 ; see also 37 C. 853. In Madras, a vakil can appear on the original side. 1 M. 24 ; 37 Ind. Cas. 699. In the Presidency Small Cause Courts of Bombay, only the barristers and attorneys are entitled to practise. 8 B. 105 (F.B.) But in Calcutta and Madras, pleaders and vakils are entitled to practise in the Presidency Small Cause Courts. 7 W. R. 228.

**120. [Ss. 638, 639.]** (1) The following provisions shall not apply to the High Court in the exercise of its original jurisdiction, namely, sections 16, 17 and 20.\*

**Scope.**—Section 20 is not applicable to High Court on original side. A. I. R. 1923 Mad. 272=(1922) M. W. N. 811=72 Ind. Cas. 982 ; see also 13 B. 520=16 I. A. 156.

\* Sub-section (2) of section 120 was repealed by the Presidency-towns Insolvency Act, 1909 (3 of 1909), s. 127 and Sch. III.

## PART X.

## RULES.

**121.** [*New.*] The rules in the First Schedule shall have effect as if  
 Effect of rules in First Schedule. enacted in the body of this Code until annulled or altered in accordance with the provisions of this Part.

**122.** [*New.*] High Courts† constituted by His Majesty by Letters Patent  
 and the Chief Courts of Oudh and Sind,\* may,  
 Power of certain High Courts from time to time after previous publication, make  
 to make rules. rules regulating their own procedure and the  
 procedure of the Civil Courts subject to their superintendence, and may by such  
 rules annul, alter or add to all or any of the rules in the First Schedule.

*This section has been substituted in Burma by the following section 122 by G. B. Order of 1937 :—*

**122.** *The High Court may, from time to time, after previous publication, make rules regulating its procedure and the procedure of the Civil Courts subject to its superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule.*

**Scope.**—Rules made by the High Court under the powers conferred by C. P. Code and published in the local official Gazette, have the force of law. 5 Bom. L. R. 394 ; see also 6 A. L. J. 45=1 Ind. Cas. 163 ; 16 Ind. Cas. 521=245 P. L. R. 1912=8 P. R. 1912. Rules can be framed by the High Court for regulating its own procedure or the procedure of the subordinate Courts. 12 Ind. Cas. 18 ; 16 Ind. Cas. 521. But it must not be inconsistent with the Code. 32 B. 14 ; 4 Ind. Cas. 1154. High Court has no power so to frame the rules as to override the provisions of the Code or Letters Patent. A. I. R. 1930 All. 558=(1930) A. L. J. 1126=128 Ind. Cas. 238. Rules framed under this section may apply to both sides of High Court unless expressly excluded. A. I. R. 1928 Bom. 125=52 B. 159=30 Bom. L. R. 402=108 Ind. Cas. 795. High Court has power merely to make rules and orders for the purposes of regulating proceedings in the civil cases. A. I. R. 1926 Rang. 1=3 Rang. 546=4 Bur. L. J. 185 (F. B.). Chief Court of Oudh is a High Court. A. I. R. 1928. Oudh 89=4 O. W. N. 1114. Rule in conflict with clear provision of the Code is *ultra vires*. A. I. R. 1925 Oudh 492=28 O. C. 169=85 Ind. Cas. 455. Rule framed under s. 122, C. P. Code, excluding application of s. 5 of the Limitation Act to petition under Order IX, rule 3, is *ultra vires*. A. I. R. 1925 Mad. 14 (F. B.)=47 M. 824=47 M. L. J. 403=20 L. W. 352 ; 35 M. L. T. 43=(1924) M. W. N. 682=80 Ind. Cas. 877. Sections 122 and 123 do not apply to Patna High Court and rules made it though not submitted to any Rules Committee are not *ultra vires*. A. I. R. 1921 Pat. 83=2 P. L. T. 112=60 Ind. Cas. 285=2 Pat. L. T. 112. Rule can extend s. 5 of Limitation Act to application under Order IX, rule 13. 32 Ind. Cas. 975. Rule extending s. 5 of the Limitation Act to application under Order IX, rule 9, is *ultra vires* and does not change the applicability of s. 164. A. I. R. 1929 Bom. 262=53 B. 453=31 Bom. L. R. 484=122 Ind. Cas. 76. Rule framed by Lahore High Court requiring first Court's judgment to accompany memo of second appeal is *ultra vires*. A. I. R. 1926 Lah. 73=2 Lah. 227=63 Ind. Cas. 33. Rule extending s. 55 of the Limitation Act, to application under Order IX, r. 3, is *ultra vires*. A. I. R. 1925 Mad. 14 (F. B.)=47 M. 824=47 M. L. J. 400=20 L. W. 332=(1924) M. W. N. 682=80 Ind. Cas. 877. Rule cannot alter period of limitation. A. I. R. 1923 Lah. 96=68 Ind. Cas. 777. Rule framed by the Allahabad High Court requiring copy of judgment to accompany memo of second appeal is *ultra vires*. A. I. R. 1921 All. 23=43 A. 660=19 A. L. J. 598=63 Ind. Cas. 338. Patna High Court rules, Chapter VII, rule 6, is not under s. 122 and second appeal is not barred if copy of the first Court's judgment not filed in time. A. I. R. 1921 Pat. 509=(1923) Pat. 19=74 Ind. Cas. 330. Under this section the High Court has power to annul, alter or add to any of the rules in the first Schedule. If a new rule that has been made is to some extent in conflict with the previous existing rule, the new rule must by implication be deemed to have annulled or altered that rule. 139 Ind. Cas. 836=1931 A. L. J. 865=A. I. R. 1931 All. 567 (F. B.).

\* Substituted by G. I. Order of 1937.

† Substituted by Act. 34 of 1916.

**123. [New.]** (1) A Committee, to be called the Rule Committee, shall be constituted at \**[the town which is the usual place of sitting of each of the High Courts (and Chief Courts).....referred to in section 122].*

Constitution of Rule Committees in certain Provinces.

(2) Each such Committee shall consist of the following persons namely :—

(a) three Judges of the High Court established at the town at which such Committee is constituted, one of whom at least has served as a District Judge or † a Divisional Judge for three years,

(b) a barrister practising in that Court,

(c) an advocate (not being a barrister), or vakil or pleader enrolled in that Court,

(d) a Judge of a Civil Court subordinate to the High Court, and

(e) in the towns of Calcutta, Madras and Bombay, an attorney.

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president :

Provided that, if the Chief Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief Judge shall be the president of the Committee.

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf ; and whenever any member retires, resigns, dies or ceases to reside in the Province in which the Committee was constituted, or becomes incapable of acting as a member of the committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead.

(5) There shall be a Secretary to each such Committee who shall be appointed by the Chief Justice or Chief Judge and shall receive such remuneration as may be provided in this behalf "by the Provincial Government." ‡

**Section 123 is in the following form in British Burma :—**

" (1) *A Committee, to be called the Rule Committee, shall be constituted at Rangoon and shall consist of the following persons namely—*

(a) *three Judges of the High Court, one of whom at least has served for three years as a District Judge or a Judge of the High Court,*

(b) *a barrister practising in the High Court,*

(c) *an advocate of the High Court not being a barrister, and*

(d) *a Judge of a Civil Court subordinate to the High Court.*

(2) .....

(3) *The members of a Committee shall be appointed by the Chief Justice, who shall also nominate one of their members to be president :*

\* The words "the town which is the usual place of sitting of each of the High Courts.....section 122," were substituted for "each of the towns of Calcutta, Madras, Bombay, Allahabad, Lahore and Rangoon" by Act 13 of 1916 and the words "of the Chief Court" which were substituted for "Chief Court" by Act 18 of 1919 were repealed by Act XI of 1923. The words "and Chief Courts" were inserted by Act 32 of 1925 and 34 of 1926.

† The words "(in Burma)" were substituted for the original words "(in the Punjab or Burma)" by s. 2 and Sch. I of the Repealing and Amending Act, 1919 (XVIII of 1919), and the words "(in Burma)" were subsequently repealed by s. 3 and Sch. II of the Repealing and Amending Act, 1923 (XI of 1923).

‡ The words "by the Governor-General in Council or by the Local Government, as the case may be" have been substituted by the words within quotations by G. I. Order of 1937.

*Provided that, if the Chief Justice elects to be himself a member of the Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice shall be the president of the Committee.*

(4) *Each member of the Committee shall hold office for such period as may be prescribed by the Chief Justice in this behalf ; and whenever any member retires, resigns, dies or ceases to reside in British Burma or becomes incapable of acting as a member of the Committee, the said Chief Justice may appoint another person to be a member in his stead.*

(5) *There shall be a Secretary to the Committee who shall be appointed by the Chief Justice and shall receive such remuneration as may be provided in this behalf by the Governor*".

**Scope.**—Sections 122 and 123 do not apply to Patna High Court and rules made by it though not submitted to any Rule Committee are not *ultra vires*. 5 P. L. J. 749=1921 Pat. 97=2 Pat. L. T. 112=60 Ind. Cas. 285=A. I. R. 1921 Pat. 83.

124. [*New.*] Every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the first Schedule or to make new rules, and before making any rules under section 122 the High Court shall take such report into consideration.

**Amendment in Burma.**—For "every" substitute "the" and omit "established at the town at which it is constituted".—*Vide* G. B. Order of 1937.

125. [*New.*] High Courts other than the Courts specified in section 122, may exercise the powers conferred by that section in such manner and subject to such conditions as "the Provincial Government"\* may determine :

*Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction any rules which have been made by any other High Court.*

**Amendment in Burma.**—This section has been omitted in Burma.

**Scope.**—Where the fact of Patna High Court rules adopting the Calcutta High Court rules is published, there is no necessity of publishing the rules in their entirety. 61 Ind. Cas. 666=A. I. R. 1921 Pat. 428=2 P. L. T. 45.

† 126. [*New.*] Rules made under the foregoing provisions shall be subject to the previous approval of the Government of the Province in which the Court whose procedure the rules regulate is situate or, if that Court is not situate in any Province, to the previous approval of the Governor-General.

The following section has been substituted in British Burma namely :—

"126. *Rules made under the foregoing provisions shall be subject to the previous approval of the Governor.*"

**Scope.**—Rules made by High Court for conduct of its own business or regulation of pleadings appearing before it are not subject to sanction of Local Government. A. I. R. 1928 Mad. 472=109 Ind. Cas. 206.

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\* The words within quotations have been substituted for the words "as in the case of the Court of the Judicial Commissioner of Coorg, the Governor-General in Council, and in other cases the Local Government" substituted by Act. 38 of 1920 by G. I. Order of 1937.

† Section 126 has been substituted by G. I. Order of 1937.



127. [New.] Rules so made and [approved] \* shall be published in the *Gazette of India* or in the "official Gazette"† as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

**Amendment in Burma.**—For "*Gazette of India* or in the official Gazette as the case may be," substitute "Gazette" and omit "within the local limits of the jurisdiction of the High Court which made them".—*Vide* G. B. Order of 1937.

128. [New.] (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, Matters for which rules may provide. may provide for any matters relating to the Procedure of Civil Courts.

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1) such rules may provide for all or any of the following matters, namely :—

(a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service ;

(b) the maintenance and custody, while under attachment, of live-stock and other movable property, the fees payable for such maintenance and custody, the sale of such live-stock and property, and the proceeds of such sale ;

(c) procedure in suits by way of counter-claim, and the valuation of such suits for the purposes of jurisdiction ;

(d) procedure in garnishee and charging orders either in addition to, or in substitution for, the attachment and sale of debts ;

(e) procedure where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not ;

(f) summary procedure—

(i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising—

on a contract express or implied ; or on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty ; or

on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only ; or

on a trust ; or

(ii) in suits for the recovery of immovable property, with or without a claim for rent or *mesne* profits by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant ;

(g) procedure by way of originating summons ;

(h) consolidation of suits, appeals and other proceedings ;

(i) delegation to any Registrar, Prothonotary or master or other official of the Court of any judicial, *quasi* judicial and non-judicial duties ; and

(j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Courts.

**Amendment in Burma.**—In clause (i) of sub-section (2) omit "Prothonotary.—*Vide* G. B. Order of 1937.

**Scope.**—Section 128 refers to rules made under present Code with advice of Committee constituted under s. 123. A. I. R. 1929 Mad. 641 = 52 M. 563 = 29 L. W.

\* This word was substituted for the word "sanctioned" by s. 2 and Schedule I of the Repealing and Amending Act, 1917 (24 of 1917).

† Substituted by G. I. Order dated 1-4-1937.

823=57 M. L. J. 264=116 Ind. Cas. 343. A village head-man is not entitled to notice before warrant. (1930) M. W. N. 1215. Suit for negotiable instrument provided under order 37 comes within s. 128 (2) (f) and Art. 5 applies to it. A. I. R. 1927 Sind 90=21 S. L. R. 257=98 Ind. Cas. 78. It is doubtful whether s. 128 validates rules allowing delegation of judicial duties existing previous to present Code. 21 C. W. N. 1052=42 Ind. Cas. 623.

**129. [S. 652, third para.]** Notwithstanding anything in this Code, any High Court "constituted by His Majesty by Letters Patent"\* may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

**Amendment in Burma.**—For the words "any High Court constituted by His Majesty by Letters Patent" substitute "the High Court."—*Vide* G. B. Order of 1937.

**Scope.**—Rule making power under s. 129 is devised to make for elasticity of procedure and to remedy defects in Code. Rules need not be consistent with Code. A. I. R. 1930 Cal. 685=57 C. 676. Letters Patent referred to is Letters Patent of 1865. A. I. R. 1924 Cal. 1025=51 C. 905=28 C. W. N. 916=81 Ind. Cas. 1048. Section 129 expressly authorizes the Bombay High Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction. 38 P. L. R. 1101=A. I. R. 1936 Lah. 369=162 Ind. Cas. 489.

**†130. [S. 652, para 2.]** A High Court not constituted by His Majesty by Letters Patent may, within the previous approval of the Provincial Government, make with respect to any matter other than procedure any rule which a High Court so constituted might under s. 224 of the Government of India Act, 1935, make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town.

**Amendment in Burma.**—Section 130 has been omitted in Burma.

**131. [S. 652, forth para.]** Rules made in accordance with section 129 or section 130 shall be published in the *Gazette of India* or in the "official Gazette"‡ as the case may be, and shall from the date of publication or from such other date as may be specified have the force of law.

**Local Amendment in Burma.**—In Burma omit "or section 130" and for the *Gazette of India* or official Gazette as the case may be" substitute "Gazette".—*Vide* G. B. Order of 1937.

## PART XI.

### MISCELLANEOUS.

**132. [S. 640]** (1) Women who, according to the customs and manners of the country ought not to be compelled to appear in public shall be exempt from personal appearance in Court.

Exemption of certain women from personal appearance.

(2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any case in which the arrest of women is not prohibited by this Code.

**Scope.**—The provisions of this section are not restricted to the examination of witnesses. They apply also to parties to suits or proceedings before the Court. 11

\* Substituted for the words "established under the Indian High Courts Act, 1861, or the Government of India Act, 1915" by G. I. Order of 1937.

† This section has been substituted for the old s. 130 by G. I. Order of 1937.

‡ Substituted by G. I. Order of 1937.

Ind. Cas. 668. The words "personal appearance" used in s. 132, clause (1) includes "personal attendance". If a *pardanashin* lady observing strict *pardah* is ordered to attend Court, it means that she is "compelled to appear in public." Her face may be covered or she may be wearing a *burka*, but all the same she is compelled to appear in public if she is ordered to attend the Court. This is the spirit of s. 132. The words of s. 132 are pre-emptory and there is no discretion vested in the Court that in a suitable case it can order a *pardanashin* lady to attend in Court to be examined in *camera*. It is her right to refuse to attend the Court and to say that if she is to be examined her evidence should be taken on commission. The Court has no option in this matter. A. I. R. 1935 Sind 205=159 Ind. Cas. 153. But the Calcutta High Court in A. I. R. 1929 Cal. 528=33 C. W. N. 681, has held that such a person is exempt not from attendance in Court but from appearance in Court. "Appearance" means that she shall not be compelled to come forth into view or to have visible to the public gaze. Section 132(1), Civil Procedure Code, does not apply to examination under s. 36(1), Presidency Towns Insolvency Act, and the Court in a suitable case may summon before it a *pardanashin* lady who is known or suspected to have in her possession any property belonging to the insolvent. 33 C. W. N. 681=A. I. R. 1929 Cal. 528. Unmarried girl of 12 years is a woman. 24 W. R. 375. This section is extended to native women only and not to all women of rank. 8 W. R. 29; see also 19 P. R. 1899. A lady is not a *pardanashin* lady who does not object to communicate in matters of business with persons who are outside his family and who attends Court and Registration office. 8 Bom. L. R. 379=10 C. W. N. 570=33 C. 773=3 C. L. J. 484=16 M. L. J. 166=33 I. A. 86 P. C. The fact that a *pardanashin* lady appeared in public does not take away her right under this section. 45 C. 492=22 C. W. N. 147=44 Ind. Cas. 157; see also 26 C. 650=3 C. W. N. 751; 3 C. W. N. 753; 45 C. 697=26 C. L. J. 319=41 Ind. Cas. 610=22 C. W. N. 197; 2 Hyde 88; 5 C. W. N. 232 (notes); 2 Hyde 88; 3 C. W. N. 750; 24 W. R. 375; 14 B. 584; 15 W. R. 129; 8 Ind. Cas. 418; 15 C. 675; 4 C. 20=3 C. L. R. 93. But commission need not be issued when she can be examined in a *palki* on proper identification. 18 W. R. 230. But a *pardanashin* woman can not refuse to be examined on commission at any place other than place of her choice. A. I. R. 1931 Cal. 229=64 Ind. Cas. 228. Right of *pardanashin* lady to be examined on commission is absolute. A. I. R. 1928 Cal. 814=114 Ind. Cas. 95. If a woman is in fact a *pardanashin* lady she is not deprived of the statutory protection merely because she may have previously appeared in public. 45 C. 697=26 C. L. J. 319=22 C. W. N. 97=41 Ind. Cas. 610. Section 132 is not confined to *pardanashin* woman strictly so-called and an old Hindu lady of high family must be examined on commission. 45 C. 492=22 C. W. N. 147=44 Ind. Cas. 157. The word "personal appearance" in s. 132, C. P. Code means "a personal attendance." Courts have no power to insist on the attendance of *pardanashin* women in Court whether under provisions of s. 132, or Order 5, rule 3 or Order 10, rule 4. The exemption from personal appearance is a right which no Court has power to refuse and applies to parties as well as to witnesses. The words "personal appearance" in s. 132 cannot be interpreted so as to compel *pardanashins* to attend Court by wearing a veil or *burka* with their faces covered so as not to be visible to public gaze. If the Court has reason to believe that a *pardanashin*, while being examined on commission was guilty of malpractices, such as being tutored by a person behind the *purdah*, the Court may exclude her evidence, but cannot make that a ground for calling on her to attend the Court. A. L. R. 1934 All. 66=55 A. 666=1933 A. L. J. 1384

**133. [S. 641.]** (1) The "Provincial Government"\* may, by notification in the "official Gazette"\* exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the "Provincial Government"\* and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall

\* Substituted by G. I. Order of 1937.

pay the costs of that commission, unless the party requiring his evidence pays such costs.

**Local Amendments in Burma.**—In Burma for the words "Provincial Government" wherever they occur substitute "Governor" as well as for the words "such Government" substitute "Governor" ; for "official Gazette" substitute "Gazette."

**Scope.**—Every person what his position may be who seeks the aid of the Court must conform to the rules of the Court, 43 Ind. Cas. 729=42B, 135=20 Bom. L. R. 1. A person can be exempted under this section only by a special notification, 28 M. L. J. 410 (421). The exemption conferred by this section is absolute and is not confined to cases in which he is summoned by the opposite party. Marsh. 627.

Arrest other than in execution of decree.

134. [New.] The provisions of sections 55, 57 and 59 shall apply, so far as may be, to all persons arrested under this Code.

135. [S. 642.] (1) No Judge, Magistrate or other judicial officer shall be liable to arrest under civil process while going to, presiding in, or returning from, his Court.

(2) Where any matter is pending before a tribunal having jurisdiction therein, or believing in good faith that it has such jurisdiction, the parties thereto, their pleaders, mukhtars, revenue-agents and recognized agents, and their witnesses acting in obedience to a summons, shall be exempt from arrest under civil process other than process issued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub-section (2) shall enable a judgment-debtor to claim exemption from arrest under an order for immediate execution or where such judgment-debtor attends to show cause why he should not be committed to prison in execution of a decree.

**Amendment in Burma.**—In Burma, in sub-section (2) omit "mukhtars, revenue-agents."—*Vide* G. B. Order of 1937.

**Scope.**—The protection from arrest afforded to s. 642 extends only to arrest under the Civil Procedure Code. Therefore an accused person attending a Criminal Court could not claim immunity from arrest under the Rent Act. 4 A. 27. The wordings of this section is defective. 32 A. 3=6 A. L. J. 912. Defendant appearing to defend suit is exempt from arrest, and his appearance does not amount to "voluntary surrender" so as to entitle him to discharge under Order XXXVIII. 37 M. L. J. 435=10 L. W. 533=53 Ind. Cas. 367. Exemption under this section cannot be invoked where no case is pending or set down for hearing. A. I. R. 1930 Lah. 736=31 P. L. R. 188=128 Ind. Cas. 51. Each case of exemption from arrest under civil process depends on its own facts and circumstances. What period is reasonable is a question of fact and further exemption is forfeited if party indulge in unnecessary deviation. A. I. R. 1931 Bom. 175=33 Bom. L. R. 44=131 Ind. Cas. 467 ; see also A. I. R. 1935 Nag. 216. Person coming to appear as accused cannot be arrested and he is entitled to refund of money paid to secure his release from arrest. A. I. R. 1929 Oudh 426=6 O. W. N. 809=119 Ind. Cas. 367. Warrant under s. 488, Cr. Pro. Code though entrusted to civil bailiff does not come within s. 135. A. I. R. 1929 Lah. 785=30 Cr. L. J. 788=117 Ind. Cas. 238. Protection is forfeited if person adopts circuitous route or deviates from straight route. A. I. R. 1924 All. 676=46 A. 663=22 A. L. J. 638=84 Ind. Cas. 61. Where judgment-debtor is arrested in execution of decree and present before Court is not exempted from arrest in execution of second decree. A. I. R. 1924 Mad. 900=47 M. L. J. 678=34 M. L. T. 102=(1924) M. W. N. 781=84 Ind. Cas. 513. Person causing arrest and officer arresting judgment-debtor protected under s. 135, commit offence under s. 342, Penal Code, 121 P. L. R. 1916=36 Ind. Cas. 493 ; see also 39 C. W. N. 318.

In order to obtain exemption under this section the party must satisfy the Court ordinarily, by statements made on affidavit that his attendance in the Court or tribunal is *bona fide* in relation to the matter pending before that Court or tribunal ; secondly, that the Court or tribunal which he attends has jurisdiction in the matter pending before it or the party believes in good faith that it has such jurisdiction ;

and thirdly, that he should be exempt from arrest during such period as is reasonably required in going to the tribunal from his ordinary place of residence, in attending that tribunal and in returning from it to the ordinary place of residence whence he came. Such place of residence may be within the jurisdiction of the Court before which the matter is pending, or outside its jurisdiction. What period is reasonable is a question of fact to be determined by the Court in each case and no hard and fast rule can be laid down as to the extent or duration of the privilege. Further the exemption is forfeited if in going to or in returning from the Court there is unnecessary or excessive deviation sufficient in the opinion of the Court to forfeit the privilege. No party or witness can claim to return to his ordinary place of residence by any route he likes. 33 Bom. L. R. 44=A. I. R. 1931 Bom. 175=131 Ind. Cas. 467=55 B. 612; see also 36 C. W. N. 1071=A. L. R. 1933 C. 373. It makes no difference whether he comes in as a defendant or as a plaintiff. *Ibid.* An Income-tax Officer is a tribunal within the meaning of this section. 141 Ind. Cas. 463=34 P. L. R. 177=A. I. R. 1933 Lah. 214. The word "tribunal" in s. 135 (2) is used to cover tribunal both of British India as well as of Native State. 158 Ind. Cas. 507=A. I. R. 1935 Nag. 216. The principle which would apply to a person living in the place in which the Court is situate must be applied to the persons who takes up temporary lodgings in that place. 14 Pat. 242=154 Ind. Cas. 610=16 Pat. L. T. 560=A. I. R. 1935 Pat. 6.

Exemption of members of Legislative bodies from arrest and detention under civil process.

\*[S. 135 A. (1) No person shall be liable to arrest or detention in prison under the civil process—

"(a) if he is a member of a unicameral Legislature or of either Chamber of a bi-cameral Legislature constituted under the Government of India Act, 1935, during the continuance of any meeting of such Legislature or Chamber;"†

"(b) If he is a member of any Committee of such "Legislature or Chamber"‡ during the continuance of any meeting of such committee ;

"(c) if he is a member of either Chamber of such a bi-cameral Legislature, during the continuance of the joint sitting, meeting, conferences or joint Committee of the Chambers of that Legislature."†

(2) A person released from detention under sub-section (1) shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub-section (1)].

This section has been amended Burma by G. B. Order and s. 135 is in force in British Burma in the following form :—

Exemption of members of Legislative bodies from arrest and detention under civil process.

\*[S. 135A. (1) No person shall be liable to arrest or detention in prison under civil process—

(a) if he is a member of either Chamber of "Legislature"‡ during the continuance of any meeting of such Chamber ;§

(b) if he is a member of any Committee of such Chambers§ during the continuance of any meeting of such Committee ;

(c) if he is a member of either Chamber of the Legislature,§ during the continuance of a joint sitting of the Chambers or of a meeting of a conference or joint committee of the Chambers of which he is a member ; and during the fourteen days before and after such meeting or sitting.

(2) A person released from detention under sub-section (1) shall, subject to the provisions of the said sub-section, be liable to re-arrest and to the further detention to which he would have been liable if he had not been released under the provisions of sub-section (1).]

\* Section 135 A has been added by Act 23 of 1925.

† Substituted by G. I. Order of 1937.

‡ Substituted by G. B. Order of 1937.

§ Certain words were omitted by G. B. Order of 1937.

**136. [S. 643.]** (1) Where an application is made that any person shall be arrested or that any property shall be

Procedure where person to be arrested or property to be attached is outside district. attached under any provision of this Code not relating to the execution of decrees, and such person resides or such property is situate outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send to the District Court within the local limits of whose jurisdiction such person or property resides or is situate a copy of the warrant or order, together with the probable amount of the costs of the arrest or attachment.

(2) The District Court shall, on receipt of such copy and amount, cause the arrest or attachment to be made by its own officers, or by a Court subordinate to itself, and shall inform the Court which issued or made such warrant or order of the arrest or attachment.

(3) The Court making an arrest under this section shall send the person arrested to the Court by which the warrant of arrest was issued, unless he shows cause to the satisfaction of the former Court why he should not be sent to the latter Court, or unless he furnishes sufficient security for his appearance before the latter Court or for satisfying any decree that may be passed against him by that Court in either of which cases the Court making the arrest shall release him.

(4) Where a person to be arrested or movable property to be attached under this section is within the local limits of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William in Bengal or at Madras or at Bombay\* the copy of the warrant of arrest or of the order of attachment, and the probable amount of the costs of the arrest or attachment, shall be sent to the Court of Small Causes of Calcutta, Madras, or "Bombay"\*, as the case may be, and that Court, on receipt of the copy and amount, shall proceed as if it were the District Court.

**Amendment in Burma.**—In sub-section (4) for "the High Court of Judicature at Fort William in Bengal or at Madras or at Bomay" substitute "the High Court" and for "Calcutta, Madras or Bombay" substitute "Rangoon" and omit "as the case may be".—*Vide* G. B. Order of 1937.

**Scope.**—This section does not authorise the Court to attach any property, which is not authorised to attach by any other sections of the Code where such an order may be made, for execution beyond the local limits of its jurisdiction. 8 M. 20. This section merely prescribes the procedure to be adopted when property outside the jurisdiction of the Court is to be attached under any provision of the Code. It does not prescribe the circumstances under which attachment before judgment may be ordered if property situate outside the jurisdiction of the Court. 1 L. B. R. 310; see also 4 C. 823. This section authorises the Court to attach property before judgment, where the property is situate outside the jurisdiction. 7 C. W. N. 216. Whether High Court Judge on original side can direct District Judge within appellate jurisdiction to execute warrant of arrest for contempt is doubtful. Proper course is to direct to issue injunction and arrest might be ordered for breach of same bringing case within pale of section 136. A.I.R. 1938 Cal. 462=55 C. 777=32 C. W. N. 114=1007 Ind. Cas. 65; see also A. I. R. 1926 Mad. 574=50 M. L. J. 401=95 Ind. Cas. 197. The Court can order attachment before judgement of property outside the local limits of its jurisdiction and further it is also competent to entertain an application for removal of such attachment and to remove the attachment. 9 Rang. 561=A. I. R. 1931 Rang. 279. Under s. 136, C. P. Code, an injunction order under Order 39, rule 2 (1), restraining a person from committing a breach of contract may be enforced outside the jurisdiction of the Court issuing the injunction. A.I.R. 1931 Cal. 279=130 Ind. Cas. 252=57 C. 1280. In case of attachment before judgment of property in the jurisdiction of another Court, order should be sent to the District Judge of the place and not to be sent to the Naz'r of the Court. A. L. R. 1933 All. 583=2 A. W. R. 174. When the High Court issues a writ to the sheriff directing a person's arrest for disobedience of the order of injunction

\* Certain words were omitted by G. B. Order of 1937.

and directing him under the provisions of s. 136, Civil Procedure Code, to transfer it to the District Judge for execution and the latter duly executes the writ by arresting the person, the District Judge acts in the lawful exercise of his powers and hence the order is not *ultra vires*. A. I. R. 1934 Cal. 818=38 C. W. N. 799=59 C. L. J. 463=61 C. 971.

**137. [S. 645.]** (1) The language which, on the commencement of this Code, is the language of any Court subordinate to a High Court shall continue to be the language of such subordinate Court until the "Provincial Government" \* otherwise directs.

(2) The "Provincial Government"\* may declare what shall be the language of any such Court and in what character applications to and proceedings in such Courts shall be written.

(3) Where this Code requires or allows anything other than the recording of evidence to be done in writing in any such Court, such writing may be in English; but if any party or his pleader is unacquainted with English a translation into the language of the Court shall, at his request, be supplied to him; and the Court shall make such order as it thinks fit in respect of the payment of the costs of such translation.

**Amendment in Burma.**—For "a High Court" read "the High Court" and for "Provincial Government" read "Governor".—*Vide* G. B. Order of 1937.

**138. [S. 185 A.]** (1) The [High Court] may by notification in the "official Gazette" \* direct with respect, to any Judge specified in the notification, or falling under a description set forth therein, that evidence in cases in which an appeal is allowed shall be taken down by him in the English language and in manner prescribed.

(2) Where a Judge is prevented by any sufficient reason from complying with a direction under sub-section (1), he shall record the reason and cause the evidence to be taken down in writing from his dictation in open Court.

**139. [S. 197.]** In the case of any affidavit under this Code—

(a) any Court or Magistrate, or

(b) any officer or other person whom a High Court may appoint in this behalf, or

(c) any officer appointed by any other Court which the "Provincial Government"\* has generally or specially empowered in this behalf, may administer the oath to the deponent.

**Amendment in Burma.**—For "Provincial Government" read "Governor".—*Vide* G. I. Order of 1937.

**Notes.**—Order IX, rule 5, C. P. Code, is only an enabling provision enacted for a special purpose only. A plaintiff filed in support of proof of a service of process on the defendant an affidavit was sworn on the Bar Library by the identifier before a pleader who is also an Honorary Magistrate. The Munsiff refused to accept the affidavit, and directed the plaintiff to have an affidavit sworn before the officer of the Court appointed for that purpose: *Held*, that the Munsiff was right in refusing to accept the affidavit; nor section 139 of the Code contemplates that at the time when an Honorary Magistrate administers the oath, he shall be acting in his official capacity as a Magistrate, and that the provisions of s. 57, clause (7) of the Evidence Act, as to the Court's taking judicial notice of that signature of an Honorary Magistrate, should be interpreted in the same way. 5 Ind. Cas. 537. As regards affidavit made before foreign Court, *vide* 8 Ind. Cas.

\* Substituted by G. I. Order of 1937.

† These words were substituted for the words "Local Government" by s. 2 and Sch. Pt. I of the Decentralisation Act, 1914 (4 of 1914).

897. The District Judge has power to appoint Commissioners to administer oath in affidavit generally without reference to a particular area or class. Affidavit sworn to before Sharistadar of the Munsiff of Hajpur can be the foundation of a complaint under s. 476. Cr. P. Code, by the District Judge of Mazaffarpur. A. I. R. 1933 Pat. 548=14 P. L. T. 635=A. I. R. 1933 Pat. 713.

**140. [S. 645A.]** (1) In any Admiralty or Vice-Admiralty cause of salvage towage or collision, the Court, whether it be exercising its original or its appellate jurisdiction, may, if it thinks fit, and shall, upon request of either party to such cause, summon to its assistance, in such manner as it may direct or as may be prescribed, two competent assessors; and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct or as may be prescribed.

**141. [S. 647.]** The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction.

**Scope.**—This section is intended to apply to miscellaneous matters other than suits or appeals. 9 A. 36. Suit includes appeals. A. I. R. 1928 Lah. 488=110 Ind. Cas. 374. Section 141 deals with procedure alone not substantive law of arbitration. A. I. R. 1928 Rang. 137=6 Rang. 563=112 Ind. Cas. 45. This section cannot operate to give appeal from order under Order IX, r. 9, not otherwise appealable. A. I. R. 1922 Cal. 572=36 C. L. J. 184=69 Ind. Cas. 1003. An issue referred to a Civil Court for decision by a Revenue Court is an original matter in the nature of the suit. The Civil Court has jurisdiction under the provisions of s. 141 and order 9 to entertain an application for the setting aside of the *ex parte* decision and to decide the issue on the merits. A. I. R. 1934 All. 86.

**Execution proceedings.**—Under the old Code there was some divergence of opinion as regards the questions whether this section applies to execution proceedings. While the High Courts of Allahabad (*vide* 7 A. 359; 10 A. 71; 12 A. 179; 12 A. 392; 15 A. 84) and Bombay (*vide* 6 B. 681; 10 B. 62), held that it did, the Calcutta High Court on the other hand held that it did not. 18 C. 635; 18 C. 462; 22 W. R. 512. Their Lordships of the Privy Council, by affirming the view of the Calcutta High Court in 17 A. 106=22 I. A. 44=5 M. L. J. 3 has set at rest the conflict. So the previous Allahabad and Bombay decisions to the contrary are no longer good law. So now this section does not apply to proceedings in execution. A. I. R. 1926 Lah. 109=89 Ind. Cas. 360; A. I. R. 1926 Cal. 773=53 C. 679=30 C. W. N. 570=96 Ind. Cas. 705; A. I. R. 1929 Mad. 757=57 M. L. J. 381=30 L. W. 424=52 M. 899 (F. B.)=120 Ind. Cas. 567; A. I. R. 1929 All. 485=121 Ind. Cas. 552; A. I. R. 1930 Lah. 961=129 Ind. Cas. 204; A. I. R. 1925 Cal. 812=42 C. L. J. 26=29 C. W. N. 886=(F. B.)=87 Ind. Cas. 633; A. I. R. 1921 Sind. 55=17 S. L. R. 105=83 Ind. Cas. 749; A. I. R. 1925 Cal. 510=41 C. L. J. 286=79 Ind. Cas. 351; A. I. R. 1923 Lah. 506=75 Ind. Cas. 487; A. I. R. 1933 Nag. 176=29 N. L. R. 176=143 Ind. Cas. 584; A. I. R. 1922 Nag. 267=18 N. L. R. 152=4 N. L. J. 118=64 Ind. Cas. 420; 63 Ind. Cas. 855; A. I. R. 1921 Lah. 67=2 Lah. 66=64 P. L. R. 1921=60 Ind. Cas. 720; A. I. R. 1921 Bom. 463; 4 P. L. J. 135=49 Ind. Cas. 617; 1933 A. L. J. 1032=A. I. R. 1933 All. 783=145 I. C. 995 (F. B.). Order IX, rule 9, does not apply to execution proceedings. 5 Pat. L. W. 208=4 Pat. L. J. 230=47 Ind. Cas. 154; see also A. I. R. 1922 Rang. 267=4 N. L. J. 118=18 N. L. R. 152=64 Ind. Cas. 420; 68 Ind. Cas. 643=A. I. R. 1923 Nag. 18; A. I. R. 1929 Pat. 239; 1 P. L. R. 134=2 Pat. 372=4 P. L. T. 93=71 Ind. Cas. 484; A. I. R. 1925 Mad. 126=47 M. L. J. 269=20 L. W. 192=81 Ind. Cas. 841; A. I. R. 1929 All. 485=121 Ind. Cas. 552; A. I. R. 1937 Bom. 111. Order of dismissal of execution petition for failure to take necessary steps for prosecution is not appealable. A. I. R. 1923 Pat. 180=4 P. L. T. 204=68 Ind. Cas. 337. Where application for restoration of suit dismissed under Order IX, rule 2, there is no appeal against order of dismissal. 72 Ind. Cas. 547. Application for personal decree against mortgagor is not application in execution of decree and Order IX, rule 9, applies to it. A. I. R. 1930 Rang. 257=8 Rang. 316=126 Ind. Cas. 648; see also 124 Ind. Cas. 249=A. I. R. 1930 Nag. 188=26 N. L. R. 154. Section 141, C. P. Code has no application to execution proceedings and therefore order 9, C. P. Code has like-



wise no application to *ex parte* orders passed in such proceedings but the Court is competent to set aside such *ex parte* orders under its inherent powers. A. I. R. 1931 Sind 97=133 Ind. Cas. 65 (F. B.).

**In all proceedings, etc.**—This section is applicable only to proceedings in original suit. A. I. R. 1924 Pat. 345=4 P. L. T. 735. Applicability of this section is doubtful where procedure is clearly laid down. A. I. R. 1930 Mad. 105=30 L. W. 551=120 Ind. Cas. 72. Section 141 extends proviso of s. 10 to arbitration proceedings. A. I. R. 1922 Sind 6=66 Ind. Cas. 796. Section 141 applies to proceedings under s. 144. A. I. R. 1922 All. 223=20 A. L. J. 726=44 A. 407. This section applies to restitution proceedings. A. I. R. 1922 All. 223=20 A. L. J. 726=44 A. 407=66 Ind. Cas. 144. Where application for restoration for default has been dismissed, application can be restored. 1 Lah. 339=1 Lah. L. J. 188=58 Ind. Cas. 748; see also 10 P. W. R. 1919=1 P. L. R. 1919=50 Ind. Cas. 471. No appeal lies from order returning Memorandum of Appeal for proper representation. 32 C. W. N. 693=117 Ind. Cas. 849. Where deliberate delay is made in bringing legal representatives of deceased opponent, application may be rejected under Order 33, rule 9 (a) read with s. 141 and under s. 151. A. I. R. 1929 Sind 136=116 Ind. Cas. 111. Where restoration application has been dismissed for default, a subsequent application can be made under Order IX, read with s. 141 or under s. 151. A. I. R. 1925 All. 773=47 A. 878=23 A. L. J. 817=89 Ind. Cas. 350; see also A. I. R. 1926 Mad. 325=50 M. L. J. 75=23 L. W. 409=92 Ind. Cas. 802; A. I. R. 1927 Lah. 71=27. P. L. R. 564=99 Ind. Cas. 1055; A. I. R. 1923 Oudh 146=9 O. L. J. 627=9 O. & A. L. R. 32=74 Ind. Cas. 380. Order dismissing application for restoration to set aside *ex parte* decree is not appealable. A. I. R. 1924 All. 682=46 A. 538=22 A. L. J. 427=79 Ind. Cas. 323; see also A. I. R. 1925 All. 431=23 A. L. J. 442=47 A. 471=85 Ind. Cas. 95; A. I. R. 1923 Nag. 293=19 N. L. R. 119=75 Ind. Cas. 589. Where execution application has been dismissed for want of prosecution order refusing restoration is not appealable. A. I. R. 1923 All. 460=45 A. 148=21 A. L. J. 135. Order dismissing second application under Or. 9 rule 9 subsequent to one already dismissed is not appealable since s. 141 cannot operate to give appeal from order not otherwise appealable. A. I. R. 1922 Cal. 572=36 C. L. J. 184=69 Ind. Cas. 1003.

Section 141 extends ss. 10 and 11 to civil miscellaneous proceedings. A. I. R. 1922 Sind 6=16 S. L. R. 79=69 Ind. Cas. 796. Execution can issue *suo motu* in case of surety bond by guardian and surety under ss. 43 and 45, Guardian and Wards Act. A. I. R. 1927 Sind 262=103 Ind. Cas. 492; see also 66 M. L. J. 310=A. I. R. 1934 Mad. 496=39 L. W. 400. An order passed by a Civil Court under s. 120, Companies Act, is in exercise of its power as a Court of Civil jurisdiction under s. 141, C. P. Code and as such the Court is competent to review its order. A. I. R. 1937 Oudh 62. An express provision in the Succession Certificate Act confirming rights of appeal, revision or review does not render provisions of C. P. Code regarding procedure inapplicable to it. A. I. R. 1927 Sind 187=101 Ind. Cas. 166. This section does not apply in cases governed by the Succession Certificate Act in so far as introduced by ss. 19 (3) and 26 (3). A. I. R. 1924 All. 376=46 A. 372=22 A. L. J. 345=79 Ind. Cas. 363. This section has no application to application under s. 105, B. T. Act. A. I. R. 1924 Pat. 104=3 Pat. 67=(1923) Pat. 273=2 Pat. L. R. 169=5 P. L. T. 591=79 Ind. Cas. 5. Where permission is given to *mutawalli* to lease *wakf* property order is under s. 141. A. I. R. 1924 Cal. 327=38 C. L. J. 358=77 Ind. Cas. 907. Order IX and Order XLIII, r. 1, apply to application to set aside dismissal order for default. A. I. R. 1923 Nag. 293=19 N. L. R. 119=75 Ind. Cas. 589. In probate proceedings involving interest of minor, every rule in Order XXXII, is not strictly and legally applicable. 24 C. W. N. 541=59 Ind. Cas. 664. General provisions of C. P. Code apply to Court under the Companies Act. 1 Lah. 187=2 Lah. L. J. 291=55 Ind. Cas. 820. Procedure prescribed by Order XVI applies to enquiries under cases under the Legal Practitioner's Act. 23 C. W. N. 560=50 Ind. Cas. 806. But s. 141 does not apply to proceedings under s. 14 of the Legal Practitioners Act. 1 P. L. J. 576=18 Cr. L. J. 132=(1917) Pat. 60=37 Ind. Cas. 484. Provisions of Code are applicable to proceedings under the Lunacy Act. 22 C. W. N. 547=27 C. L. J. 205=43 Ind. Cas. 511. The Court could in proceedings under the Guardians and Wards Act pass an order by way of injunction restraining the giving away of a female minor in marriage to an unsuitable husband. 28 N. L. R. 332=A. I. R. 1933 Nag. 62=141 Ind. Cas. 170. Where an application to sue in *forma pauperis* is dismissed for default, Order 9, rule 9, read with s. 141 enables the Court

to restore the application for proper reasons. 140 Ind. Cas. 226=1932 M. W. N. 1262=36 L. W. 586. No appeal lies from an order rejecting an application to set aside the dismissal of an application for restoration of a suit dismissed in default. 28 N. L. R. 83=139 Ind. Cas. 296=A. I. R. 1932 Nag. 101. It is doubtful whether s. 141 and Order 9, rule 9, apply to an application to set aside an order of dismissal for default of an application to set aside an *ex parte* decree. A. I. R. 1933 Rang. 476. The Insolvency Court has the same inherent powers as any Court exercising civil jurisdiction and has power to make supplementary orders for the protection of creditors. A. L. R. 1933 Pat. 180=12 P. 163=A. I. R. 1933 Pat. 84=141 Ind. Cas. 836=13 P. L. T. 775. An issue referred to a Civil Court for decision by a Revenue Court is an original matter in the nature of a suit. The Civil Court has jurisdiction under the provisions of s. 141 and order 9 to entertain an application for the setting aside of an *ex parte* decision and to decide the issue on merits. A. I. R. 1934 All. 86=1924 A. L. J. 331=147 Ind. Cas. 721=56 A. 390.

142. [S. 94.] All orders and notices served on or given to any person under the provisions of this Code shall be in writing.

143. [S. 95.] Postage, where chargeable on a notice, summons or letter issued under this Code and forwarded by post, and the fee for registering the same, shall be paid within a time to be fixed before the communication is made :

Provided that the "Provincial Government"\* may remit such postage, or fee or both, or may prescribe a scale of Court-fees to be levied in lieu thereof.

144. [S. 583.] (1) Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed ; and, for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and *mesne* profits, which are properly consequential on such variation or reversal.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

**Principle.**—A claim under s. 144 is governed by the same principles that apply to a claim for money had and received. Where pursuant to a decree or order of the Court one party has been compelled to pay money or transfer property *in invitum* to another party it would be unconscionable upon the reversal of the decree or order that the party who had received the money or property through the wrongful act of the Court should be held entitled to retain such money or property as against the party who had wrongfully been ordered to pay it and who was claiming restitution. 10 Rang. 480=A. I. R. 1932 Rang. 148=A. L. R. 1932 Rang. 356. The obvious intention of s. 144 of the Code of Civil Procedure, is to place the successful litigant so far as possible in the position in which he would have been had the original decree not been passed against him and the unsuccessful party is also liable for the delays of the Court. 16 R. D. 503=13 L. R. 293=13 U. P. 145. It is a duty cast upon Court to enforce the obligation. 33 C. 927 ; see also 32 A. 79 affirmed in 48 I. A. 43=38 A. 163 P. C ; 23 M. 306 ; 13 C. L. J. 243 ; 15 C. L. J. 187 ; A. I. R. 1930 Mad. 787=59 M. L. J. 225 ; A. I. R. 1929 Nag. 138=117 Ind. Cas. 288.

**Scope of the section**—The party seeking restitution under s. 144 must show that there was a decree in consequence of which some party to the record had obtained a benefit to the detriment of the applicant and secondly, that the decree having been reversed or varied, the applicant is entitled to be restored to the position in which he would have been, but for the decree which ultimately has been declared erroneous. A. I. R. 1937 Bom. 173. The

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\* Substituted for "Local Government" by G. I. Order of 1937. In Burma read "Governor" for "Provincial Government."

principle underlying s. 144 is to give to litigants the fullest benefit of a final decree in a litigation and restore to a party on the final determination of his rights what, if any, has in the meanwhile been lost to him or taken away from him by his opponent on the strength of a decree or order which has been subsequently varied or reversed by the superior Court. Before restitution can be made under this section, however, the following conditions must be satisfied : (1) that the applicant must be a party to the litigation which terminated according to law : (2) that he has either lost something or been deprived of something by reason of the decree or order which has been subsequently varied or reversed : (3) that on the final pronouncement of his rights he is entitled to the benefit of restitution. The section does not in terms say that the applicant for restitution must be a party to the proceeding which has resulted in the original decree being reversed or varied ; nor does it state that the final decree should provide for a right in him to apply for restitution. All that is necessary is that the final decree should provide for a right in him to apply for restitution. All that is necessary is that the final decree must be of such a nature that it would be inequitable to allow his opponent to retain what he has obtained from the former on the strength of a decree which ultimately is held to be erroneous or wrong. The only question is whether the applicant was a party to the litigation in the first instance, and, if so, whether the final decision can be said to be in his favour as accepting his contention made in the suit and declaring his rights. A. I. R. 1937 Bom. 101 ; see also A. I. R. 1934 All. 13 ; A. I. R. 1934 Pat. 150=14 P. L. T. 753. This section is applicable not only to restitution brought about in consequence of a decree passed after contest but also to compromise decree passed on appeal. 68 M. L. J. 332=A. I. R. 1935 Mad. 476=1935 M. W. N. 280=41 L. W. 705=156 Ind. Cas. 85. An application for restitution under s. 144, C. P. Code is essentially different thing from an application for execution. 1934 A. L. J. 503=A. I. R. 1934 All. 626 (F. B.)=150 Ind. Cas. 1096 ; but see A. I. R. 1936 Oudh 185=1936 O. W. N. 262. This section applies only to cases where in execution of a decree passed by one Court a benefit is received by the defendant and that decree is reversed or set aside subsequently by a competent Court. A. I. R. 1931 Mad. 81=60 M. L. J. 219=33 L. W. 259=130 Ind. Cas. 451. The principle of this section is not confined exclusively to matters in execution. The power of restitution is inherent in Court. A. I. R. 1930 Ma l. 988=(1930) M. W. N. 644=60 M. L. J. 79=33 L. W. 391=129 Ind. Cas. 63. This section applies only when a decree has been set aside in appeal or otherwise. A. I. R. 1924 All. 64=73 Ind. Cas. 602. This section applies to a case in which a decree has been reversed by the Privy Council. A. I. R. 1926 Lah. 488=7 Lah. 232=8 Lah. L. J. 338=27 P. L. R. 400=93 Ind. Cas. 954. Right of restitution is not limited to reversal of decree in appeal, but applies equally to cases where a decree has been reversed or suppressed by some ulterior proceedings. (1916) 1 M. W. N. 155=30 M. L. J. 368=19 M. L. T. 236=33 Ind. Cas. 739. Where possession is taken independent of and in opposition to the decree, s. 144 is in applicable. 6 L. W. 631. Where a decree is neither varied nor reversed but execution thereof has taken place under a mistake and the judgment-debtor seeks restitution, s. 144 will not apply. A. I. R. 1923 Oudh 16=72 Ind. Cas. 879. An assignee is entitled to the benefits of s. 144 of the Code even where the assignment takes place after the appellate decree which is the basis of claim under the section. (1918) Pat. 243=5 P. L. W. 141=46 Ind. Cas. 465. As an attaching creditor of sale-proceeds, payable to a vendor decree-holder is not a party to the decree or to an application for restitution as a vendee of the decree-holder and is not therefore his representative an application for restitution by him cannot lie. 29 C. L. J. 360=51 Ind. Cas. 375. Where decree has been passed with reservation as to question of restitution, party taking benefit of the decree cannot object to the restitution application. 34 C. W. N. 746=52 C. L. J. 505=130 Ind. Cas. 236=A. I. R. 1931 Cal. 42. The right of auction-purchaser to a refund of the money paid by him arises both under s. 144, C. P. Code and also on principles of equity and justice and if the case does not come under s. 144, the Court can exercise its inherent jurisdiction to direct a refund of the money of the auction-purchaser. A. I. R. 1936 Lah. 497.

This section is mandatory and gives no discretion to the Court. The legal representatives or assignees of a party liable to restore possession are equally liable. 6 L. W. 568=42 Ind. Cas. 523. The powers given by this section can be exercised by all Courts, Civil or Revenue. 46 Ind. Cas. 475=11 Bur. L. T. 3. Section 144 does not deal with restitution only. It covers a case of party entitled to a benefit by way of restitution and empowers a Court to do justice to the parties to the suit.

A. I. R. 1929 Lah. 657=118 Ind. Cas. 389; see also A. I. R. 1930 Pat. 473=11 P. L. T. 361=125 Ind. Cas. 779; A. I. R. 1937 Lah. 635=103 Ind. Cas. 657. Apart from s. 144, restitution can be granted under s. 151. A. I. R. 1926 Lah. 685=96 Ind. Cas. 804; see also A. I. R. 1924 All. 718=45 A. 767=22 A. L. J. 673=84 Ind. Cas. 75; 75 Ind. Cas. 858=A. I. R. 1924 Lah. 583; A. I. R. 1925 Mad. 365=83 Ind. Cas. 138; A. I. R. 1921 Pat. 800=5 P. L. T. 553=78 Ind. Cas. 310; A. I. R. 1925 Pat. (F. B.)=3 Pat. 371=5 P. L. T. 145=78 Ind. Cas. 200; A. I. R. 1922 Cal. 28=26 C. W. N. 408=35 C. L. J. 53=64 Ind. Cas. 864; A. I. R. 1924 Lah. 583=75 Ind. Cas. 858; A. I. R. 1922 Cal. 28=26 C. W. N. 408=35 C. L. J. 53=64 Ind. Cas. 864.

The word "restitution" implies that a party who applies under s. 144 should prove that he was in possession of something, the restitution or restoration of which he seeks. A. I. R. 1931 Mad. 81=60 M. L. J. 719=33 L. W. 259=(1930) M. W. N. 1245=130 Ind. Cas. 451. "Or otherwise" immediately following "restitution" provide for cases where it is not possible to make restitution in the sense of restoring the very property lost to the petitioner. A. I. R. 1931 Mad. 81=60 M. L. J. 219=33 L. W. 259=130 Ind. Cas. 451; see also A. I. R. 1931 Rang. 21. The restitution should clear the account between the parties and leave no claim on one side or the other. A. I. R. 1931 Oudh 12=7 O. W. N. 1075=129 Ind. Cas. 326. Restitution must be granted as a matter of course and is not discretionary. A. I. R. 1928 Rang. 293=117 Ind. Cas. 57; A. I. R. 1926 Lah. 685=96 Ind. Cas. 804. Decree in another suit in respect of same property between same parties cannot be affected by anything in s. 144. A. I. R. 1929 All. 527=118 Ind. Cas. 519; A. I. R. 1929 Cal. 814=33 C. W. N. 908. This section is not exhaustive, Court has inherent power to restore any party which has suffered any injury by virtue of an order. A. I. R. 1929 Lah. 657=118 Ind. Cas. 389; 60 L. L. J. 44; A. I. R. 1934 Lah. 1023=36 P. L. R. 119; A. I. R. 1934 Lah. 322=150 Ind. Cas. 924; A. I. R. 1935 Mad. 783=69 M. L. J. 84; 71 M. L. J. 795=44 L. W. 798=1936 M. W. N. 1119; A. I. R. 1936 Mad. 636=1936 M. W. N. 503. Under this section there is no distinction between decree in suit and a decree in a proceeding. A. I. R. 1925 Cal. 102=28 C. W. N. 988=84 Ind. Cas. 747. The word "decree" covers an "order" and the word "Court" includes Courts of every grade. A. I. R. 1924 Nag. 258=20 N. L. R. 93=7 N. L. J. 130=80 Ind. Cas. 49. This section applies only on reversal of a decree and cannot therefore be applied where an order setting aside a sale is reversed. 1 P. L. W. 551=2 Pat. L. J. 361=39 Ind. Cas. 763. Proceedings under s. 144 of the Code cannot properly be described as proceedings in execution of a decree in view of the different language and in the present section 144 and section 586 of the old Code. 66 Ind. Cas. 144. Where prejudice suffered is not due to the variation in decree but to the terms of the sale order which was not objected to either at the time of proclamation or sale, s. 144 does not apply. A. I. R. 1922 Mad. 96=(1922) M. W. N. 141=42 M. L. J. 315=16 L. W. 355=68 Ind. Cas. 518. The meaning of the words of this section that the restitution should as far as possible 'place the parties in the position which they would have occupied but for such decree' is that the restitution should clear the account between the parties and leave no claim on one side or the other. 129 Ind. Cas. 326=7 O. W. N. 1075=A. I. R. 1931 Oudh 12. By liberal construction this section can be made applicable to claim to recover money overpaid under a decree. 33 Bom. L. R. 1557. The expression "party" includes representative of a party. 138 Ind. Cas. 260=32 P. L. R. 673=A. I. R. 1932 Lah. 527; see also A. I. R. 1932 All. 239=1932 A. L. J. 239=137 Ind. Cas. 39; A. I. R. 1933 Pat. 564.

Section is confined in its operation to cases in which a decree is varied or reversed in appeal or revision and does not apply to cases in which the decree is held to be wholly or partially null and void. 55 A. 221=144 Ind. Cas. 492=1933 A. L. J. 60=A. I. R. 1933 All. 218; see also 146 Ind. Cas. 564=38 L. W. 874=A. I. R. 1933 Mad. 888. Where the Receiver had in pursuance of an order of Insolvency Court paid off some of the assets to the creditor, the Court has the power under s. 144, C. P. Code on reversal of that order by the High Court to direct the creditors to refund the amount. 143 Ind. Cas. 330=1932 A. L. J. 1095=A. I. R. 1933 All. 117.

**Decree varied or reversed.**—Section 144 applies where the decree is varied or reversed and not to a case where, as the result of a different suit the title of a person derived by purchase under quite a different proceeding in execution of a decree which stands unreversed is questioned. A. I. R. 1929 Cal. 814=33 C. W.

N. 908=57 C. 226=125 Ind. Cas. 645; A. I. R. 1930 Cal. 89=56 C. 550=120 Ind. Cas. 807; A. I. R. 1937 All. 232. Restitution should be ordered only when applicant discharge his obligation under the reversed decree. A. I. R. 1929 Rang. 156=7 Rang. 107=117 Ind. Cas. 252. Where a decree is reversed costs realised under the same must be refunded irrespective of the fact that the suit property was given to charity or any other purpose. 54 Ind. Cas. 816. In order to obtain restitution under s. 144, the applicant must establish that the decree under which he was compelled to part with his property was varied or reversed by a Court which had jurisdiction to vary or reverse the decree. The use of the phrase "Court of first instance" contemplates that the variation or reversal of the decree is made by a superior Court. The section clearly applies where a decree has been reversed or varied upon appeal, revision or review. A. I. R. 1937 All. 232; A. I. R. 1937 Bom. 173; A. I. R. 1937 Nag. 151. Plaintiff getting decree for uses of a well, which is reversed on appeal, but on second appeal restored, was entitled for a compensation during which he was kept out of enjoyment of the water. 21 Bom. L. R. 157=43 B. 433 (F. B.)=50 Ind. Cas. 715. Auction purchaser is bound to restore possession to the judgment-debtor on reversal of the decree in appeal. During pendency of appeal the purchaser is a representative of decree-holder for the purpose of transference of possession from the latter to the judgment-debtor. 27 C. L. J. 489=46 Ind. Cas. 168; but see 30 M. L. J. 497=19 M. L. T. 381=(1916) 2 M. W. N. 73=34 Ind. Cas. 760; 47 Ind. Cas. 628=41 M. 467. This section is applicable where decree-holder is auction purchaser and the decree is set aside. 43 B. 235=20 Bom. L. R. 925=48 Ind. Cas. 130. It is only a *bona fide* purchaser who is not a party to the suit or proceeding that is entitled to keep the property purchased by him. In all other cases the purchaser is liable to be defeated on the reversal of the decree in execution of which the sale is effected. A. I. R. 1926 Mad. 78=48 M. 767=49 M. L. J. 452=22 L. W. 439=91 Ind. Cas. 16. Where decree-holder obtained possession of the property decreed otherwise than by executing the decree but under colour thereof, the opposite party is entitled to be replaced possession, if the decree be set aside on appeal. A. I. R. 1927 All. 37=8 Lah. 41=8 Lah. L. J. 551=28 P. L. R. 62=99 Ind. Cas. 952. Under this section a Court by virtue of equitable jurisdiction sets right injustice caused by lower Courts passing erroneous decrees. Creditor of the decree-holder attaching the decree, is a representative of the decree-holder and restitution can be had against him. A. I. R. 1930 Mad. 727=32 L. W. 148=53 M. 796=39 M. L. J. 225=127 Ind. Cas. 643. A decree need not necessarily be put in execution for s. 144 (2) to apply. Where an application for restitution is erroneously rejected suit for possession and declaration is barred. A. I. R. 1931 Cal. 14=34 C. W. N. 707=129 Ind. Cas. 403. Section 144 applies where a decree is varied or reversed. A decree is only varied or reversed by a superior Court on appeal or on revision or on reference. But if a decree is set aside either by a proceeding to the suit itself or by a decree in another suit altogether or if, without being set aside by such a decree, it is superseded, these are matters which are not within the words of the section. A. I. R. 1931 Cal. 14=34 C. W. N. 707=129 Ind. Cas. 403. Where the preliminary decree is varied or upset by the appellate Court, the final decree passed thereon and all execution proceedings taken in pursuance of the final decree fell through even though no appeal is filed from the final decree. Application under s. 144 is not barred on the ground that there was no reversal of final decree in appeal. 1931 A. L. J. 661=A. I. R. 1931 All. 655=133 Ind. Cas. 622. This section prescribes a remedy which is separate from and independent of the remedy under Order 21, rule 9. *Ibid*. This section is not confined to cases where restitution is claimed on the reversal of the decree in first and second appeal but applies also to case of variance of decree effected by compromise. 1933 M. W. N. 641; see also 144 Ind. Cas. 695=A. I. R. 1933 Lah. 791. The right to apply for restitution really on the date when for the first time a decision is given which entitles a party asking for restitution to have restitution. 144 Ind. Cas. 150=A. I. R. 1933 Cal. 422.

**Restitution.**—Restitution means restoration of parties to their former position before passing of erroneous decree that is reversed. A. I. R. 1929 Nag. 138=117 Ind. Cas. 288; see also A. I. R. 1927 Lah. 625=8 Lah. 356=9 Lah. L. J. 359=28 P. L. R. 695=104 Ind. Cas. 817. Where a decree is reversed in an appeal filed by one of the defendants the other defendants are also entitled to apply for restitution. A. I. R. 1927 All. 182=98 Ind. Cas. 1042. It cannot be said that the Court granting restitution is executing a decree. An application for restitution

under s. 144, Civil Procedure Code, cannot therefore be an application for execution under s. 47, C. P. Code. A. I. R. 1937 Cal. 752. Restitution under s. 144 can be claimed not only against the opposite party, but also his representatives or persons deriving title from him. 152 Ind. Cas. 663. Where a decree is passed with a reservation as to the question of restitution the party taking benefit of the decree cannot object to the application for restitution. A. I. R. 1931 Cal. 42=52 C. L. J. 505=130 Ind. Cas. 236. No restitution can be obtained against *bona fide* auction purchaser, through Court competent to hold the sale. A. I. R. 1925 Lah. 176=79 Ind. Cas. 57. Where an *ex parte* decree is passed the judgment-debtor is entitled to restitution of property lost to him in execution on the decree being set aside. Question whether s. 47 or s. 144 applies need not be considered. 22 Bom. L. R. 403=44 B. 702=57 Ind. Cas. 125. There can be no restitution against a *bona fide* purchaser for value at any auction sale held by a Court competent therefor even if the decree is set aside on appeal. 38A. 240=14 A. L. J. 302=34 Ind. Cas. 308. Where disputed property is in the hands of a Receiver such custody is for the benefit of the true owner and restitution can be ordered in favour of the true owner. A. I. R. 1928 Pat. 260=7 Pat. 319=108 Ind. Cas. 89. Where a decree-holder gets possession of the property in dispute without executing the decree the owner of the property can claim restitution on the decree being set aside. 18 A. L. J. 729=2 U. P. L. R. (A) 238=41 A. 568. This section does not justify restitution when the rights of third parties intervene. A. I. R. 1937 Lah. 169.

It is the party who is entitled to restitution who can apply to the Court and claim the help of the Court in the matter, it is for his benefit that the provision has been introduced. The restitution must be such as will put the parties in the position which they would have occupied but for the wrong decree. The party who is to be assisted by Court must be put into the position which he could have occupied but for the wrong decree. It is no answer to that provision to say that it cannot be given effect to because the other party happened to gain no benefit by the wrong decree or order which has been made. 55 M. 1025=63 M. L. J. 383=36 L. W. 504=1932 M. W. N. 1044=139 Ind. Cas. 348=A. I. R. 1933 Mad. 33. Section 144 is meant to apply ordinarily to the class of cases where a person having obtained a decree executes it and recovers money or property from the judgment-debtor and then the decree is reversed which necessitates restitution of the property or money which the judgment-debtor had to part with at the instance of the Court on the ground that this is no longer in force. 11 P. 553=140 Ind. Cas. 482=A. L. R. 1932 P. 619=A. I. R. 1932 P. 317. An order for restitution against the respondent who has never received the money or obtained any benefit from it in favour of the applicants who never possessed the money nor lost it would offend as well against the dictates of conscience and reason as against the express provisions of s. 144. 10 Rang. 480=A. I. R. 1932 Rang. 148. Court has inherent power to grant restitution apart from s. 144. A. I. R. 1934 Mad. 320; see also A. I. R. 1934 Lah. 322. No restitution can be obtained against *bona fide* auction purchaser, through Court competent to hold the sale. A. I. R. 1925 Lah. 176=79 Ind. Cas. 57. Restitution should be made as nearly as possible with reference to positions of parties before the erroneous order and not to the subsequent position taken by them as a consequence of the order as it is not authorised by s. 144 to restore parties to latter positions taken up by them of their own accord, as remotely resulting from that order. 37 Ind. Cas. 863=1917 Pat. 153=5 P. L. W. 238. No restitution can be claimed under this section when the decree is intact. A. I. R. 1930 Pat. 280=11 P. L. T. 156=9 Pat. 685=122 Ind. Cas. 589. A claimant for restitution under this section need not be a party to the suit. A. I. R. 1929 Lah. 657=118 Ind. Cas. 389. Restitution can be claimed where a decree is varied. 95 Ind. Cas. 877=A. I. R. 1926 Rang. 126=5 Bur. L. J. 66. Purchase by decree-holder is a nullity if the decree is reversed though sale is not formally set aside. L. R. 3A. 44. Where on appeal a sale is set aside after auction purchaser is put in possession of the property sold in execution restitution should be granted to the judgment-debtor applying for restitution of possession under s. 115, C. P. Code. A. I. R. 1922 Nag. 92=18 N. L. R. 24=64 Ind. Cas. 732. Provided the decree is varied or reversed, this section applies. It does not matter whether the reversal or variance has been effected in appeal or not. A. I. R. 1922 Mad. 70=16 L. W. 587=65 Ind. Cas. 797. Applications for restitution are in substance execution proceedings and as such cognizable by the executing Court. 67 Ind. Cas. 319=A. I. R. 1922 Nag. 198. Where a decree-holder is the auction purchaser in execution of *ex parte* decree, the sale will fall through if decree is set aside, but not in the case of an innocent purchaser in good faith where his right is injuriously

affected by conduct of the parties to suit. A. I. R. 1925 Cal. 1074=86 Ind. Cas. 376 ; but see A. I. R. 1924 Sind 101=17 S. L. R. 73=80 Ind. Cas. 1002.

Where a decree is set aside after confirmation of sale the auction purchaser can by application under s. 47, recover his purchase money. A. I. R. 1923 All. 394=15 A. 369=21 A. L. J. 228=74 Ind. Cas. 873 ; see also A. I. R. 1922 P. C. 269=27 C. W. N. 582 (P. C.)=44 M. L. J. 735=21 A. L. J. 490=25 Bom. L. R. 643=49 I. A. 551=4 P. L. T. 61=69 Ind. Cas. 278 ; but see A. I. R. 1922 Mad. 228=42 M. L. J. 308=15 L. W. 40=67 Ind. Cas. 369. Person illegally arrested can get refund of money paid to secure his release. A. I. R. 1929 Oudh 426=6 O. W. N. 809=119 Ind. Cas. 367. Where an order of abatement is set aside restitution of the costs paid as per 1st. Court's order of abatement can be obtained. A. I. R. 1929 Mad. 70=1922 M. W. N. 167=16 M. L. W. 445=66 Ind. Cas. 216. Where a preliminary decree for partition is reversed on appeal, the final decree passed pending the appeal becomes ineffective and a party from whom any money is recovered under the final decree is entitled to restitution of the amount from the party who received it. 27 C. L. J. 451=43 Ind. Cas. 775. A purchaser at execution sale in a mortgage decree paying Government revenue on the property for 4 years after which period the sale is set aside is entitled to restitution of amount against the Receiver of the mortgaged property. 51 Ind. Cas. 706. A decree for cost for Rs. 49 was executed by sale of 2 times, 1st. fetched Rs. 35, and second Rs. 15. In appeal the costs were reduced to Rs. 36. On a question arising whether defendant is entitled to get restitution of properties on payment of costs decreed by the appellant Court held, not entitled unless they show that if the decree originally passed was for the correct amount, the properties would not have been sold. 35 C. W. N. 1298=54 C. L. J. 293. Where the Court passes a joint decree for costs against several defendants and one of them deposits the decree amount for himself and on behalf of others, the depositor is entitled to a refund of the amount when the decree is reversed in appeal and no question of proportionate refund can arise under those circumstances. 35 C. W. N. 1305. The same principles as are applicable to restitution proceedings under s. 144 apply to those under the inherent powers of the Court. 35 C. W. N. 483=58 C. 1070=134 Ind. Cas. 906. Restitution can be had only in respect of matters, done under the decree or as an immediate consequence of it. It cannot be ordered against persons whose claims have not arisen under the decree or as a direct or immediate consequence thereof, and who are in no sense the legal representatives of one of the parties. *Ibid.*

**Court of first instance.**—Where on appeal the decree of a temporary subordinate Court was reversed and that Court ceased to exist and a new temporary subordinate Court was established : *Held* that the latter Court was the Court of first instance within the meaning of s. 144 and could order restitution. A. I. R. 1921 Mad. 103=13 L. W. 67=61 Ind. Cas. 962. For the purpose of this section "Court of first instance" when it has lost territorial jurisdiction should be interpreted according to the general principle as laid down in s. 37 (b) as it would apply even to cases where the Court of first instance has been abolished and also to cases where the Court of first instance has ceased to have a jurisdiction. A. I. R. 1926 Mad. 813=51 M. L. J. 161=95 Ind. Cas. 587. "Court of first instance" confines the applicability to the cases where the variation or reversal has been made or is in consequence of an order made by a superior Court. If the case comes within the purview of the section no matter whether the question is simple or complicated, it will have to be determined on an application made under it and a separate suit would be barred. A. I. R. 1931 Cal. 42=52 C. L. J. 505=34 C. W. N. 746=130 Ind. Cas. 236. The words "Court of first instance" must mean that the application for restitution must be made to the Court which did the act which turned out to be wrong and not to the appellate Court. A. I. R. 1931 Rang 21.

**Interest.**—This section contains an express provision that the Court shall in its discretion award such interest as it chooses and the fact that the principal only is secured by the bond given by the executing creditor withdrawing money from Court does not absolve him from paying interest. 2 Pat. L. J. 149=39 Ind. Cas. 22. Interest can be awarded on costs refunded. 20 O. C. 327=4 O. L. J. 729=43 Ind. Cas. 337 ; see also A. I. R. 1921 All. 241=19 A. L. J. 771=63 Ind. Cas. 513 ; 41 M. 316=(1917) M. W. N. 669=22 M. L. T. 162=42 Ind. Cas. 836 ; A. I. R. 1929 Pat. 593=126 Ind. Cas. 383 ; A. I. R. 1930 Mad. 577=1930 M. W. N. 153=58 M. L. J. 318=53 M. 708=123 Ind. Cas. 47 ; A. I. R. 1926 Lah. 488=7 Lah. 232=8 Lah. L. J. 338=27 P. L. R. 400=93 Ind. Cas. 954 ; A. I. R. 1934 Lah. 604=148 Ind. Cas. 569.

Where money is lying in Court and none is on such money deriving benefit from it no interest is payable. 89 Ind. Cas. 603=A. I. R. 1925 Rang. 215=4 Bur. L. J. 58=3 Rang. 251; but see A. I. R. 1925 Bom. 313=27 Bom. L. R. 485=87 Ind. Cas. 713. Where no interest is awarded by the decree the Court has no power to grant interest or damages in lieu of interest by way of restitution. A. I. R. 1924 Rang. 275=3 Bur. L. J. 58=82 Ind. Cas. 427. A party in whose favour an order has been made directing the repayment of cost paid by him under a decree subsequently reversed is entitled to interest thereon. 54 M. 887=131 Ind. Cas. 832=33 L. W. 618=A. I. R. 1931 Mad. 561=61 M. L. J. 34; 35 C. W. N. 1305; see also A. I. R. 1932 Cal. 313=137 Ind. Cas. 294. The duty of the Court when awarding restitution under s. 144 of the Code is imperative. It shall place the applicant in the position in which he would have been if the order had not been made; and for this purpose the Court is armed with powers (the 'may' is empowering not discretionary) as to *mesne* profits, interest and so forth. Hence restitution ordinarily involves interest also and Court can grant same. A. I. R. 1935 P. C. 12=1935 A. L. J. 251=1935 O. W. N. 147=153 Ind. Cas. 654=37 Bom. L. R. 162=39 C. W. N. 377=60 C. L. J. 594=1935 M. W. N. 95=68 M. L. J. 168 (P. C.)

**Mesne profits.**—In an application for restoration of possession *mesne* profits need not be claimed whether s. 144 applies or not. A. I. R. 1931 Nag. 112=17. N. L. R. 62=54 Ind. Cas. 664. On reversal of a decree in appeal, the appellant is entitled to restitution of the profits accruing from the property of which he had been deprived. 53 Ind. Cas. 119; see also A. I. R. 1915 P. C. 92=38 A. 163=43 I. A. 43=20 C. W. N. 425=23 C. L. J. 411=18 Bom. L. R. 382 (P. C.)=33 Ind. Cas. 505; 21 C. 989; 6 C. W. N. 710; 53 Ind. Cas. 119; 21 A. 1; 20 A. 430; 18 A. 262; 69 Ind. Cas. 278=A. I. R. 1922 P. C. 269; 24 C. W. N. 50; A. I. R. 1924 Lah. 486=6 Lah. L. J. 142=80 Ind. Cas. 316; A. I. R. 1930 Cal. 89=56 C. 550=120 Ind. Cas. 807; A. I. R. 1929 Cal. 586=115 Ind. Cas. 105; A. I. R. 1931 Mad. 81=60 M. L. J. 219=130 Ind. Cas. 451. Where the suit under Order 21, rule 103, for declaration and possession is decreed application for *mesne* profits does not lie under s. 144. A. I. R. 1927 Mad. 898=39 M. L. T. 94=27 L. W. 188=104 Ind. Cas. 768. Order for *mesne* profits after decree is not one for restitution under s. 144. An executing Court has ample power to make an order to prevent what would be essentially a miscarriage of justice and a separate suit is not necessary. A. I. R. 1927 Lah. 346=28 P. L. R. 128=103 Ind. Cas. 328; see also 9 Lah. L. J. 207. A landlord cannot deduct rent to which he may have a right for period of wrongful possession from the *mesne* profits which he is liable to pay to the tenants during the period of their dispossession. 3 L. W. 405=19 M. L. T. 336=34 Ind. Cas. 2. An order awarding *mesne* profits is not consequential on an order of remand when the question as to whether the person in possession under the decree of the first Court was rightly in possession is yet to be decided. An application for *mesne* profits would be in that case premature and limitation will start only when it is decided that possession is wrongful. A. I. R. 1923 Nag. 101=18 N. L. R. 200=76 Ind. Cas. 255; but see 38 C. W. N. 1197. Where the landlord decree-holder purchased property in execution of rent decree and let it to another tenant and the decree was subsequently set aside at the instance of the judgment-debtor: *Held* that the tenant judgment-debtor was entitled to restitution of possession as against the new tenant and to *mesne* profits against the landlord for the period he was out of possession. 24 C. W. N. 50=29 C. L. J. 486=51 Ind. Cas. 959. The ultimate decree-holder can get compensation for any loss caused to him by reason of the execution of the decree of the lower Court, but is not entitled to recover *mesne* profits for a period prior to the execution of such decree as the object of s. 144 is to place the finally victorious party in a position which he would have occupied if the erroneous decree had not been executed. A. I. R. 1921 Lah. 234=4 Lah. L. J. 333=68 Ind. Cas. 807. The principle to be followed in awarding compensation or damages by way of restitution under s. 144 is that the assessment must be on the basis of cost what the party in possession could have made, but what he did in fact make or could within reasonable diligence have made. 38 C. W. N. 1197.

**Bar to suit.**—An application for restitution must be made to Court which passed the decree which is reversed. A separate suit for the same is not maintainable. A. I. R. 1922 All. 71=44 A. 283=20 A. L. J. 13=65 Ind. Cas. 798. Where a decree is varied or set aside not by a superior Court but by the Court passing it, a suit claiming restitution is not barred by this section, which is limited to cases when the decree is varied by a superior Court. 1 Pat. L. J. 43=3 P. L. W. 95=34



Ind. Cas. 747. Where an application for restitution is refused as time-barred a suit for same relief is barred under s. 144 (2). A. I. R. 1931 Cal. 14=34 C. W. N. 707=129 Ind. Cas. 403. Question of liability of a mortgagee in a redemption suit for alleged waste by him while in possession of the mortgaged property must be settled only at the time of the preparation of the decree for redemption. It cannot be gone into in an application for restitution under s. 144 nor can a separate suit lie for it. A. I. R. 1925 Oudh 654=88 Ind. Cas. 529. Where the filing of a suit involves as a necessary consequence an injury to property which cannot be compensated by the grant of costs in the action, a subsequent suit by defendant for damage is not barred. A. I. R. 1922 All. 465=44 A. 681=20 A. L. J. 636=69 Ind. Cas. 173. Section 144, C. P. Code, is exhaustive of the remedies available by way of restitution. A suit to declare an execution sale null and void is not maintainable when the sale is not void *ab initio*. A. I. R. 1931 Mad. 713=134 Ind. Cas. 1151. Suit is not barred when restitution has been granted by virtue of inherent power. 58 C. 465=A. I. R. 1931 Cal. 517=134 Ind. Cas. 572; see also A. I. R. 1934 Pat. 109=13 Pat. 108.

**Procedure.**—This section is not a rule of substantive law but lays down merely the procedure. A. I. R. 1928 All. 293=50 A. 767=26 A. L. J. 587=112 Ind. Cas. 876. An application for restitution is not an application for execution. A. I. R. 1930 Lah. 961=129 Ind. Cas. 204; A. I. R. 1923 Nag. 94=71 Ind. Cas. 42; but see A. I. R. 1926 Mad. 813=51 M. L. J. 161=95 Ind. Cas. 587; 40 M. 780=38 Ind. Cas. 806; A. I. R. 1926 Oudh 199=13 O. L. J. 731=1 Luck. 40=92 Ind. Cas. 23. Proceedings under s. 144 of the Code are not execution proceedings although they are of course in the nature of proceedings in execution to enforce either directly or indirectly the final decree. A party to an application under s. 144 need not have been a party to the decree. Section 144 includes matters which an execution Court or appellate Court could not ordinarily deal with and the word "party" in the section is not used in the sense "party to the suit" but means party to the application. A. I. R. 1922 All. 238=44 A. 555=20 A. L. J. 456=66 Ind. Cas. 515. Only the Court executing the decree can restore the property to the judgment-debtor by way of restitution. A. I. R. 1928 Pat. 502=113 Ind. Cas. 717. In objection proceedings and proceedings therefrom (such as proceedings under s. 144) the objector under order 58 is party to the suit, and the decree-holder and the judgment-debtor are the other parties. A. I. R. 1929 Lah. 657=118 Ind. Cas. 389. Restitution proceedings not being one in execution, Order 45, rule 15 does not apply to application for restitution. A. I. R. 1927 Pat. 208=102 Ind. Cas. 614. Application for restitution may be made in such nature as the manner of each case might require and need not follow in any case the procedure in Order 21, rule 11, Civil Procedure Code. A. I. R. 1937 Mad. 173.

A *bona fide* auction purchaser for value is not a party to the suit hence an order refusing restitution against him is not a decree and is therefore, not appealable. A. I. R. 1925 Lah. 176=79 Ind. Cas. 57. It might be necessary to take evidence before restoring the *status quo ante*, statement as to prior possession made in report by partition Commissioner is not conclusive. 55 Ind. Cas. 356. An order under s. 144, C. P. Code, is an order deciding a question under s. 47 (1) and is therefore appealable to the High Court, the Court-fee therein being Rs. 2. 21 C. W. N. 544=39 Ind. Cas. 640. An appeal lies from an order under s. 151 in exercise, by analogy, of jurisdiction under s. 144. 100 Ind. Cas. 735=A. I. R. 1927 Cal. 285=31 C. W. N. 290. An order for rateable distribution between rival decree-holders is not an order under s. 47 and is not a decree within the meaning of s. 144. Powers under s. 151, C.P. Code, should be exercised when necessary for the ends of justice in the absence of other legal method of redress. A. I. R. 1922 Mad. 99=42 M. L. J. 473=15 L. W. 421=30 M. L. T. 178=67 Ind. Cas. 546. Where decree was reversed on appeal, auction sale in execution was cancelled and the order cancelling the sale was allowed by the auction purchaser to become final, the remedy of the auction purchaser was not by proceedings under s. 144. A. I. R. 1925 Rang. 215=3 Rang. 251=4 Bur. L. J. 58=89 Ind. Cas. 603. Where delivery of actual possession under Order XXI, rule 35, is ordered and is accepted by the applicant, a second application for execution in restitution is barred as the process for delivery issued on the order on the first application had been carried out. 32 Ind. Cas. 46.

**Limitation.**—Application under s. 144 is for execution of decree passed on appeal. It is governed by Art. 182 of the Limitation Act. A. I. R. 1931 Oudh 51=7 O. W. N. 1153=130 Ind. Cas. 78; 67 P. R. 1918=36 P. W. R. 1918=15

P. L. R. 1918=44 Ind. Cas. 301; A. I. R. 1921 Bom. 67=45 B. 1137=23 Bom. L. R. 480=62 Ind. Cas. 233; A. I. R. 1923 Pat. 371=2 Pat. 277=1 Pat. L. R. 338=72 Ind. Cas. 912; 6 L. W. 539=(1917) M. W. N. 643=33 M. L. J. 413=22 M. L. T. 333=42 Ind. Cas. 530. An application made to obtain restitution as per order of His Majesty in Council, is governed by Art. 183 and not by the general and omnibus Art. 181. A. I. R. 1928 All. 293=50 A. 767=26 A. L. J. 587=112 Ind. Cas. 876; but see A. I. R. 1926 Lah. 685=96 Ind. Cas. 804; 78 Ind. Cas. 200=A. I. R. 1925 Pat. 1=3 Pat. 371=5 P. L. T. 145; A. I. R. 1928 Pat. 598=10 P. L. T. 49=114 Ind. Cas. 476; 47 Ind. Cas. 47. The period of limitation is three years for an application for restitution. A. I. R. 1926 Cal. 981=92 Ind. Cas. 960; 17 N. L. J. 281. Limitation for application for restitution begins from date of first appellate decree. A. I. R. 1928 Cal. 646=32 C. W. N. 971=56 C. 61. Section 6, Limitation Act applies to application made under s. 144. A. I. R. 1926 Oudh 199=13 O. L. J. 731=1 Luck. 40=3 O. W. N. 65=92 Ind. Cas. 23 Application for *mesne* profits under s. 144 is not one for execution and when the decree is reversed a right to apply for *mesne* profits accrues. A. I. R. 1929 Lah. 166=5 Lah. L. J. 389=76 Ind. Cas. 501. Time for restitution begins from the date of High Courts order in second appeal, which affirms the first appellate Court's order reversing trial Court's decree. A. I. R. 1926 Cal. 981=92 Ind. Cas. 960. A judgment-debtor applied for execution against the decree-holder, transferee and certain other persons and was successful. The purchaser then appealed and the order was set aside; the judgment-debtor then made a second application for restitution against the decree-holder for loss suffered by him on account of the sale: *Held* that it was a continuation of the first application and so not time-barred. 19 A. L. J. 549=3 U. P. L. R. 91=63 Ind. Cas. 184. In cases not falling strictly within s. 144 under which restitution is in certain cases imperative restitution lies in the discretion of the Court and will be ordered only when justice demands it. 21 C. W. N. 564=24 C. L. J. 467=38 Ind. Cas. 17. An application under s. 144, C. P. Code is an application for execution of a decree passed in appeal when the decree varies or reverses the decree of the Court of first instance, it being in substance an application made for seeking the aid of the Court in working out the final decree and falls within Article 182 of the Limitation Act. A. I. R. 1931 Oudh 51=130 Ind. Cas. 78; see also 1931 M. W. N. 1006; 35 C. W. N. 1294 (*contra*); 11 Rang. 275=A. I. R. 1933 Rang. 180; A. I. R. 1934 Pat. 246 (F. B.). An application for restitution and for *mesne* profits under s. 144 of the C. P. Code is an application in execution and is therefore governed by Art. 182 and not by Art. 181. A. I. R. 1934 Pat. 246 (F. B.)=15 P. L. T. 173=13 Pat. 411; see also 3 Pat. 371 (F. B.).

**Court-fee.**—Application for compensation under s. 144 by judgment-debtor relates to execution, discharge or satisfaction of decree, and so the Court-fee payable on memorandum of first appeal against its dismissal is 8 annas. A. I. R. 1922 Nag. 62=67 Ind. Cas. 225. An appeal from an order under s. 141 must be stamped *advalorem*. A. I. R. 1925 All 137=47 A. 98=22 A. L. J. 811=82 Ind. Cas. 321; A. I. R. 1930 Rang. 241=8 Rang. 271=126 Ind. Cas. 211. The Court-fee payable on Memorandum of Appeal against such an order must be calculated in accordance with Art. 1, Sch. I, Court Fees Act. A. I. R. 1930 Lah. 24=113 Ind. Cas. 270. No *advalorem* fee but a fee of Rs. 4 is required for an appeal from order under s. 144. A. I. R. 1927 Lah. 635=103 Ind. Cas. 657; see also A. I. R. 1928 Lah. 143=107 Ind. Cas. 491; A. I. R. 1925 Pat. 577=4 Pat. 294=7 P. L. T. 415=92 Ind. Cas. 474.

**Appeal**—Where an application is made under s. 144 and an order is passed under s. 144 read with s. 151 it is appealable, even though it is subsequently held that s. 144 had bearing on the case and the application thereunder is competent. 11 Pat. 153=140 Ind. Cas. 432=A. I. R. 1932 Pat. 317.

**145. [S 253.]** Where any person has Enforcement of liability of become liable as surety—  
surety.

(a) for the performance of any decree or any part thereof, or

(b) for the restitution of any property taken in execution of a decree,

or,

(c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or in any proceeding consequent thereon,  
the decree or order may be executed against him, to the extent to which he has

rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47 :

Provided that such notice as the Court in each case thinks sufficient has been given to the surety.

**Scope of the section.**—Object of s. 145 is expeditious enforcement of liabilities against sureties. The surety can raise any defence that is open to him. A. I. R. 1923 Mad. 340=44 M. L. J. 171=17 L. W. 473=72 Ind. Cas. 194. This section does not apply to sureties of an administration bond. A. I. R. 1928 Rang. 248=6 Rang. 474=112 Ind. Cas. 427. Section 145 applies where surety is only personally liable and not where charge is created. A. I. R. 1928 B. 42=30 Bom. L. R. 19=52 Bom. 72=107 Ind. Cas. 701. This section lays down procedure for enforcing surety's liability. A. I. R. 1927 Rang. 316=5 Rang. 494=105 Ind. Cas. 541. This section applies to surety and in compromise of suit. A. I. R. 1928 Lah. 209=103 Ind. Cas. 449. This section does not bar suit. It is not exclusive remedy. A. I. R. 1928 Rang. 249=6 Rang. 474=112 Ind. Cas. 427. The word "decrees" in the operative part of s. 145 refers only to clauses (a) and (b) and not to clause (c), to which the word "order" only applies. A. I. R. 1928 Rang. 249=6 Rang. 474=112 Ind. Cas. 427. Section 145 does not apply to refund of deposit by surety. A. I. R. 1926 Lah. 541. The procedure laid down in s. 145, C. P. Code is not applicable to the case of a surety under the Guardians and Wards Act. A. I. R. 1929 Sind 35=19 S. L. R. 390=89 Ind. Cas. 342. The object of this section is to provide that a party for whose benefit a security has been given may enforce the security by executing the decree or order against the surety in the same manner as if the surety had been a party to the decree or order and was directed by the decree or order to perform obligation undertaken by him. A. I. R. 1924 All. 105=45 A. 649=21 A. L. J. 604=74 Ind. Cas. 927 ; see also A. I. R. 1924 Mad. 241=75 Ind. Cas. 830. Order discharging surety from suretyship is a decree. A. I. R. 1925 All. 344=23 A. L. J. 59=86 Ind. Cas. 105. This section includes case of surety for production of judgment-debtor released wishing to apply for insolvency. 39 Ind. Cas. 407=(1916) 2 M. W. N. 273 ; see also A. I. R. 1921 Pat. 72=57 Ind. Cas. 303. Forfeiture of security will be applied in satisfaction of the decree. 25 C. W. N. 36=59 Ind. Cas. 778. Liability of a surety for the decree is not affected where a suit once dismissed for default is again restored. 59 C. 1450=30 C. W. N. 749=A. I. R. 1932 Cal. 858. In the absence of fraud or collusion a surety is liable by a consent decree. 59 C. 1450=36 C. W. N. 749=A. I. R. 1932 Cal. 858. But he is not so bound when there is other stipulation. 11 Pat. 590=140 Ind. Cas. 565=A. I. R. 1932 Pat. 313. A surety may be liable after a certain amount. 136 Ind. Cas. 629=36 C. W. N. 701=55 C. L. J. 413=36 L. W. 111=A. I. R. 1932 P. C. 131=63 M. L. J. 85 (P. C.). A bond given to the Judge of a Court in pursuance of an order of the Court under Order 32, rule 6, is not enforceable by execution in the manner provided by s. 145. 1936 M. W. N. 1127=44 L. W. 621=A. I. R. 1936 Mad. 953=71 M. L. J. 675. But surety bond given under Order 38, rule 5, can be executed under this section. A. I. R. 1936 Cal. 143=162 Ind. Cas. 619. Forfeiture of a security bond executed under s. 145 is not by way of penalty. The money goes to the judgment-creditor and not the Government. A. I. R. 1936 Sind 244=30 S. L. R. 177.

Surety bond can be executed by the Court without a suit. 145 Ind. Cas. 1004=1933 M. W. N. 1005=A. I. R. 1933 M. 722=38 L. W. 450=65 M. L. J. 507 ; A. I. R. 1934 Mad. 186 ; 1933 M. W. N. 185=A. I. R. 1933 Mad. 342=142 Ind. Cas. 581 ; A. I. R. 1934 Lah. 128 (F. B.) ; 58 M. 687=1933 M. W. N. 949=38 L. W. 315=A. I. R. 1933 Mad. 678=65 M. L. J. 142 (F. B.) ; A. I. R. 1933 Lah. 913 ; but see 54 A. 346=1933 All. 121=142 Ind. Cas. 510=1933 A. L. J. 142=A. I. R. 1933 All. 269 (F. B.) ; A. I. R. 1936 Lah. 463=164 Ind. Cas. 281. Execution of decree order contemplated by s. 145 is execution in manner provided under Order XX, C. P. Code. A. I. R. 1934 Oudh 139.

**For the performance of any decree.**—The expression "any decree" is wide enough to cover a decree that has been already passed as well as a decree that may be passed after the person concerned has become liable as surety. A. I. R. 1935 Lah. 189=37 P. L. R. 372=159 Ind. Cas. 410. As regards surety's enhanced liability in appeal, *vide* A. I. R. 1935 Lah. 21=156 Ind. Cas. 903. Surety for performance of decree arrived at by *bona fide* compromise of suit, has been held liable. A. I. R. 1931 B 55=32 Bom. L. R. 1394=55 B. 97=128 Ind. Cas. 903. Sub-clause (1) applies even to person who is surety for himself. A. I. R. 1931 Rang.

65=131 Ind. Cas. 500. Surety for performance of decree that may be passed cannot be discharged for misconduct of defendant, A. I. R. 1927 Mad. 294=23 L. W. 705=92 Ind. Cas. 251. The liability of surety for appearance of judgment-debtor ceases on the surrender of the judgment-debtor to the Court or on the dismissal of the application. 143 Ind. Cas. 322=56 C. L. J. 586=A. I. R. 1933 Cal. 337 ; see also 145 Ind. Cas. 285=38 L. W. 254.

**For the restitution of any property.**—A Court cannot call on *supurdar* to produce property in a different suit. A. I. R. 1924 All. 64=73 Ind. Cas. 602. Judgment-debtor is not bound to accept him in *supurtinama* in absence of condition to that effect. A. I. R. 1929 Lah. 386=120 Ind. Cas. 421. Liability of a *supurdar* can be enforced in execution. A. I. R. 1928 Lah. 181=111 Ind. Cas. 592 ; A. I. R. 1921 All. 220=19 A. L. J. 247=62 Ind. Cas. 719. *Supurdar* for livestock cannot be proceeded against in execution summarily. 16 N. L. R. 178=47 Ind. Cas. 956. In case of handing over of property for safe custody to third person on executing bond with sureties can be proceeded against in execution but the decree-holder must get the bond assigned. 12 L. W. 329=39 M. L. J. 472=(1920) M. W. N. 784=60 Ind. Cas. 134. Where a *supurdar* has already received a valid order from the Court to deliver on a certain date the property entrusted and the order has never been set aside, it is legal to attach the personal property before that date. 8 O. W. N. 218=A. I. R. (1931) Oudh 311=14 O. L. J. 248=132 Ind. Cas. 49 ; see also A. I. R. 1931 All. 567 (F.B.)=134 Ind. Cas. 836=1931 A. L. J. 865. But see A. I. R. 1936 All. 555=1936 A. L. J. 736. In case of *Supurdar's* failing to produce property for sale, when required to do so, the decree-holder can bring suit against him for value of property. A. I. R. 1935 All. 373=1935 A. L. J. 335. When *supurdar* is not a surety the liability cannot be enforced in execution. A. I. R. 1935 All. 768=1935 A. L. J. 1000.

**For the payment of any money, etc.**—Surety for payment of decree, that may be passed will not be liable for compromise decree granting time for payment. A. I. R. 1927 Cal. 239=98 Ind. Cas. 988. This section is applicable when surety is for payment of decree. Liability of surety for production of goods can be enforced on execution in Court's inherent power. A. I. R. 1926 Mad. 1005=24 L. W. 300=51 M. L. J. 239=(1926) M. W. N. 681=97 Ind. Cas. 787. Surety for production of goods by order of trial Court is bound by order of appellate Court also. A. I. R. 1927 Bom. 84=28 Bom. L. R. 1516=51 B. 31=99 Ind. Cas. 820.

**Enforcement of security bond.**—Contract of security may be oral or in writing. A. I. R. 1926 Cal. 877=53 C. L. J. 493=30 C. W. N. 609=95 Ind. Cas. 483 ; 38 P. L. R. 623=A. I. R. 1936 Lah. 463. This section does not apply to security bond taken out of Court. It has to be enforced by a separate suit. 24 M. L. T. 416=8 L. W. 507=(1918) M. W. N. 764=48 Ind. Cas. 940. Surety bond for appearance of judgment-debtor cannot be forfeited without specific order for attendance is served. 90 P. L. R. 1916=166 P. W. R. 1916=36 Ind. Cas. 73. Simple money decree-holder can bring to sale surety's mortgaged property in execution. 38A. 327=14 A. L. J. 385=33 Ind. Cas. 982. Surety's hypothecated property should not ordinarily be proceeded against without suit. 39 A. 225=15 A. L. J. 76=38 Ind. Cas. 33. A property mortgaged by a surety cannot be sold as mortgaged property. 38 Ind. Cas. 130. Surety bond for release of judgment-debtor can be enforced in execution. 10 L. W. 172=53 Ind. Cas. 673. Immovable property validly mortgaged as security can be realized in execution. A. I. R. 1929 Lah. 126=7 Lah. 352=118 Ind. Cas. 632 ; see also A. I. R. 1929 Lah. 393=118 Ind. Cas. 443. Surety bond is enforceable like any other contract. A. I. R. 1928 Lah. 61=108 Ind. Cas. 376. Surety bond not to any named person is not void and is enforceable. A. I. R. 1928 Bom. 42=52 B. 72=30 Bom. L. R. 19=107 Ind. Cas. 710. Punjab Court have inherent jurisdiction to proceed against surety even if obligee not named. A. I. R. 1928 Lah. 807. Hypothecated property can be sold in execution. A. I. R. 1927 Mad. 416=52 M. L. J. 182=38 M. L. T. 143=100 Ind. Cas. 841. Contract of additional interest by surety can be enforced by decree-holder. A. I. R. 1927 Mad. 416=52 M. L. J. 182=38 M. L. T. 143=100 Ind. Cas. 841. Surety bond not in favour of Court can be enforced. A. I. R. 1926 Cal. 877=53 C. L. J. 493=30 C. W. N. 609=95 Ind. Cas. 483. Mortgage or equitable mortgage by surety can be enforced in execution. A. I. R. 1926 Cal. 889=54 C. 1=30 C. W. N. 683=95 Ind. Cas. 908 ; A. I. R. 1926 Bom. 279=50 B. 339=28 Bom. L. R. 603=95 Ind. Cas. 696. When an application is made under s. 145 for an execution against surety the application is for the execution of the bond as such and even if the application

is occasioned by and mentions the breach of one condition only yet execution can be ordered by the Court if in the course of proceedings arising from that application it appears that breach of any one of the conditions has occurred. A. I. R. 1936 Sind 244=30 S. L. R. 177. Liability of a surety may arise even in the absence of a surety bond. A letter to the decree-holder may create such liability. 68 M. L. J. 136=A. I. R. 1935 Mad. 209=1935 M. W. N. 79=58 M. 777. Decree executed against surety is same decree in suit and not second decree. A. I. R. 1926 Mad. 574=49 M. 325=50 M. L. J. 584=24 L. W. 361=94 Ind. Cas. 512 Surety under Order XXI, r. 23, C. P. Code is not enforceable. Decree-holder must obtain assignment of bond. 25 M. L. T. 220=(1917) M. W. N. 219=9 L. W. 476=52 Ind. Cas. 410. This section does not help to realise debt due by surety for guardian of man by summary procedure. 41 M. 40=(1917) M. W. N. 490=39 Ind. Cas. 928. Order for payment by surety is decree for purpose of appeal only. 2 Pat. L. J. 197=3 Pat. L. W. 414=39 Ind. Cas. 648. The Court may in exercise of its discretion refuse to make an order in favour of the judgment-creditor in case of deposit. A. I. R. 1922 Bom. 340=46 B. 702=23 Bom. L. R. 1263=64 Ind. Cas. 648. The properties of this surety charged can be directed to be sold on default of payment with a date fixed. A. I. R. 1918 P. C. 55=42 A. 158=46 I. A. 228=22 O. C. 212=38 M. L. J. 302=18 A. L. J. 263=22 Bom. L. R. 521=55 Ind. Cas. 550 (P. C.). Surety for Receiver can be proceeded against the execution. 10 L. B. R. 236=13 Bur. L. T. 91=59 Ind. Cas. 844. Surety bond creating charge over immovable property cannot be enforced in the absence of registration. A. I. R. 1931 Rang 65=131 Ind. Cas. 500. Words in a surety bond should be strictly construed. A. I. R. 1934 Lah. 401. Even when security bond gives certain immovable property as security, security bond is not mortgage and can be enforced in execution. A. I. R. 1936 Mad. 589=1936 M. W. N. 443=165 Ind. Cas. 453. Where after executing a security bond in favour of the Court for due performance of a decree that may be passed against the defendant, the property given as security is alienated, the rule of *lis pen dens* operates. *Ibid.* A security bond executed in accordance with order passed under Order 41, rr. 5, 6 staying execution of a decree pending decision of the appeal, whereby the surety hypothecates his immovable property for satisfaction of such decree as might be passed by the appellate Court, and which is duly accepted by the Court and execution stayed accordingly, does not require registration as it is a step in judicial proceeding, and the decree-holder can move the Court to realize the decretal amount from the immovable property of the surety mentioned in the bond, even though it had not been registered. A. I. R. 1934 Lah. 138=36 P. L. R. 386=15 Lah. 282=149 Ind. Cas. 282.

**Construction of security bond.**—The rule that a security bond must be strictly construed according to its own terms is certainly true where there is no ambiguity in the terms, s. 95, Evidence Act allows a reference to antecedent circumstances. 61 C. 890=150 Ind. Cas. 988=A. I. R. 1934 Cal. 569.

**Liability of surety.**—Surety's liabilities are co-extensive with those of the judgment-debtor. Decree-holder can proceed directly against surety on dismissal of appeal. 117 Ind. Cas. 65; A. I. R. 1933 Nag. 287. Surety is liable for not only property but its profits also. A. I. R. 1929 All. 905=118 Ind. Cas. 191. Surety agreeing to pay instalment in case of default is personally liable even without express stipulation. A. I. R. 1930 Lah. 185=154 Ind. Cas. 677. Where judgment-debtor is absent in execution proceedings, surety for presence of judgment-debtor is liable. A. I. R. 1930 Lah. 80=129 Ind. Cas. 689. Contract of surety is revocable. A. I. R. 1931 All. 242=1931 A. L. J. 74. Discharge of surety for decree-holder extending time to judgment-debtor is discretionary. A. I. R. 1930 Lah. 896=129 Ind. Cas. 762. Surety for stay of execution is discharged if execution is taken out. A. I. R. 1929 Lah. 770=119 Ind. Cas. 485. Execution against judgment-debtor before proceedings against surety not necessary. A. I. R. 1925 Rang. 135=84 Ind. Cas. 998; 6 Rang. 474=A. I. R. 1929 Rang. 249=112 Ind. Cas. 427. Surety for appearance can be discharged but surety for performance of decree cannot. A. I. R. 1929 Lah. 435=11 Lah. L. J. 141=30 P. L. R. 130=119 Ind. Cas. 419. Decree-holder's absence does not excuse non-production of judgment-debtor on date fixed. A. I. R. 1928 Lah. 974=116 Ind. Cas. 554. Where judgment-debtor fails to apply for insolvency in time fixed makes surety liable. A. I. R. 1928 Lah. 974=116 Ind. Cas. 554. Surety for party in suit is for successor in trust though not on record. A. I. R. 1928 Nag. 294=109 Ind. Cas. 636. Surety is not liable for not producing judgment-debtor on any other date than named even if Court is closed. A. I. R.

1928 Lah. 696=10 Lah. L. J. 401=109 Ind. Cas. 546. Surety is liable for Receiver's accounts unchallenged but subsequently discovered to be improper. A. I. R. 1927 Rang. 334=6 Bur. L. J. 15=100 Ind. Cas. 996. Surety for deceased is not liable on decree against wrong legal representatives. A. I. R. 1927 Bom. 63=50 B. 802=28 Bom. L. R. 1382=100 Ind. Cas. 186. Liability of surety can be enforced against his legal representatives. A. I. R. 1926 Sind 294=19 S. L. R. 165=98 Ind. Cas. 136. This section applies to surety even in compromise of suit. A. I. R. 1928 Lah. 209=103 Ind. Cas. 449; 59 P. W. R. 1918=45 Ind. Cas. 992. The property given as security can be realised by the decree-holder in execution and no separate suit is either necessary or maintainable. 6 L. W. 762=(1917) M. W. N. 872=34 M. L. J. 84=41 M. 327=43 Ind. Cas. 187. The fact that the security is given does not take away any legal right which a decree-holder otherwise has. 3 Pat. L. J. 176=4 P. L. W. 216=43 Ind. Cas. 454. Where sureties have substantially complied and have though somewhat late produced the judgment-debtor, the extreme step of executing the decree must not be taken. A. I. R. 1925 Rang. 135=2 Rang. 567=84 Ind. Cas. 998. Surety for appearance is liable personally for decree-debt, if he fails to produce judgment-debtor on date fixed. A. I. R. 1924 Lah. 490=6 Lah. L. J. 200=80 Ind. Cas. 700. Where a surety asks for time to bring the judgment-debtor next time and the Court allows the time and the judgment-debtor is brought on the adjourned date surety's obligation is discharged. A. I. R. 1924 Rang. 374=3 Bur. L. J. 99. A surety under an adjustment of an execution can be proceeded against in execution under this section. A. I. R. 1925 Sind 25=17 S. L. R. 257=83 Ind. Cas. 870. Dismissal of execution in which security furnished is no bar to enforcement of the bond by separate execution. A. I. R. 1924 Pat. 487=5 P. L. T. 336=81 Ind. Cas. 702. An assignee decree-holder can proceed in execution against the surety. It is not necessary for him to get an assignment of the surety bond and institute a suit. 142 Ind. Cas. 363=1932 M. W. N. 1296=37 L. W. 127=A. I. R. 1933 Mad. 219. Where security bond has been executed by plaintiff to the Court as a condition for temporary injunction, it can be executed by the Court under this section where it can be executed by any other provision of the Code. 56 M. 984=145 Ind. Cas. 1011=1933 M. W. N. 985=38 L. W. 385=A. I. R. 1933 Mad. 691=65 M. L. J. 342. Where a judgment-debtor who has been arrested in execution of a decree is released on the surety furnishing security for his appearance but owing to the default of the decree-holder to appear on the due date, the execution petition is dismissed and the surety is also discharged, the liability of the surety is not automatically revived by the mere restoration of the execution petition. A. I. R. 1934 Lah. 349. The personal liability of a surety can only be enforced under this section. A. I. R. 1934 Oudh 139=148 Ind. Cas. 864=11 O. W. N. 376=A. L. R. 1934 Oudh 170; see also 57 M. 803=148 Ind. Cas. 846=A. I. R. 1934 Mad. 262=66 M. L. J. 540; A. I. R. 1934 Mad. 186=1934 M. W. N. 667=57 M. 688=66 M. L. J. 248.

**Discharge of surety.**—The liability of a surety for a debt ceases when his principal's debt is extinguished by merger of the estate of the debtor and creditor. A. I. R. 1923 Mad. 340=17 L. W. 473=44 M. L. J. 171=72 Ind. Cas. 194. Death of defendant does not discharge surety. 19 Bom. L. R. 112=41 B. 402=39 Ind. Cas. 88; 71 Ind. Cas. 46. Dismissal of execution case does not affect liability of surety. 22 C. W. N. 919=43 Ind. Cas. 464. Surety for stay of proceedings is discharged if decree-holder commits breach. A. I. R. 1925 Lah. 552=7 Lah. L. J. 343=26 P. L. R. 634=91 Ind. Cas. 272. Consent decree passed without knowledge and consent of the surety for judgment debtor, the surety is discharged. A. I. R. 1926 Cal. 818=30 C. W. N. 510=95 Ind. Cas. 409. Obtaining of protection order does not excuse non-production of judgment-debtor on date fixed. A. I. R. 1926 Mad. 958=(1926) M. W. N. 612=24 L. W. 480=97 Ind. Cas. 413. Surety's liability does not end by getting decree set aside in first Court unless otherwise provided in bond. A. I. R. 1927 Rang. 321=5 Rang. 456=105 Ind. Cas. 602. Surety to remove attachment before judgment is discharged by dismissal of suit. A. I. R. 1927 Rang. 310=5 Rang. 492=105 Ind. Cas. 549. Where surety is for payment of interest upto certain amount on stay of execution pending appeal, and where the amount of security is changed, surety is liable for interest upto date of changing the order. A. I. R. 1926 Bom. 565=28 Bom. L. R. 517=94 Ind. Cas. 645. Compromise if *bona fide* does not discharge surety even when made without his consent or knowledge. 55 B. 97=32 Bom. L. R. 1394=A. I. R. 1931 Bom. 55; see also 56 M. 625=64 M. L. J. 386=A. I. R. 1933 M. 309. A surety is discharged from his liability when substantial compliance has been made with his surety bond. 134 Ind. Cas. 718=33 Bom. L. R.

820=A. I. R. 1931 Bom. 444. Liability of surety subsists even where the creditor agrees to discharge the principal debtor in as much the agreement operates as a covenant not to sue. 56 M. 625=141 Ind. Cas. 852=(1933) M. W. N. 45=37 L. W. 170=A. I. R. 1933 Mad. 309=64 M. L. J. 386.

**Notice.**—Notice before attachment of surety's property is essential. A. I. R. 1929 Lah. 205=30 P. L. R. 131=11 Lah. L. J. 40=117 Ind. Cas. 226. Notice under the proviso along with warrant for the arrest of surety is not invalid. A. I. R. 1927 Lah. 131=99 Ind. Cas. 518. Order to pay against surety without notice is wrong. A. I. R. 1923 Rang. 26=4 U. B. R. 99=1 Bur. L. J. 236=70 Ind. Cas. 870. An order for arrest against surety, without notice under the proviso is *ultra vires*. A. I. R. 1931 Mad. 828=1931 M. W. N. 963; see also 132 Ind. Cas. 49=14 O. L. J. 249=8 O. W. N. 218=A. I. R. 1931 Oudh 311. Only one notice under section 145 is necessary to be served upon the surety; it is not necessary to serve him with a notice each time an application for execution is made. 40 C. W. N. 465. A mere record in the order sheet that a notice has been served on a particular person is no evidence of service of such notice. To prove service it is necessary to prove the return of service or to examine persons who can speak to the actual service. But an entry in the order sheet that a certain person has entered appearance is evidence of the appearance of such person. *Ibid.* Where surety had undertaken to produce judgment-debtor on every date fixed and the first day on which the judgment-debtor fails to appear was fixed by the Court in the presence of the judgment-debtor and the surety, there is no need to give the surety specific notice to produce the judgment-debtor on that day, but that notice under this section should be given to the surety regarding the realization of the decretal amount from him. 158 Ind. Cas. 373=A. I. R. 1935 Lah. 145.

**Surety is a party.**—The effect of the words "for the purposes of appeal" as used in s. 145 is that the surety is given the right of appeal against an order made against him in execution proceedings as a party to the suit possesses but is not for any other purpose to be regarded as a party to the suit or representative of such within s. 47. A surety is not therefore entitled to file any application which falls under s. 47 unless such application is permitted under some express provision in the Code. A. I. R. 1931 Rang. 206=9 Rang. 431. Surety is a party to the suit within section 47, Civil Procedure Code. 10 Bur. L. T. 15=34 Ind. Cas. 247. A third party who has given security on behalf of a judgment-debtor for the performance of a decree cannot apply to the executing Court to cancel the surety bond on the ground that it was obtained by fraud. His remedy is only by way of suit. Section 145 only makes him a party for a limited purpose, namely, for appeal. 43 M. 325=38 M. L. J. 65=11 L. W. 45=27 M. L. T. 207=(1920) M. W. N. 114=55 Ind. Cas. 363. Hypothecation of property does not make surety party under s. 47. A. I. R. 1919 P. C. 55=55 Ind. Cas. 550. Surety being party can plead fraud in execution. A. I. R. 1925 Lah. 118=7 Lah. L. J. 457=26 P. L. R. 561=92 Ind. Cas. 259. Surety is party only for purpose of appeal and not in suit before trial Court. A. I. R. 1926 Sind 105=20 S. L. R. 362=96 Ind. Cas. 234. Surety not party to suit, becomes judgment-debtor in execution against him. A. I. R. 1928 All. 527=51 A. 346=26 A. L. J. 1160=112 Ind. Cas. 534.

**Limitation.**—Surety bond is enforceable within 3 years of appellate decree. 44 B. 34=21 Bom. L. R. 861=53 Ind. Cas. 187. An application for execution against the judgment-debtor and the surety is not barred, if made within 3 years of the application against the judgment-debtor alone. A. I. R. 1922 All. 481=20 A. L. J. 726=44 A. 743=77 Ind. Cas. 129; but see 31 B. 50=8 Bom. L. R. 807; 142 Ind. Cas. 363=1932 M. W. N. 1296=37 L. W. 127=A. I. R. 1933 Mad. 216.

**Revision.**—An order under s. 145 passed by a Sub-Judge is open to revision by the High Court although an appeal lies to the District Court from such order and a further appeal from the order of the District Court lies to the High Court. 11 Rang. 134=144 Ind. Cas. 163=A. I. R. 1933 Rang. 64; see also 56 M. 909=145 Ind. Cas. 871=1933 M. W. N. 925=38 L. W. 651=A. I. R. 1933 Mad. 780=65 M. L. J. 407; 35 P. L. R. 466=A. I. R. 1934 Lah. 538=152 Ind. Cas. 693.

**146. [New.]** Save as otherwise provided by this Code, or by any law for the time being in force, where any

Proceedings by or against representatives. proceeding may be taken or application made by or against any person, then the proceeding

may be taken or the application may be made by or against any person claiming under him.

**Scope.**—S. 146 is a general residuary provision. 38 L. W. 280. No fresh execution petition by legal representative is necessary. A. I. R. 1930 Sind 283=24 S. L. R. 195=123 Ind. Cas. 303. Representative can continue appeal or application when not properly prosecuted or when the person dies. It is not limited to fresh proceedings. A. I. R. 1926 Mad. 573=51 M. L. J. 10=23 M. L. W. 379=(1926) M. W. N. 287=93 Ind. Cas. 831. Auction purchaser of under proprietary tenure in mortgage decree is legal representative for the purpose of rent decree against the original tenant. A. I. R. 1929 Oudh 353=6 O. W. N. 469=117 Ind. Cas. 452. Execution application by one of the surviving co-parceners of the deceased decree-holder can not be said to be invalid so as to prevent the deduction of the time mentioned in sub-para (3) of Part II of the 3rd Schedule of the Code. A. I. R. 1927 Bom. 123=51 B. 143=29 Bom. L. R. 75=100 Ind. Cas. 519. Section 146 does not refer to pending proceedings. A. I. R. 1927 Mad. 507=52 M. L. J. 477=38 M. L. T. (H. C.) 275=102 Ind. Cas. 243. Decree-holder's legal representatives cannot be substituted in the execution petition to continue it. A. I. R. 1927 Mad. 184=50 M. 1=25 L. W. 354=(1925) M. W. N. 981=51 M. L. J. 745=99 Ind. Cas. 927. An executing Court cannot go behind the decree and by invoking section 146, it cannot change a decree passed against R, into a decree against his legal representatives. For purposes of rateable distribution on the executing Court must take the decree as they are. Section 146 cannot enlarge the scope of s. 73 as it is expressly made subject to the other provisions of the Code. A. I. R. 1935 Cal. 738. PUISNEE mortgagee is not a representative under this section. 92 Ind. Cas. 946=A. I. R. 1926 Cal. 1015. The assignee of preliminary partition decree is not a person claiming under the decree-holder within s. 146. A. I. R. 1926 Mad. 1129=24 L. W. 392=97 Ind. Cas. 754. Assignee of heir cannot apply under Order XXII, r. 10, when heir is not on record. A. I. R. 1925 Mad. 1166=87 Ind. Cas. 402. Legal representative not on record can apply for setting aside *ex parte* decree. A. I. R. 1925 Oudh 370=27 O. C. 299=85 Ind. Cas. 529; see also A. I. R. 1923 All. 30=83 Ind. Cas. 601. Assignment of devolution of interest creates legal representation. A. I. R. 1924 Mad. 709=19 L. W. 660=76 Ind. Cas. 809; see also 8 L. W. 21=41 M. 510=48 Ind. Cas. 840. Judgment-debtor's assignee cannot continue appeal when already withdrawn. A. I. R. 1924 Mad. 470=(1924) M. W. N. 62=84 Ind. Cas. 665. This section covers cases of transfers in part. A. I. R. 1921 Mad. 599=(1921) M. W. N. 649=44 M. 919=41 M. L. J. 316=14 L. W. 297 (F. B.)=69 Ind. Cas. 337. Section 146 should be read as supplementary to rules. A. I. R. 1921 Mad. 599=44 M. 919=41 M. L. J. 316=69 Ind. Cas. 337. Legal representative cannot execute the decree without his name being substituted. A. I. R. 1922 Pat. 563=3 P. L. T. 625=69 Ind. Cas. 959. Transferee from auction purchaser can obtain possession. 40 A. 216=16 A. L. J. 150=42 Ind. Cas. 936. Transferee after decree can appeal. 1917 M. W. N. 306=40 Ind. Cas. 846; see also 20 O. C. 31=38 Ind. Cas. 511. Pending proceedings can be continued against purchaser *pendente lite*. A. I. R. 1921 Mad. 126=13 L. W. 37=61 Ind. Cas. 979. This is subject to procedure in Order XXI, rule 16. A. I. R. 1922 All. 98=66 Ind. Cas. 878. Where on the death of a pauper plaintiff *pendente lite* his heir is brought on record and he is not himself a pauper, an application may be made to have him dispaupered. 131 Ind. Cas. 828=1931 M. W. N. 199=33 L. W. 446=A. I. R. 1931 Mad. 324. On the death of a decree-holder his legal representative has a right to continue execution. 33 Bom. L. R. 818=A. I. R. 1931 Bom. 423=134 Ind. Cas. 720; see also 1931 M. W. N. 1209=34 L. W. 866 (F. B.). When *karta* or manager of joint Hindu family is alive co-parcener has no right to sue in his place. A. I. R. 1937 Sind 94.

**147. [New.]** In all suits to which any person under disability is a party, any consent or agreement, as to any proceeding shall, if given or made with the express leave of persons under disability. the Court by the next friend or guardian for the suit, have the same force and effect as if such person, were under no disability and had given such consent or made such agreement.

**148. [New.]** Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from  
**Enlargement of time.**



time to time, enlarge such period, even though the period originally fixed or granted may have expired.

**Scope.**—Court has power to grant extension of time fixed by it for doing any Act. A. I. R. 1924 All. 818=22 A. L. J. 791=82 Ind. Cas. 184. This section expressly empowers the Court to extend any time fixed by it even after the expiry of the period originally fixed. 162 Ind. Cas. 689=A. I. R. 1936 Cal. 221=40 C. W. N. 747; A. I. R. 1934 Lah. 537=35 P. L. R. 459. This section relates to matters arising in the course of proceeding under the Code; it can have no reference to orders of the Code embodied in a decree at the termination of such proceeding. A. I. R. 1935 Rang. 341. Where the mistake is not a *bona fide* one extension of time should not be granted. A. I. R. 1934 Lah. 424. The period of limitation under Art. 166 being fixed by statute and not by Court, it cannot be extended by Court. A. I. R. 1934 Pesh. 25. The Court has no power to extend time fixed by the decree. A. I. R. 1934 Nag. 109=149 Ind. Cas. 840. A decree of the type that "plaintiff should pay deficit Court-fee on Rs. 470-8-0 within 15 days or suit shall be dismissed" is undesirable. The proper course is for the Court to fix a time for payment and writ until it expires before passing its decree. The decree should then be a final one dismissing the suit and not contain contingent clauses. *Ibid.* Where a compromise decree was passed by which mortgagor was allowed to pay the decretal amount in instalment, the Court is not competent to extend the time fixed for payment in the compromise decree, on default by the judgment-debtor. A. I. R. 1934 Oudh. 44=147 Ind. Cas. 559. This section applies only to proceedings prior to the passing of a decree. Any order extending time after final decree must be deemed to have been passed under s. 47 of the Code. 74 Ind. Cas. 573=A. I. R. 1924 Oudh. 179; see also A. I. R. 1926 Nag. 44=21 N. L. R. 111=87 Ind. Cas. 12. This section does not apply to extension of time for doing acts under mortgage or other decrees. 39 M. 876=2 L. W. 1074=29 M. L. J. 708=18 M. L. T. 486=31 Ind. Cas. 240; see also 34 A. 388; 14 Ind. Cas. 240; 37 C. W. N. 878; A. I. R. 1933 Pat. 563=145 I. C. 548; 10 A. L. J. 520; 79 Ind. Cas. 912. Court can extend time agreed upon by parties for payment of decretal amount of mortgage money. 23 C. W. N. 439=50 Ind. Cas. 937; see also A. I. R. 1925 Nag. 258=8 N. L. J. 6=86 Ind. Cas. 397. Neither s. 148 nor s. 151 empowers a Court to meddle with final decree. A. I. R. 1926 Mad. 1059=24 L. W. 443=(1926) M. W. N. 713=97 Ind. Cas. 795. Court has inherent power to amend its own decree so as to extend time fixed to make up deficit Court-fee. A. I. R. 1923 Cal. 612=26 C. W. N. 720=37 C. L. J. 395=74 Ind. Cas. 575; A. I. R. 1926 Mad. 133=22 L. W. 582=92 Ind. Cas. 800; but see A. I. R. 1925 Pat. 293=6 P. L. T. 4=4 Pat. 191=85 Ind. Cas. 172.

Time can be extended excusing delay under this section where an application for issue of fresh notice is not made in time, the previous notice having been returned unserved. A. I. R. 1927 Bom. 68=28 Bom. L. R. 1446=50 B. 815=100 Ind. Cas. 147. But the Court cannot extend the period of one month allowed under s. 55 (4) as in that case the period is fixed by Code and not by Court and s. 148 has no application. A. I. R. 1926 Mad. 689=50 M. L. J. 477=(1926) M. W. N. 390. As the provisions of s. 43(1) of Insolvency Act are mandatory and the powers given by s. 5 of the Act are limited to that extent time of application for discharge cannot be extended. A. I. R. 1930 Rang. 166=8 Rang. 187=125 Ind. Cas. 346. Section 27(2) of the Insolvency Act contemplates an extension of time for application for discharge for good reason and should be granted even if the application for extension is made after expiry of the fixed date. A. I. R. 1925 Lah. 416=26 P. L. R. 126=86 Ind. Cas. 115.

Where plaintiff in whose favour decree is passed in suit for specific performance is asked to deposit sale consideration within fixed time that time cannot further be extended. A. I. R. 1930 Pat. 279=126 Ind. Cas. 910; see also 3 L. W. 29=19 M. L. T. 137=32 Ind. Cas. 401; 12 P. L. T. 249=A. I. R. 1930 Rang. 279=126 Ind. Cas. 910. Time fixed by a pre-emption decree, for paying purchase money cannot be extended either under s. 148 or s. 151, C. P. Code. 64 Ind. Cas. 242; A. I. R. 1923 Lah. 162=71 Ind. Cas. 35; A. I. R. 1924 Lah. 357=73 Ind. Cas. 891; A. I. R. 1928 Oudh. 492=5 O. W. N. 890=114 Ind. Cas. 500; *contra*; 1 P. L. J. 92=2 Pat. L. W. 400=34 Ind. Cas. 88. Jurisdiction under s. 148 is limited to cases where time is fixed by Court, otherwise than by its decree in a suit. But once an appeal is preferred from the decree the Appellate Court has jurisdiction to extend the time though not

under s. 148 but under the provisions of r. 32 of Order XLI, by varying the decree of the Court of first instance in that behalf. A. I. R. 1928 Oudh 32=2 Luck. 425=4 O.W.N. 252=101 Ind. Cas. 258. Where decree finally settles the rights of the parties, the Court cannot extend time so as to interfere with the rights of the parties. A. I. R. 1929 All. 666=(1929) A. L. J. 968=118 Ind. Cas. 591. Time fixed by a decree which has become final between the parties cannot be extended where the effect is to alter the terms of the decree. A. I. R. 1924 Oudh 330=11 O. L. J. 119=78 Ind. Cas. 387; see also A. I. R. 1923 Lah. 372=73 Ind. Cas. 922 (40 A. relied on); A. I. R. 1921 Lah. 6=3 Lah. L. J. 310 (F. B.)=67 Ind. Cas. 770; 9 O. L. J. 53=66 Ind. Cas. 273; A. I. R. 1922 Oudh 131=25 O. C. 74=66 Ind. Cas. 205; 7 O. L. J. 378=23 O. C. 254=57 Ind. Cas. 488; 57 Ind. Cas. 16=18 A. L. J. 826. The test to determine whether power exists to extend time is whether the proceeding in which time was originally granted is still pending or not. A. I. R. 1928 Mad. 154=33 M. L. J. 494=26 L. W. 33=39 M. L. T. 146=105 Ind. Cas. 124. Under ss. 148 and 149, C. P. Code read together, it is always open to the Court to extend the time for the payment of deficit Court-fee even after the expiry of the time originally fixed for payment and the Court has power to extend the time in such circumstances even after passing a decree when the direction as to payment of Court-fee is not incorporated in it. A. I. R. 1934 Lah. 537=35 P. L. R. 459=149 Ind. Cas. 56.

Where a compromise decree contains independent and separately enforceable terms the fact of parties failing to perform their respective obligations does not debar one party to enforce the other to perform his obligation in execution proceedings and any time fixed by the decree can be enhanced. A. I. R. 1929 Nag. 164=25 N. L. R. 110=116 Ind. Cas. 651. But where in proceedings by the judgment-debtor to set aside an execution sale, a compromise is made that on payment of the decretal amount within a fixed time the sale shall be cancelled, which upon failure the sale shall stand confirmed, the Court has no power to extend the time fixed for payment. A. I. R. 1925 Pat. 691=6 P. L. T. 510=88 Ind. Cas. 1020. Where under a compromise decree payment of the decretal amount, is to be made within certain time the Court can extend the time if it thinks that time is not of the essence of the contract, and no revision lies from such an order extending time. A. I. R. 1924 Pat. 387=2 Pat. 906=5 P. L. T. 401=82 Ind. Cas. 805; see also A. I. R. 1923 Nag. 88=71 Ind. Cas. 421. When an order provides that the suit would be dismissed if money is not paid within certain time further order by the Court is necessary before the dismissal of the suit, and on application for extension of time for making the payment, it is open to Court to grant the prayer. But if the order states that on default of payment the suit will stand dismissed time cannot be extended. A. I. R. 1922 Cal. 320=48 C. 922=65 Ind. Cas. 481; see also 37 M. L. J. 695=11 L. W. 25=54 Ind. Cas. 451; 23 M. L. T. 7=42 Ind. Cas. 561; 15 A. L. J. 511=42 Ind. Cas. 613. In the absence of negligence or laches time for payment of Court-fee can be extended if there is sufficient cause for the delay. A. I. R. 1924 Pat. 663=3 Pat. 337=6 P. L. T. 151=80 Ind. Cas. 1030; A. I. R. 1922 Cal. 234=26 C. W. N. 391=70 Ind. Cas. 43. Time for deposit of printing charges under r. 13 of Oudh Rule of Practice cannot be extended under s. 148. 22 O. C. 13=50 Ind. Cas. 789. Executing Court cannot extend time fixed for payment of decretal amount. 49 Ind. Cas. 840=15 N. L. R. 39; A. I. R. 1923 Nag. 210=19 N. L. R. 8=71 Ind. Cas. 401; A. I. R. 1923 Oudh 16=72 Ind. Cas. 879; A. I. R. 1925 Pat. 153=80 Ind. Cas. 574.

In the absence of a very strong case the appellate Court must not interfere with trial Court's discretion used under s. 148 or s. 149. A. I. R. 1925 Pat. 299=6 P. L. T. 4=3 Pat. L. R. 22=4 Pat. 190=85 Ind. Cas. 172. Where an appeal is to be accepted only on payment of costs by appellant and he does not pay in time the Court can extend the time limited in the order for payment either under s. 148 or 115. A. I. R. 1925 Pat. 153=80 Ind. Cas. 575. Where an order setting aside an *ex parte* decree is passed on condition of paying damages within certain time the Court can extend time. A. I. R. 1924 Lah. 222=73 Ind. Cas. 648. Where terms fixing time within which Court-fee should be paid are embodied in decree directing that the suit should stand dismissed in default of payment even the Court which passed the decree has no jurisdiction to extend the time. 40A. 579=16 A. L. J. 625=47 Ind. Cas. 4; A. I. R. 1931 All. 318=129 Ind. Cas. 732. This section does not empower Court to grant extension of time for doing an act prescribed by the Provincial Small Cause Courts Act. 1 P.L.T. 323=56 Ind. Cas. 810.

Where order rejecting plaint is set aside in review, Court can extend time for payment of the deficit Court-fee if the plaint is originally filed within the period of limitation the suit was not barred. A. I. R. 1922 Cal. 234=26 C. W. N. 491=69 Ind. Cas. 43. In matters to which the rules of limitation apply, the Court can extend time after a proper judicial consideration of the cause shown under s. 5 or fraud established under s. 18 of the Limitation Act. 4 Pat. L. J. 428=52 Ind. Cas. 439. Where time for payment is fixed by decree of first Court and the decree is confirmed on appeal, time runs from date of appellate decree though it does not expressly mention the time for payment. 34 C. L. J. 415=70 Ind. Cas. 6. Where time granted has expired and an application by party to excuse delay and enlarge the time is presented along with the fulfilment of the condition and the Court acts upon the matter as though it was in time it should be deemed that the Court has extended the time. 20 C. W. N. 615=34 Ind. Cas. 625. S. 148 would not authorise the Court to extend the period by which purchase money should be deposited under Order 21, rule 85 because the period is fixed by statute and not by Court. 35 C. W. N. 877. Where time is given by the appellate Court by its order of remand for production of documents the order is not final and so it can be extended by the Court under s. 148. 55 A. 326=142 Ind. Cas. 331=1933 A. L. J. 127=A. I. R. 1933 All. 262 (F.B.). This section has no application for the doing of an act by a decree passed in suit. 146 Ind. Cas. 171 ; 138 Ind. Cas. 121=1932 M. W. N. 72=35 L. W. 57=A. I. R. 1932 Mad. 223 ; A. I. R. 1934 Nag. 109.

Section 148 applies only where time is fixed for the doing of any act prescribed or allowed by the Code. 146 Ind. Cas. 171 ; see also 145 Ind. Cas. 191=A. I. R. 1933 All. 157 ; 38 L. W. 201=A. I. R. 1933 Mad. 563=143 Ind. Cas. 903=65 M.L.J. 538 ; 144 Ind. Cas. 129=A. I. R. 1933 All. 261 ; 33 P. L. R. 549=A. I. R. 1932 Lah. 235=137 Ind. Cas. 76 ; 36 C. W. N. 869=140 Ind. Cas. 373 ; 1932 M. W. N. 655.

This section has no application where time is fixed by the Court. A. I. R. 1933 Rang. 8. When mistake in payment of Court-fee stamp is not *bona fide* extension of time cannot be granted. A. I. R. 1934 Lah. 424. Limitation under Art. 166 of the Limitation Act cannot be extended. A. I. R. 1934 Pesh. 25.

**Appeal.**—Order under s. 148 is not a decree and is not appealable under s. 104. A. I. R. 1923 Lah. 162=71 Ind. Cas. 35 ; A. I. R. 1935 Rang. 500. A revision lies against an order dismissing application for extension of time fixed for payment under the terms of a decree. A. I. R. 1925 Oudh 530=11 O. L. J. 119=78 Ind. Cas. 387.

**149. [New.]** Where the whole or any part of any fee prescribed for

any document by the law for the time being in  
 Power to make up deficiency of Court-fees. force relating to Court-fees has not been paid,  
 the Court may, in its discretion, at any stage,  
 allow the person, by whom such fee is payable, to pay the whole or part, as  
 the case may be, of such Court-fee ; and upon such payment the document,  
 in respect of which such fee is payable, shall have the same force and effect  
 as if such fee had been paid in the first instance.

**Scope.**—Time can be granted at any stage for payment of deficit Court-fee. Court may therefore grant time before or after registration of the plaint and even after the expiry of the period of limitation. A. I. R. 1926 Nag. 156=89 Ind. Cas. 419. The discretion to give time for payment of Court-fee at any stage means a stage of judicial proceedings and not after a final decree has been passed and the Court is divested itself of jurisdiction. A. I. R. 1931 All. 138=129 Ind. Cas. 732. Discretion under s. 149 can be exercised at any stage in the case and in respect of whole or part of any prescribed fee. A. I. R. 1929 P. C. 147=31 Bom. L. R. 841=33 C. W. N. 781=56 L. A. 232=50 C. L. J. 39=57 M. L. J. 281=10 Lah. 737=(1929) M. W. N. 818=31 P. L. R. 7 (P. C.)=117 Ind. Cas. 493 ; see also 16 Pat. L. T. 385=A. I. R. 1935 Pat. 201=156 Ind. Cas. 405 ; A. I. R. 1935 Oudh 231=1935 O. W. N. 162 ; A. I. R. 1935 Lah. 448 ; A. I. R. 1935 Mad. 878=1935 M. W. N. 863 ; 62 C. 711. In the absence of *bona fide* mistake about Court-fee and where the omission to pay the full amount is deliberate, time to make up deficiency cannot be granted. A. I. R. 1923 Lah. 309=75 Ind. Cas. 667 ; 1 Lah. 234=3 Lah. L. J. 370=57 Ind. Cas. 215 ; A. I. R. 1922 Lah. 440=67 Ind. Cas. 106 ; 62 P. L. R. 1919=53 Ind. Cas. 256 ; A. I. R. 1923 All. 629=80 Ind. Cas. 251 ; 59 C. 388=138 Ind. Cas. 643=A. I. R. 1932 Cal. 482. Where the deficiency in Court-fee was pointed out to the

party at an early stage but he made no attempt to make it good, no time can be granted at the time of hearing. 138 Ind. Cas. 738=33 P. L. R. 187. Under this section the Court has a discretion to allow the plaintiff to pay the deficit Court-fee on an insufficiently stamped plaint even after the expiry of the period of limitation prescribed for filing the suit. I. R. 1932 Lah. 635. When once the Court has allowed and accepted payment of deficit Court-fee on a plaint or on a Memorandum of Appeal no further question of limitation arises. 133 Ind. Cas. 122=I. R. 1931 Lah. 746. 14 Lah. 312=145 Ind. Cas. 809=34 P. L. R. 274=A. I. R. 1932 Lah. 598; A. I. R. 1932 Lah. 21=133 Ind. Cas. 122; I. R. 1932 Lah. 635; but see 37 C.W.N. 779=A.I.R. 1933 Cal. 796=146 Ind. Cas. 159. Where within the time allowed the proper Court-fee and printing-fee are paid up, the document on which the Court-fee is so made up must be taken to date back to the date on which it was originally presented. A. I. R. 1936 Lah. 564. This section gives wide and unfettered discretion to the Court to accept Court-fees at any stage, and if the Court receives the Court-fee after the expiry of the period of limitation, the instrument is validated retrospectively as from the date of its presentation. A. I. R. 1936 Oudh 340=163 Ind. Cas. 770; see also 38 P. L. R. 445. Where the Court passed a decree that the plaintiff's suit would be decreed on payment of certain Court-fees within a time fixed by the decree and also directed that in default the suit would stand dismissed but before expiry of the period fixed, on application by the plaintiff the Court extended the time for payment of the Court-fees: *Held* that under s. 149 of the C. P. Code, the Court had jurisdiction to do so. A. I. R. 1936 Cal. 245=162 Ind. Cas. 522=63 C. L. J. 591=40 C. W. N. 758. After rejection of plaint for failure to pay proper Court-fee within prescribed time the Court has power to restore the suit on payment of proper Court-fee. A. I. R. 1935 All. 985=1935 A. L. J. 1127=159 Ind. Cas. 630. The power to allow deficiency of Court-fee to be made up is not confined to the Court receiving the insufficiently stamped document. 13 Lah. L. T. 31. Where the Court-fee payable on a memorandum of objections to an award has not been paid through inadvertence, owing to the *bona fide* mistake of the objector's counsel but the requisite Court-fee is paid at the earliest opportunity, the Court should, under s. 149, Civil Procedure Code accept the Court-fee and should not dismiss the objections as not properly stamped. A.I.R. 1937 Lah. 276. For granting permission to pay Court-fees under s. 149, it is essential that there should be a pending proceeding before the Court. A.I.R. 1937 Lah. 151. Where the plaintiff has obtained to pay deficient Court-fees after period of limitation on a false pretence, the Court has power to review its order granting time under s. 149 and reject the plaint as barred by limitation. A. I. R. 1937 Nag. 87. Payment of deficient Court-fees at the instance of a Court not authorized to pass such order under s. 149, also save limitation. A. I. R. 1937 Lah. 392. Section 8 of the Court-fees Act. relating to appeals in respect of compensation money being quite clear, any mistake in not paying Court-fee could not be regarded as *bona fide* and therefore time could not be granted for making up the deficiency. 32 P.L.R. 251=A.I.R. (1931). L. 343. A Court before which an insufficiently stamped appeal is filed in time has power under s. 149, C. P. Code to accept it on the deficiency being made good, even if it was made after expiry of limitation. A. L. R. 1934 All. 72=1933 A. L. J. 1357=146 Ind. Cas. 753. Section 149 does not speak of rejection but only of admission and it is not easy to see how read with order 7, rule 11 it can be said to confer unlimited power of rejection. 1932 M. W. N. 104.

Unless there is satisfactory explanation of the mistake, any extension will not be granted for making up deficiency on Memorandum of Appeal. 3 Lah. L. J. 156=67 Ind. Cas. 130. Before granting permission to deposit deficit Court-fee reason for not filing the entire Court-fee in the first instance must be considered. 66 Ind. Cas. 493.

Where an insufficiently stamped plaint is filed within limitation the suit is deemed to have been instituted on the date of filing of plaint though the deficiency is made good after limitation. 1 P. L. J. 420=3 P. L. W. 51=37 Ind. Cas. 507. Where Court-fee cannot definitely be ascertained until record is received or there is doubt as to the amount time may be extended, but not where it is deliberately not paid fully. 3 Pat. L. J. 74=5 Pat. L. W. 18=42 Ind. Cas. 675; A. I. R. 1924 Lah. 325=69 Ind. Cas. 196; 71 Ind. Cas. 737=A. I. R. 1923 Lah. 135; 73 Ind. Cas. 788; 72 Ind. Cas. 879=A. I. R. 1923 Oudh 16; A. I. R. 1929 Pat. 731=8 Pat. 906=10 P. L. T. 622=120 I. C. 313. A case of mistake in valuation is pre-eminently a case where discretion under s. 149 C. P. Code should be used. A. I. R. 1929 P. C. 147=31 Bom. L. R. 841; 33 C. W. N. 781=56 I. A. 232=50 C. L. J. 39=30 L. W. 104=57 M. L. J. 281=

10 Lah. 737=31 P. L. R. 7 (P. C.)=117 Ind. Cas. 493; A. I. R. 1929 Nag. 294=119 Ind. Cas. 700; 123 Ind. Cas. 527=A. I. R. 1929 Lah. 784. Inability of a party to raise funds is not ordinarily a sufficient ground which would entitle the Court to exercise its discretion under s. 149 and to permit payment of the deficit Court-fees. But such inability may be a ground under special conditions. 40 C. W. N. 1294; A. I. R. 1935 Rang. 336=13 Rang. 50=159 Ind. Cas. 468; see also 38 C. W. N. 650=6 I. C. 663=A. I. R. 1934 Cal. 559.

Ignorance of law or poverty is not an adequate legal ground for extension and no extension should be granted when insufficiently stamped Memorandum of Appeal is re-filed. 3 Lah. L. J. 237=67 Ind. Cas. 901; see also 8 P. L. R. 1919=37 P. W. R. 1919=49 Ind. Cas. 871. Where Court-fee is paid within time allowed, the Memorandum of Appeal has the same force and effect as if the Court-fee had been paid in the first instance and its validity cannot be challenged on the ground of limitation. A. I. R. 1922 Lah. 225=3 Lah. 35=26 P. W. R. 1922=65 Ind. Cas. 741. The same rule is applicable in the case of plaint as well. 5 P. L. J. 554=1 P. L. T. 544=58 Ind. Cas. 216. But to avail the terms of s. 149, the permission to deposit deficit Court-fee must be given after considering the circumstances and reasons for not filing the entire Court-fee in the first instance. 60 Ind. Cas. 493.

Under Order VII, rule II, clause (c) read with section 149 empowers a Court to allow plaintiff further time to make up the deficiency and if such deficiency is made good within the prescribed time the fact of limitation expressing in meantime could not affect the suit. A. I. R. 1923 All. 538=21 A. L. J. 387=45 A. 518=74 Ind. Cas. 358; A. I. R. 1922 Pat. 56=3 P. L. T. 142=70 Ind. Cas. 372. Where deficiency in stamp for a Memorandum of Appeal is brought to the notice of appellant but is still not made up till long after the appeal is time-barred benefit of s. 149, C. P. Code, cannot be given. 21 P. W. R. 1921=59 Ind. Cas. 689; A. I. R. 1921 Lah. 371=26 P. L. R. 1921=59 Ind. Cas. 667. Where discretion as regards granting time is not exercised and the Memorandum of Appeal is rejected the order of rejection should be set aside. A. I. R. 1923 All. 349=21 A. L. J. 333=74 Ind. Cas. 757. An appeal cannot be rejected on the ground that requisite Court-fee was not paid without calling upon appellant to make up deficiencies or exercising any discretion in the matter. *Ibid.*

Deficiency cannot be allowed to be made up on the day of hearing in the absence of some reason for exercise of discretion and a *bona fide* mistake. 44 Ind. Cas. 398. Where deficiency in appeal filed within time, is due to a *bona fide* mistake of pleader, who on discovering his mistake makes it good after expiry of the period allowed for appeal, discretion under s. 149 might be exercised. 10 P. R. 1919=49 Ind. Cas. 1081. Where the amount of Court-fee payable is doubtful and the party had a reasonable cause for not paying the requisite Court-fee the case is a fit one for extending time for making good the deficiency. A. I. R. 1930 Lah. 24=113 Ind. Cas. 270. Where an error of the Court misleads party and the deficiency in the Court fee is due to a *bona fide* mistake on his part he is entitled to benefit of s. 149. A. I. R. 1931 Lah. 509=92 Ind. Cas. 319. Where plaint is in time and the deficiency is made up within time allowed by the Court, but after the expiry of the period of limitation, the suit is not time-barred. A. I. R. 1926 Nag. 156=89 Ind. Cas. 419. Where the deficiency in an insufficiently stamped appeal is made good after the expiry of the limitation but the omission to pay proper Court-fee is unintentional and a *bona fide* mistake has been committed, the appeal should not be dismissed merely for such an omission. A. I. R. 1925 Lah. 246=6 Lah. L. J. 506=84 Ind. Cas. 946. Where deficit Court-fee is accepted after time fixed for payment and plaint is registered, it may be inferred that the Court condones the delay and grant extension as it is in its discretion to do under s. 148 or s. 149 for it might have rejected the plaint under Order VII, rule 11. A. I. R. 1925 Pat. 299=4 P. 190=3 P. L. T. 22=6 P. L. R. 4=85 Ind. Cas. 172; see also A. I. R. 1926 Mad. 676=51 M. L. J. 90=(1926) M. W. N. 341=95 Ind. Cas. 439.

Time can be allowed under Art. 158, Limitation Act for supplying Court-fee stamp on application to set aside an award, can be extended. A. I. R. 1928 Sind 87=23 S. L. R. 91=107 Ind. Cas. 223. Court can refuse to fix a time within which the deficit Court-fee shall be paid. It has discretion to extend the time already fixed. Section 149 does not give the Court any discretion to refuse to grant the time while Order VII, rule 11 says it shall grant. A. I. R. 1926 Mad. 675=1926 M. W. N. 341=51 M. L. J. 50=95 Ind. Cas. 439. It is an abuse of the powers of the Court to refuse the deficit Court-fee where the delay is that of one day. A. I. R. 1927

**Oudh 507=1 Luck. 574=104 Ind. Cas. 527.** Where indulgence under s. 149 in case of an appeal insufficiently stamped is refused the appellant is entitled to have his appeal heard in regard to his claim for which Court-fee has been paid and in so far as it is within time, whether or not such a request is made to the Court by the appellant. A. I. R. 1931 Lah. 237=32 P. L. R. 1929=131 Ind. Cas. 297.

**Leave to sue as pauper.**—Section 149 has no application to validate subsequent payment of Court-fees in case of an application for leave to sue as a pauper. A. I. R. 1929 Nag. 268=12 N. L. J. 69=118 Ind. Cas. 687; A. I. R. 1933 Nag. 237= A. L. R. 1933 Nag. 282. Discretion under s. 149 to accept the plaint in a Court and treat the suit as having been instituted on date of application to sue as a pauper should not be too widely used by Court in favour of a plaintiff who fails to establish his right to sue as a pauper. A. I. R. 1929 Pat. 637=11 P. L. T. 55=118 Ind. Cas. 329. On dismissal of an application for leave to sue as pauper the plaint still remains and may be validated by payment of Court-fees within time to be fixed by Court which lies in the discretion of the Court to do so. A. I. R. 1924 Mad. 118=18 L. W. 451=33 M. L. T. 18=46 M. L. J. 254=76 Ind. Cas. 767. But where such application is fraudulent, such discretion should be exercised. A. I. R. 1923 Rang. 256=74 Ind. Cas. 835. While dismissing application for leave to appeal as pauper, time can be allowed to pay requisite Court-fee and if paid within time appeal will be admitted, 40 M. 687=31 M. L. J. 269; see also 65 Ind. Cas. 741=26 P. W. R. 1922=3 Lah. 35. Where an application for permission to appeal as a pauper was filed accompanied with a Memorandum of Appeal as required by order 44, C. P. Code, and after the rejection of the application for permission to appeal as a pauper the appellant filed an application along with a Court-fee stamp, within limitation, held that the effect of the payment of s. 149, C. P. Code was that the appeal should be deemed to have been instituted on the date of which the Memorandum of Appeal was originally filed and that the Court-fee payable was according to the scale in force on that date. 9 O. W. N. 855=140 Ind. Cas. 190=A. I. R. 1932 Oudh 343; see also A. I. R. 1936 Pesh. 69; 62 C. 711; but see A. I. R. 1937 Rang. 185.

**Appeal and revision.**—Propriety of the exercise of discretion in granting time under this section cannot be challenged by the appellate Court. A. I. R. 1925 Pat. 299=(1924) Pat. 355=6 F. L. T. 4=85 Ind. Cas. 172; 89 Ind. Cas. 419=A. I. R. 1926 Nag. 156. An order demanding additional Court-fees is open to revision. A. I. R. 1927 Nag. 256=10 N. L. J. 106=103 Ind. Cas. 268. Where deficit Court-fees are accepted after the time fixed for its payment though without specifically excusing the delay, review lies on proper and legal grounds. A. I. R. 1926 Mad. 676=(1926) M. W. N. 341=51 M. L. J. 90=95 Ind. Cas. 439. If order under s. 149 is not objected to, when made or in Court making it appellate Court cannot go into the question as to whether the lower Court exercised its discretion in making orders. 2 U. P. L. R. 1919=56 Ind. Cas. 47.

**150. [New.]** Save as otherwise provided, where the business of any Court is transferred to any other Court, the Court to which the business is so transferred shall have the same powers and shall perform the same duties as those respectively conferred and imposed by or under this Code upon the Court from which the business was so transferred.

**Scope.**—This section applies only to cases when certain specified business has been actually transferred by order of a competent Court. A. I. R. 1928 Mad. 746=28 L. W. 885=114 Ind. Cas. 545 [37 M. 462, held overruled by 42 M. 481 (F. B.)]. This section applies only to cases of transfer from a Court and not to cases of Court which has ceased to exist. A. I. R. 1927 Mad. 627=50 M. 882=52 M. L. J. 605=38 M. L. T. 351=25 L. W. 671=103 Ind. Cas. 245. The word "transfer" in this section includes cases where the District Judge fixes jurisdiction of the Court under the Civil Courts Act and transfers business within a certain area to it. A. I. R. 1923 Mad. 92=(1922) M. W. N. 743=16 L. W. 748=43 M. L. J. 713=46 M. 63=86 Ind. Cas. 650. Assignment of business under s. 13(2) of the Bengal and Assam Civil Courts Act from one Judge to another is not transferred within the meaning of s. 150 and the latter Judge cannot entertain application to execute decree of former. A. I. R. 1922 Cal. 41=26 C. W. N. 216=70 Ind. Cas. 210. Where a Court passing decree is abolished Court competent to execute the decree is that to which the

business is transferred. A. I. R. 1929 All. 677=(1929) A. L. J. 976=118 Ind. Cas. 670; see also A. I. R. 1921 Pat. 152=2 P. L. T. 374=6 P. L. J. 304=62 Ind. Cas. 487. An application to set aside an *ex parte* decree passed by a Court can be entertained by Court to which whole business is transferred. A. I. R. 1922 Mad. 10=46 M. L. J. 42 M. L. J. 344=15 L. W. 458=31 M. L. T. 79=65 Ind. Cas. 727. Section 150 is intended to apply not merely to cases when there was a judicial transfer of specific business but that the section was in terms wide enough to authorise the Court to which the area has been transferred (including a *fortiori* the business not directly depending on territorial jurisdiction) to entertain in the first instance any application which might have been made to the Court which passed the decree. 34 L. W. 271=1931 M. W. N. 842=61 M. L. J. 307. "*Sadasiv Ayar J.* in 31 M. L. J. 22 said that the transfer of business referred to in s. 150 can be only by a notification effecting change of jurisdiction and not transfer of business by specific orders. In this extreme view he was not supported by latter decisions which hold that s. 150 applies to both kinds of transfer". 55 M. 801=62 M. L. J. 687=35 L. W. 742=137 Ind. Cas. 305=A. I. R. 1932 Mad. 418 (F. B.).

**Effect of transfer of territorial jurisdiction pending suit.**—Section 150, C. P. Code refers to the change of the territorial limits of a Court's jurisdiction by restitution or by special order and not to a mere distribution of work among Courts exercising the same jurisdiction. 61 C. L. J. 543. Where a suit is pending a transfer of territorial jurisdiction will not *per se* result in a transfer of the suit and a transfer order is technically necessary. A. I. R. 1930 Mad. 528=53 M. 378=59 M. L. J. 102=32 L. W. 329=113 Ind. Cas. 160. Where after attachment of property and order for sale by Court passing a money decree, the property is transferred to the local limits of the jurisdiction of another Court, the new Court can entertain an application for execution by sale of property. A. I. R. 1929 Mad. 852=30 L. W. 649=125 Ind. Cas. 90. Transfer of territorial jurisdiction over properties in mortgage decree will not confer jurisdiction to entertain an application for unrealised balance after sale of the properties within its jurisdiction, unless decree is transferred under Order XXI, rule 6 or business of the Court where execution was last pending is transferred. 38 Ind. Cas. 152. Where an injunction order under Order 39, rule, 1, C. P. Code, is passed by a Court and the local jurisdiction as well as the suit in case are transferred to another Court, an application for punishing the opposite party for contempt for disobeying the injunction can be entertained by the latter Court. A. I. R. 1923 Mad. 92=43 M. L. J. 713=(1922) M. W. N. 743=86 Ind. Cas. 650=46 M. 83. A temporary sub-court having no defined local jurisdiction is not empowered to execute decree passed by it in suit transferred to it by District Court by attachment of properties, situate in places not subjected to its jurisdiction but should transfer the decree for execution to the Court having jurisdiction over the property. 31 M. L. J. 22=35 Ind. Cas. 295.

**151. [New.]** Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

**Scope of the section.**—Section 151, C. P. Code, does not confer new power on the Court. It simply saves the inherent power of the Court to make such orders as may be necessary for the ends of justice. 62 C. L. J. 298=A. I. R. 1935 Cal. 707; A. I. R. 1935 Pesh. 151=158 Ind. Cas. 971; A. I. R. 1935 Sind 214; 164 Ind. Cas. 200=1936 A. L. J. 736=A. I. R. 1936 All. 555; A. I. R. 1934 All. 250=148 Ind. Cas. 496; A. I. R. 1935 All. 599 (F. B.)=156 Ind. Cas. 806. The Court is bound to exercise its inherent powers cautiously and with circumspection, and it is not at liberty to do so where the order proposed would contravene any principle of common law or equity, or would affect a matter in respect of which provision has been made by statute either expressly according to the true indictment thereof. A. I. R. 1936 Rang. 208=163 Ind. Cas. 340=14 Rang. 173. In order to get equitable relief provided in this section the applicant must come with clean hands. A. I. R. 1936 Lah. 567. The inherent power must not be exercised where the Code contains specific provisions that would meet requirements of case and such provisions should be followed. A. I. R. 1929 Lah. 694=119 Ind. Cas. 488; see also A. I. R. 1928 Lah. 772=112 Ind. Cas. 295. Power under this section is to be used only when there is no other remedy. Courts are not enabled to evade or ignore provisions of law as to procedure. A. I. R. 1923 All. 603

= 21 A. L. J. 447 = 73 Ind. Cas. 491 ; 73 P. L. R. 1916 = 105 P. W. R. 1916 = 35 Ind. Cas. 633 ; A. I. R. 1934 All. 442 ; A. I. R. 1934 Mad. 199. As no Code can be exhaustive of procedure for exercising every power, which a Court of justice is competent to exercise, s. 151 has been enacted and should be availed of only where power which has been exercised has not been provided for in the Code. A. I. R. 1921 Sind 38 = 15 S. L. R. 61 = 63 Ind. Cas. 131. Courts have therefore always acted upon an assumption of their being possessed of an inherent power to act *ex debito justitiæ* and to do that real and substantial justice for the administration of which alone they exist. 9 O. W. N. 803 = 140 Ind. Cas. 412 = A. I. R. 1932 Oudh 293 ; 26 S. L. R. 395 ; A. I. R. 1931 All. 427 = 132 Ind. Cas. 562. The exercise of the inherent power under this section is subject to the rule that it must not be invoked where the Code contains specific provisions which would meet the necessities of the case. This section does not become applicable in every case in which there is no other remedy. It is usually applied at the instance of the party who has a specific remedy under the Code but has neglected to avail himself of it ; nor can the law of limitation be ignored by taking recourse to the section. A. L. R. 1933 Pat. 449 = A. I. R. 1933 P. 132 = 144 Ind. Cas. 147 ; see also A. L. R. 1933 Lah. 747 = A. I. R. 1933 Lah. 266 ; A. L. R. 1933 Lah. 598 = 34 P. L. R. 88 = A. I. R. 1933 Lah. 169 = 141 Ind. Cas. 188 ; 69 Ind. Cas. 718 = 40 P. L. R. 1922 ; 34 P. L. R. 51 = A. I. R. 1933 Lah. 73 = 140 Ind. Cas. 843 ; 34 P. L. R. 414 = A. I. R. 1933 Lah. 229 = 142 Ind. Cas. 654 ; A. I. R. 1933 Pat. 582 ; 55 A. 548 = 144 Ind. Cas. 731 = A. I. R. 1933 A. 382 ; 1931 M. W. N. 710 = A. I. R. 1931 M. 791 ; 35 I. C. 633 = 73 P. L. R. 1916.

This section empowers the Court to pass such orders as it deems necessary for the proper administration of justice and to prevent abuse of the process of the Court. A. I. R. 1925 Oudh 418 = 12 O. L. J. 246 = 87 Ind. Cas. 987 ; 84 Ind. Cas. 134 = A. I. R. 1925 Mad. 42 = 48 M. 494 = 20 L. W. 175. A reduction *ad absurdum* can be avoided by resort to s. 151. 170 P. W. R. 1916 = 37 Ind. Cas. 382. Exercise of powers conferred by s. 151 is merely discretionary. A. I. R. 1923 Lah. 506 = 75 Ind. Cas. 487. Court has no inherent power to pass order in respect of suit not pending before it. Court trying subsequent suit cannot pass order in respect of previous suit. A. I. R. 1929 Mad. 631 = 91 Ind. Cas. 519. Court has no inherent jurisdiction to set aside order of predecessor in office or touch his judgment except that he can correct clerical or arithmetical mistakes or error by slip or omission or if there are grounds he can review it. A. I. R. 1924 Pat. 136 = 1 Pat. L. R. 155 = 74 Ind. Cas. 110. Application under s. 151 can be regarded as one for review. A. I. R. 1922 Mad. 446 = 31 M. L. T. 132 (H. C.) = 16 L. W. 440 = 43 M. L. J. 290 = (1922) M. W. N. 495 = 70 Ind. Cas. 425. It is the duty of the Court to prevent injustice and abuse of its own powers. A. I. R. 1923 Nag. 182 = 19 N. L. R. 36 = 6 N. L. J. 100 = 71 Ind. Cas. 436. To relieve party from result of his own mistakes or to enable him to evade law of limitation, the inherent power cannot be revoked. A. I. R. 1922 Mad. 417 = 43 M. L. J. 184 = 16 L. W. 178 = (1922) M. W. N. 514 = 30 M. L. T. (H. C.) 135 = 70 Ind. Cas. 743. This section cannot be so used as to override the provisions of the law of limitation. A. I. R. 1922 Lah. 266 = 66 Ind. Cas. 270. This section empowers Courts to deal with their own decrees and orders. 42 B. 363 = 20 Bom. L. R. 348 = 45 Ind. Cas. 552. All trial Courts including Revenue Courts possess power given by s. 151. 46 Ind. Cas. 621. Sections 151, 152 and 153 are equally applicable both to the Court of first instance and Courts with appellate jurisdiction and appellate Court ought to take step by way of amendment which were clearly open to the first or other lower Court. 38 A. 398 = 34 Ind. Cas. 79. The above sections have no application to decree which are in conformity with judgment. 34 Ind. Cas. 787. Where final decree omitted to give relief of *mesne profits* as amended by the preliminary decree and an appeal was not filed therefrom, review application from it being rejected, s. 151 cannot be resorted to for the purpose of granting the suit relief. A. I. R. 1925 Mad. 886 = 48 M. L. J. 512 = 88 Ind. Cas. 94. But a plaint cannot be rejected even under s. 151 in case not mentioned by Order VII, rule 11. A. I. R. 1924 Oudh 413 = 11 O. L. J. 260 = 83 Ind. Cas. 778. Damages or interest under s. 151 cannot be awarded when not decreed. A. I. R. 1924 Rang. 275 = 3 Bur. L. J. 58 = 82 Ind. Cas. 427. Insolvency Courts possess powers under this section. 15 Lah. 698.

High Court can under s. 151 pass such orders and give such directions as it finds necessary in the circumstances of a particular case, pending appeal to the Privy Council. A. I. R. 1931 Cal. 79 = 34 C. W. N. 631 = 129 Ind. Cas. 833. Memorandum of Appeal can be changed into revision petition by the High Court. A. I. R. 1921



Mad. 612=41 M. L. J. 54=14 L. W. 85=63 Ind. Cas. 730; see also 43 Ind. Cas. 779. It is the duty of the Court to invoke s. 151 whenever justice so demands, even in absence of precedent. A. I. R. 1924 Bom. 90=25 Bom. L. R. 713=82 Ind. Cas. 852. Re-opening of a decision of fact arrived at upon evidence or in absence of it, cannot be allowed except under provisions for review of judgment. A. I. R. 1929 Mad. 404=122 Ind. Cas. 519. Court is not empowered either by s. 148 or s. 151 to meddle with its final decree. A. I. R. 1926 Mad. 1039=97 Ind. Cas. 795=24 L. W. 443. Though Court has inherent power to recall order not perfected there is no power to recall one which has been perfected. A successor cannot therefore recall the perfected order of his predecessor. A. I. R. 1922 Pat. 204=69 Ind. Cas. 742; see also A. I. R. 1927 Cal 57=97 Ind. Cas. 697. Questions cutting at the root of subject-matter under dispute can be taken cognizance of by every Court under the inherent power. A. I. R. 1927 Mad. 143=98 Ind. Cas. 280. Discretion conferred upon by s. 151 should not be exercised unless a strong case is made out for the same. A. I. R. 1927 Cal. 420=100 Ind. Cas. 518. Court can under this section order the cancellation of order made by it under para 3 of Sch. II. A. I. R. 1925 Pat. 720=6 P. L. T. 488=86 Ind. Cas. 540. Under certain circumstances suit may be decreed even if cause of auction arises subsequent to its institution. A. I. R. 1929 Lah. 409=30 P. L. R. 306=11 Lah. 251=116 Ind. Cas. 31. Abortive proceedings can be set aside and necessary orders can be passed under this section by the High Court. A. I. R. 1924 All. 818=22 A. L. J. 29=82 Ind. Cas. 184. Under s. 151 the appellate Court has power to dispense with a copy of that part of the decree which is required to be filed under Order 41, rule 1, which is unnecessary for the purposes of the appeal. 40 C. W. N. 1298. Court has power to convert a suit into application. 165 Ind. Cas. 715=40 C. W. N. 856=A. I. R. 1936 Cal. 342.

This section does not apply to a Commissioner under the Workman's Compensation Act, who cannot exercise power under the same. A. I. R. 1930 Lah. 657=125 Ind. Cas. 637. Section 151 does not apply to every case where there is not other provision. A. I. R. 1926 Pat. 27=4 Pat. 704=7 P. L. T. 291=91 Ind. Cas. 483. A Court cannot order a thing prohibited by the statute. A. I. R. 1925 Pat. 435=4 Pat. 180=91 Ind. Cas. 213; A. I. R. 1922 Pat. 479=1 Pat. 277=65 Ind. Cas. 341. Where other remedies exist by which justice can be done this section does not apply. But it does apply where there are provisions of law leading to injustice. It can also be resorted to, to override certain provisions of law under exceptional circumstances. A. I. R. 1928 Nag. 106=106 Ind. Cas. 575; A. I. R. 1924 Lah. 70=69 Ind. Cas. 718=40 P. L. R. 1922; A. I. R. 1921 Pat. 491=2 P. L. T. 251=60 Ind. Cas. 368; A. I. R. 1923 Lah. 490=73 Ind. Cas. 136. Application of s. 151 comes in question only to prevent injustice and abuse of process of Court. 5 O. L. J. 153=46 Ind. Cas. 68; see also A. I. R. 1923 Oudh 59=25 O. C. 286=70 Ind. Cas. 278. This section applies where case is not covered by s. 144. A. I. R. 1922 Cal. 28=26 C. W. N. 408=35 C. L. J. 53=64 Ind. Cas. 864. Procedure to set aside appeal proceedings on ground that respondent was not living on date of hearing is to apply for review. Section 151 does not apply to the case. 54 Ind. Cas. 284. Order certifying adjustment of decree cannot be set aside if there is no application for review from order which is prejudicial to one party. 1 P. L. T. 663=1920 Pat. 358=5 P. L. J. 379=62 Ind. Cas. 234. Relief cannot be given under this section to a party who has neglected to avail himself of the remedy provided for in the Code. 9 O. W. N. 430=138 Ind. Cas. 149=A. I. R. 1932 Oudh 220=A. L. R. 1932 Oudh 445; 33 P. L. R. 146=136 Ind. Cas. 735=A. I. R. 1932 Lah. 238. Review application cannot be treated as an application under this section. A. L. R. 1932 Lah. 63. Court has no inherent power to arrest any person and to send him to jail forthwith for non-compliance with his order without any proper trial. 136 Ind. Cas. 367=1932 A. L. J. 221=A. I. R. 1932 All. 524. Varieties of inherent jurisdiction are well recognized and new categories cannot be invented. A. I. R. 1934 All. 585. Where the decree is according to the terms of the compromise, it cannot be amended because application for compromise cannot be accepted by other party contained additional terms. A. I. R. 1934 Lah. 399. Order passed by Court under misapprehension of facts cannot be set aside. A. I. R. 1934 All. 287. This section cannot be used for remedying effects of negligence. A. I. R. 1934 All. 250. Obvious infringement by subordinate Court can be set right in interest of justice. A. I. R. 1934 Lah. 156. Where in a case of attachment of decree, proceeds are paid to one of the decree-holders before satisfaction of decree of attaching decree-holder, Court can order refund under s. 151. A. I. R. 1934 Lah. 142.

**Orders can be passed for the ends of justice.**—Orders under this section can be passed to prevent the miscarriage of justice. 38 A. 147=14 A. L. J. 1230=36 Ind. Cas. 585; A. I. R. 1922 Sind 6=6 S. L. R. 79=66 Ind. Cas. 796; A. I. R. (1922) Pat. 149=69 Ind. Cas. 200; A. I. R. 1924 Oudh 408=11 O. L. J. 227=80 Ind. Cas. 833; A. I. R. 1924 All. 818=22 A. L. J. 791=46 A. 864=82 Ind. Cas. 184; A. I. R. 1930 Lah. 20=11 Lah. L. J. 93=31 P. L. R. 375=119 Ind. Cas. 494; A. I. R. 1929 All. 743=(1929) A. L. J. 918=51 A. 1010=122 Ind. Cas. 685. But order based on wrong view that wrong procedure has been followed cannot be changed on the ground of importing justice. A. I. R. 1929 Nag. 251=12 N. L. J. 148=27 N. L. R. 102=121 Ind. Cas. 57. Even an order not appealed against in the revisional petition can be set aside under s. 151 by the High Court in order to give proper relief to the parties. 2 P. L. T. 739=64 Ind. Cas. 496. Court can exercise powers under this section in order to avoid multiplicity of suits. A. I. R. 1922 Mad. 193=42 M. L. J. 563=15 L. W. 586=(1922) M. W. N. 268=31 M. L. T. (H. C.) 35; 68 Ind. Cas. 910. High Court can interfere under this section where execution is being done manifestly at variance with the decree. 3 P. L. J. 435=48 Ind. Cas. 104. Court has inherent power under this section to remedy the injury caused to a party by dishonesty of officer of Court deputed to execute the order, by passing necessary orders. A. I. R. 1925 Mad. 1212=22 L. W. 387=91 Ind. Cas. 300. Where a minor himself bid at an auction sale but subsequently applied for not confirming the sale on the ground that he was a minor, he is competent to set aside the sale under s. 151. A. I. R. 1937 Lah. 72; see also A. I. R. 1937 Sind 101. Court has power to decide the question as to who is legal representative of deceased for the ends of justice. 11 O. W. N. 917=A. I. R. 1934 Oudh 337=150 Ind. Cas. 425. So also Court can restore possession to objections for the ends of justice. A. I. R. 1934 Pat. 683.

In spite of absence of sufficient cause for plaintiff's absence Court should use the inherent power to restore suit if claim is substantial and would be barred by limitation. A. I. R. 1924 Pat. 274=(1924) Pat. 280=4 P. L. T. 615=72 Ind. Cas. 668. Courts are given inherent power under s. 151 to go beyond the law of procedure in the interest of justice. A. I. R. 1926 All. 212=24 A. L. J. 375=48 A. 356. Outrageous valuation of a suit by the plaintiff for the purpose of getting it tried by a particular Court can be interfered with and corrected under s. 151. A. I. R. 1928 Oudh 260=107 Ind. Cas. 330. Where process of the Court has been abused by party Court has inherent power to direct it to make good loss caused by such abuse or to restore to other party benefit obtained by misleading the Court. A. I. R. 1928 Mad. 610=110 Ind. Cas. 555. When there are distinct provisions in Code, inherent power cannot be invoked. Appellate Court can order fresh local enquiry itself or send case to trial Court to have it made and decided appeal after considering result, such enquiry is necessary at appellate stage. A. I. R. 1926 Cal. 897=94 Ind. Cas. 393. In a suit to enforce contract, order under s. 151 allowing a portion of amount claimed before right to claim is established is bad. A. I. R. 1924 Pat. 69=(1923) Pat. 290=2 P. L. R. 159=5 Pat. L. T. 560=77 Ind. Cas. 718. For the ends of justice, the Court is competent to keep in abeyance the order of suspension of a pleader pending his application for obtaining leave to appeal to the Privy Council. 145 Ind. Cas. 367=(1933) A. L. J. 221=A. I. R. 1933 All. 259 (F. B.). To meet the ends of justice High Court can refuse to be bound by the finding in a remand order of a lower Court though not appealed against. A. I. R. 1929 All. 421=(1929) A. L. J. 448=51 A. 780=121 Ind. Cas. 211. Where rights are conferred by the sections of the Code and no provision is made for a particular set of facts, Courts ought to apply the provisions of the rules which are nearest in point, with such modifications as may be necessary, and not to refuse relief on the ground that the Legislature has not made provision for a particular case. 33 L. W. 359=1931 M. W. N. 48=A. I. R. 1931 Mad. 303=60 M. L. T. 628.

**Limits of exercise of powers under this section**—In the presence of specific provisions governing a particular case, this section cannot be invoked. A. I. R. 1930 Lah. 26=11 Lah. L. J. 342=31 P. L. R. 658=124 Ind. Cas. 339; A. I. R. 1930 Lah. 789=31 P. L. R. 477=12 Lah. L. J. 71=122 Ind. Cas. 102; 45 C. L. J. 557=104 Ind. Cas. 188=A. I. R. 1927 Cal. 657; A. I. R. 1926 Mad. 258=23 L. W. 85=92 Ind. Cas. 615; A. I. R. 1924 Nag. 325=78 Ind. Cas. 72; 102 Ind. Cas. 543=A. I. R. 1927 Nag. 262; 28 P. L. R. 554=103 Ind. Cas. 425=A. I. R. 1927 Lah. 622; A. I. R. 1930 Lah. 72=120 Ind. Cas. 681; A. I. R. 1927 Nag. 212=23 N. L. R. 79; 55 C. 219=47 C. L. J. 69=103 Ind. Cas. 864=A. I. R. 1929 Cal. 850; A. I. R. 1937 Lah.

416 ; A. I. R. 1937 All. 18 ; 66 M. L. J. 498 ; 59 C. L. J. 250. Where the Code provides an alternative remedy, the Court has no jurisdiction to act under s. 151 of the Code. 59 C. L. J. 218=A. I. R. 1934 Cal. 653 ; see also A. I. R. 1934 Pat. 582=152 Ind. Cas. 288 ; A. I. R. 1934 All. 624=1934 A. L. J. 560 ; 38 P. L. R. 373. The Court cannot use its inherent powers to extend the scope of a provision which places limitation on it. A. I. R. 1935 Mad. 175=41 L. W. 111=1935 M. W. N. 398=156 Ind. Cas. 110. Inherent powers of Court ought not to be exercised against the express provisions of a statute. An application which barred both by the law of limitation and by the principle of *res judicata* cannot be legally entertained or granted by a Court in exercise of its inherent powers. A. I. R. 1935 Lah. 60 ; see also 62 C. 61=156 Ind. Cas. 126=A. I. R. 1935 Cal. 336. Inherent power cannot be invoked where there is a direct statutory bar. 6 O. L. J. 55=50 Ind. Cas. 180 ; A. I. R. 1921 Oudh 46=24 O. C. 215=64 Ind. Cas. 217. Inherent powers cannot be exercised so as to contravene provisions of the Limitation Act. 1 Lah. 363=2 Lah. L. J. 249=58 Ind. Cas. 789 ; 2 U. P. L. R. Lah. 128=57 Ind. Cas. 15 ; A. I. R. 1925 Mad. 331=17 L. W. 150=71 Ind. Cas. 204 ; A. I. R. 1924 All. 658=46 A. 631=22 A. L. J. 583=79 Ind. Cas. 937 ; A. I. R. 1925 Lah. 321=26 P. L. R. 841=7 Lah. L. J. 13=86 Ind. Cas. 256. Section 151 cannot be resorted to where other remedy was open but was not taken advantage of within period of limitation. A. I. R. 1927 Nag. 197=101 Ind. Cas. 320 ; A. I. R. 1924 All. 446=46A. 144=78 Ind. Cas. 416. This section should be invoked in proper cases for administering justice. A. I. R. 1927 Cal. 534=54 C. 405=31 C. W. N. 576=103 Ind. Cas. 69 ; A. I. R. 1928 Cal. 179=47 C. L. J. 87=107 Ind. Cas. 729 ; A. I. R. 1927 Cal. 158=98 Ind. Cas. 70 ; A. I. R. 1926 Bom. 139=27 Bom. L. R. 1511 ; A. I. R. 1924 Rang. 274=3 Bur. L. J. 47=82 Ind. Cas. 418. This section cannot be invoked to do what has been expressly prohibited by the Code. A. I. R. 1925 Pat. 36=6 P. L. T. 309=84 Ind. Cas. 320=3 Pat. 778.

Court must state reasons whenever it exercises discretion vested in it by this section. A. I. R. 1926 Oudh 59=87 Ind. Cas. 438. Inherent power is not limited to ss. 151 and 152 if vested in the Court by its own constitution. A. I. R. 1925 Cal. 420=79 Ind. Cas. 586. Decision of Court in exercising inherent power should be based on general legal principles subject to special provisions in Code necessary for case. (1919) 3 U. B. R. 198=56 Ind. Cas. 255. An order made cannot be recalled under this section. A. I. R. 1924 Pat. 696=5 P. L. T. 631=79 Ind. Cas. 900. S. 158 cannot be invoked so as to perpetuate injustice on third parties. A. I. R. 1924 Nag. 91=20 N. L. R. 11=78 Ind. Cas. 601. Inherent power cannot be invoked to confer jurisdiction not otherwise possessed. A. I. R. 1923 Oudh 177=26 O. C. 10=10 O. L. J. 36. The interpretation of a provision applicable to a particular case should be based on the language used by the Legislature. A. I. R. 1924 Mad. 114=45 M. L. J. 813=18 L. W. 870=33 M. L. T. 207=47 M. 171=76 Ind. Cas. 836. Where remedy by way of review is open to plaintiff Court should not exercise inherent power to set aside its own decree. A. I. R. 1923 All. 603=21 A. L. J. 447=73 Ind. Cas. 494. In a suit for ejectment defendant cannot be ordered to give security for *mesne* profits since there is no provision made in the Code for the same. A. I. R. 1924 Oudh 11=10 O. L. J. 209=74 Ind. Cas. 335. High Court cannot interfere where an entire property worth Rs. 1700/- had been sold to satisfy a small decree of Rs. 162/- in as much as it was not possible for the Revenue Court to sell a portion of the property. 134 Ind. Cas. 697=33 Bom. L. R. 611=A. I. R. 1931 Bom. 385. In matter of furnishing security, the High Court can extend time where the lower Court did not exercise discretion. A. I. R. 1931 All. 727 (F. B.).

**Abuse of process.**—The inherent powers under this section can be used to prevent abuse of process of Court. A. I. R. 1926 All. 212=48 A. 356=24 A. L. J. 375=93 Ind. Cas. 285 ; A. I. R. 1927 Mad. 592=52 M. L. J. 670=38 M. L. J. 364=102 Ind. Cas. 396 ; A. I. R. 1924 Mad. 100=45 M. L. J. 312=(1923) M. W. N. 672=77 Ind. Cas. 12 ; A. I. R. 1928 All. 108=50 A. 335=25 A. L. J. 1082=108 Ind. Cas. 141. Where plaintiff obtains a decision on an immaterial issue in a suit which he knows, is bound to fail, and brings another suit requiring the Court to follow the *dictum* previously given, it was held that this would amount to abuse of process of the Court. A. I. R. 1923 All. 495=45 C. 466=21 A. L. J. 393=74 Ind. Cas. 656. Court purporting to prevent abuse must find what the abuse is. A. I. R. 1928 Mad. 522=1928 M. W. N. 222=54 M. L. J. 665=28 L. W. 152=109 Ind. Cas. 528. Court has inherent power to investigate whether certain property should vest in Court under s. 47 (2), Provincial Insolvency Act, 1907, so far as process of Court is abused,

and is not absolutely barred claims of third parties. A. I. R. 1921 Nag. 159=61 Ind. Cas. 589. Where Sub-Judge retired a plaint for presentation to the Munsiff who refused to entertain it as being out of his jurisdiction, the High Court can under s. 151 direct a suit to be tried when application was barred and references under Order 46, rule 1, could not lie to meet the ends of justice. A. I. R. 1925 Oudh 461=12 O. L. J. 189=2 O. W. N. 81=28 O. C. 323=85 Ind. Cas. 702. Where certain questions have been taken away from the jurisdiction of the Court, s. 151 cannot be invoked to bring them again within the jurisdiction. A. I. R. 1926 Nag. 17=88 Ind. Cas. 693. The Court can dismiss the suit if it thinks that the suit though instituted by a next friend is not in interest of the minor. A. I. R. 1924 Oudh 413=11 O. L. J. 260=83 Ind. Cas. 778. The presence of a witness during the examination of the previous witness may well be termed an abuse of the process of the Court, and therefore under s. 151, the Court has inherent power to prevent that abuse and the Court can order that such witness should not be heard as a witness. A. I. R. 1934 All. 840=152 Ind. Cas. 30=1934 A. L. J. 750.

**Decree, etc.—amendment of.**—Where no decree has been prepared in conformity with compromise petition, the aid of this section can be invoked to have a decree in accordance with compromise petition. A. I. R. 1933 Pat. 135. The Court has power to amend a decree although based on an award and to correct the accidental or clerical slips in the award itself. 140 Ind. Cas. 412=9 O. W. N. 803=A. I. R. 1932 Oudh 293. This section cannot be resorted to, for the purpose of amending decrees in execution proceedings. 3 L. W. 499=34 Ind. Cas. 787. This section can be used to amend decree only, to bring them in conformity with pleadings and not otherwise. 37 Ind. Cas. 352. Where the consent decree and *salenama* are in conformity with each other there can be no amendment under s. 151. 36 Ind. Cas. 239. A decree in conformity with judgment cannot be awarded under s. 151. A. I. R. 1927 Lah. 403=101 Ind. Cas. 142; A. I. R. 1927 Cal. 203=44 C. L. J. 441=100 Ind. Cas. 309. Latches of a party may deprive him of the remedy under this section. 109 Ind. Cas. 727=A. I. R. 1928 Nag. 149. Decree acted upon for six years cannot be allowed to be amended under s. 151. A. I. R. 1923 Nag. 109=67 Ind. Cas. 310. A decree under s. 90 of the T. P. Act not in conformity with the judgment can be amended under s. 151, so as to bring it in conformity with judgment. 2 Pat. L. W. 405=41 Ind. Cas. 206. Sections 151 and 152 cannot be invoked for the amendment of decree in execution, if amendment is allowed the act of the Court would be *ultra vires*. A. I. R. 1922 Mad. 286=15 L. W. 301=65 Ind. Cas. 710.

Amendment of decree under s. 151 can be allowed to correct accidental omission of item of mortgaged property both from plaint and decree. A. I. R. 1924 Rang. 104=74 Ind. Cas. 1020. Amendment of decree necessitated by the decision in second appeal should be granted. A. I. R. 1929 Lah. 371=11 Lah. 34=120 Ind. Cas. 176. Where there is mistake as to costs included in the decree, it is open to the aggrieved party to point out the mistake and claim its correction under s. 151. A. I. R. 1928 Lah. 800=10 Lah. L. J. 401. Decree for pre-emption money can be amended and amount due to pre-emptor from vendee on charge of property sold can be deducted for pre-emption money under Court's inherent power. 2 U. P. L. R. (I.C.) 54=54 Ind. Cas. 34. Court has inherent power to correct decree not correctly expressing what Court actually decided or intended to decide. A. I. R. 1923 Lah. 147=73 Ind. Cas. 679. Alteration to make the decree consistent can be made before it being signed. A. I. R. 1923 Mad. 392=17 L. W. 254=74 Ind. Cas. 416. High Court acting as a Court of Appeal can correct clerical errors under s. 151. A. I. R. 1923 All. 358=45 A. 53=74 Ind. Cas. 1004. Only appellate Courts can amend original decree appealed against where appeal is dismissed under Order XLI, r. 11. 95 Ind. Cas. 649; see also A. I. R. 1923 Pat. 218=81 Ind. Cas. 295. Amendment as to over-statement of interest in execution application can be allowed under s. 151. A. I. R. 1922 Pat. 409=1 Pat. 119=69 Ind. Cas. 200. Alteration in the decree can be made only by way of review, appeal or revision and s. 151 cannot be resorted to for that purpose. A. I. R. 1921 Lah. 3=3 Lah. L. J. 310 (F.B.)=67 Ind. Cas. 772. Section 151 should not be invoked to give costs in cases other than in Order XXV, rule 1, and Order XLI, r. 10. A. I. R. 1924 Cal. 251=50 C. 853=79 Ind. Cas. 298. Court cannot under its inherent power amend its own decree extending time to pay deficit Court-fees. A. I. R. 1923 Cal. 612=37 C. L. J. 395=27 C. W. N. 720=74 Ind. Cas. 575. Substitution of heir wrongly applied for under other rule can be amended into one under Order XXII, rule 10. A. I. R. 1924 Cal. 90=75 Ind. Cas. 255=27 C. W. N. 710. When in a preli-

minary decree which is in accordance with the judgment in a mortgage suit there was no provisions for interest, amendment in final decree allowing the same cannot be allowed. A. I. R. 1921 U. B. 5=4 U.B.R. 1=63 Ind. Cas. 799. Section 152 applies in terms to the amendment of decrees and not to the amendment of the plaint, sale certificate or *dakhlanama*. But for the ends of justice extensive powers can be exercised by the Court under ss. 151 and 153. 139 Ind. Cas. 471=1932 A.L. J. 784=A.I.R. 1932 All. 587; see also 134 Ind. Cas. 407=8 O.W.N. 883=12 L.R. 213 (Rev.)=A.I.R. 1931 Oudh 346; A. I. R. 1932 Oudh 291=139 Ind. Cas. 367=9 O. W. N. 633; 12 Pat. L. T. 558=133 Ind. Cas. 171. When the preliminary decree in a mortgage suit did not provide for sale, but the final decree contained a provision that on the mortgagor's failure to pay the property could be sold, *held* that ss. 151 and 152 were wholly inapplicable in as much as it was not a case of mistake or omission. A.I.R. 1931 All. 427. Where property is misdescribed in sale certificate due to misdescription in the mortgage deed itself, certificate can be corrected under s. 151. A. I. R. 1937 Oudh 144; 1936 O. W. N. 575=162 Ind. Cas. 233; A. I. R. 1934 Lah. 29; 11 O. W. N. 550; see also 1935 M. W. N. 378=A. I. R. 1935 Mad. 420. Amendment of decree can be made under this section where the mortgaged property is incorrectly described in the plaint, preliminary decree, etc. A. I. R. 1935 Rang. 522. Where the judgment and decree fail to give effect to the real intention of the Court and the Court refuses to amend the decree under s. 152, it is open to the Chief Court to interfere under this section. 1935 O. W. N. 968=A. I. R. 1935 Oudh 461=157 Ind. Cas. 810. The Court has ample powers under s. 151, if not under s. 152 to correct its mistake and amend its decree so as to bring it in accordance with the agreement of parties. A. I. R. 1934 Rang. 108=150 Ind. Cas. 721. An amendment in the judgment and decree of Court can be made when during the pendency of the suit there had been a change in the circumstances of the case. A. I. R. 1934 Lah. 735.

**Compromise decree.**—Compromise decree as a result of fraud upon the Court can be reversed under s. 151. A. I. R. 1927 Pat. 354=6 Pat. 108=105 Ind. Cas. 271; see also A. I. R. 1922 Mad. 446=43 M. L. J. 290=(1922) M. W. N. 495=31 M.L. T. 132=16 L. W. 440=70 Ind. Cas. 425. Court has no inherent power to set aside consent decree. 26 S. L. R. 395. But where a suit is compromised and a decree passed it is open to the plaintiff to apply under s. 151 to have the compromise decree cancelled on the ground that they had not concented to the terms therein mentioned. 8 O. W. N. 1267.

**Admission of evidence.**—In a fit case the Court can admit a document which was improperly rejected by the lower Court 138 Ind. Cas. 328=33 P. L. R. 152=A. I. R. 1932 Lah. 267.

**Arbitration.**—Under s. 151 the Court is competent to revise its own order superseding a reference to arbitration. 138 Ind. Cas. 524=A. I. R. 1932 All. 656. The Court has inherent jurisdiction to deal with allegations of misconduct of arbitrator, even though the award is not made. A. I. R. 1933 Pat. 566.

**Partition.**—The inherent power should be applied where the decree of the lower Court directs partition in an impossible manner. 27 N. L. R. 341.

**Consolidation of suits and appeals.**—Courts are empowered to consolidate suits even without the consent of the parties. A. I. R. 1922 Pat. 566=3 P. L. T. 584=1 Pat. 669=67 Ind. Cas. 1000; see also A. I. R. 1924 Nag. 196=75 Ind. Cas. 917; 40 Ind. Cas. 182. Consolidation of appeals can also be made under s. 151 apart from Order XLV, rule 4. 3 Pat. L. J. 446=(1918) Pat. 259=45 Ind. Cas. 551; A. I. R. 1923 All. 490 (F. B.)=21 A. L. J. 465=45 A. 506=74 Ind. Cas. 411; 34 M. L. J. 279=45 Ind. Cas. 468. Appeals once consolidated for whatever reason, form in fact one appeal and parties in suit must be regarded as parties in one suit. A. I. R. 1923 Pat. 215=70 Ind. Cas. 782. Effect of order declaring appeals to be analogous is not that of consolidation but merely that they shall be heard together and order in one does not unless so stated govern the other. A. I. R. 1925 Pat. 765=7 P. L. T. 431=4 Pat. 448=1925 Pat. 345=93 Ind. Cas. 129.

**Costs.**—Court can under inherent power enforce in such manner as it thought proper, payment of costs, in favour of Commissioner in connection with execution of commission recoverable from parties, and proceeding taken if not proceeding between parties within s. 47, the order is not appealable. A. I. R. 1924 All. 192=74 Ind. Cas. 186. Order to pauper to pay costs of amendment in cash and order dismissing a suit in failure of the same is bad. A. I. R. 1922 Bom. 385=24 Bom. L. R. 924=47 B. 104=69 Ind. Cas. 207. Where third party conducts proceedings

costs in insolvency can be ordered to be paid if facts show that there has been abuse of the process of Court. 21 C. W. N. 826=26 C. L. J. 44=40 Ind. Cas. 999. Order as to costs cannot be altered by the successor in office except in review or under s. 152. A. I. R. 1925 Pat. 47=3 Pat. 654=82 Ind. Cas. 813.

**Dismissal for default.**—If an application under Order 9, rule 9 is made when the period for it has expired, s. 151 cannot be invoked to set aside a dismissal for default. A. I. R. 1931 Cal. 319=52 C. L. J. 23=129 Ind. Cas. 778 ; 23 N. L. R. 183=107 Ind. Cas. 193=A. I. R. 1928 Nag. 91. Where in an application really purporting to be for restoration of a suit, the word "review" is used, the suit should be restored despite the technical objection. 58 Ind. Cas. 748. An appeal dismissed for default can be restored by Court under its inherent power. 45 B. 648=23 Bom. L. R. 110=60 Ind. Cas. 919. Order under s. 151 restraining execution application dismissed for default without due notice to the judgment-debtor is not maintainable. A. I. R. 1926 Oudh 59=87 Ind. Cas. 438. Mistaken order of dismissal for default can be set aside under s. 151. A. I. R. 1928 All. 301=26 A. L. J. 382=108 Ind. Cas. 576. Where plaintiff is absent as having been adjudged insolvent and the Official Assignee is not served, dismissal of suit for default is bad and can be set aside in appeal. A. I. R. 1927 Cal. 76=31 C. W. N. 22=53 C. 844=98 Ind. Cas. 281. Inherent power cannot be exercised in favour of party remaining absent when he ought to be present and unable to give satisfactory reason therefor, so as to interfere with rights of third parties. A. I. R. 1926 Bom. 377=28 Bom. L. R. 626=50 B. 457=96 Ind. Cas. 411. The Court cannot under s. 151 set aside the order of dismissal for default or an order passed *ex parte* in applications under Order XXI, rr. 97 and 100 on sufficient cause being shown, since there is no justification in taking resort to s. 151 when other remedies already exist. A. I. R. 1929 Mad. 757=52 M. 899=57 M. L. J. 387=30 L. W. 424=120 Ind. Cas. 567.

**Execution.**—Inherent powers should be invoked for execution of Court procedure whereof is not clearly provided in the Act under which it is passed. A. I. R. 1929 All. 211=114 Ind. Cas. 890 ; A. I. R. 1936 Pesh. 115 ; but see A. I. R. 1936 Pat. 176=161 Ind. Cas. 933. Section 151 can be invoked to refuse to confirm auction sale only when it is shown that the Court is misled by misstatement or non-disclosure of relevant facts. A. I. R. 1926 Nag. 17=88 Ind. Cas. 693 ; see also A. I. R. 1930 Lah. 793=126 Ind. Cas. 443 ; A. I. R. 1923 Mad. 635=44 M. L. J. 680=72 Ind. Cas. 545 ; 69 Ind. Cas. 872. There is no inherent jurisdiction in a Court to set aside a sale outside the provisions of Order 21. 1932 A. L. J. 392=A. I. R. 1932 All. 403 ; see also A. I. R. 1923 Bom. 51=24 Bom. L. R. 1167=76 Ind. Cas. 433 ; A. I. R. 1930 All. 513=124 Ind. Cas. 48 ; but see A. I. R. 1927 Lah. 153=28 P. L. R. 86=99 Ind. Cas. 291. But the Court should not except in very substantial circumstances set aside a rule *suo motu* without proof of any substantial injury under s. 151. A. I. R. 1925 Sind. 253=18 S. L. R. 39=86 Ind. Cas. 1045. In considering validity of execution sale, appellate Court need not confine itself only to order 21, rule 90, but it may act even under s. 151. A. I. R. 1924 Mad. 778=47 M. L. J. 549=(1924) M. W. N. 842=84 Ind. Cas. 975 ; see also A. I. R. 1925 Oudh 128=80 Ind. Cas. 444 ; A. I. R. 1924 Mad. 100=(1923) M. W. N. 672=45 M. L. J. 312=77 Ind. Cas. 12. Court has inherent power to transmit certified copies of necessary documents to Court in Native State to enable it to execute decree though the decree itself cannot be transferred. 13 Bnr. L. T. 145=61 Ind. Cas. 704. The Court cannot invoke s. 151 when the applicant has his remand under Order 21, rule 89, but did not avail himself of it. 136 Ind. Cas. 735=33 P. L. R. 146=A. I. R. 1932 Lah. 238. The order dismissing the application for execution is appealable, and where no appeal has been preferred from that order the application cannot be restored under s. 151. A. I. R. 1932 Oudh 220=9 O. W. N. 430=138 Ind. Cas. 149=A. I. R. 1932 Oudh 445. Where an objection petition by judgment-debtor was dismissed and another petition containing the same and some fresh objections was put in by the judgment-debtor under s. 47 and Order 21, rule 66, *held* that the proper order would be to treat the application as one under s. 151 and revive both the applications on terms as to cost. 36 C. W. N. 367=55 C. L. J. 184=A. I. R. 1932 Cal. 569. Where after the Court sale and before its confirmation the judgment-debtor was shown to have leased the property and realised a portion of the rent and thereupon the purchaser applied for a prohibitory order against the judgment-debtor and tenant as regards the paying and receiving of rent : *Held* that although the prohibitory order could not be issued under s. 47 or Order 21, rule 46, it could be passed under s. 151 as the

ends of justice required the same. 136 Ind. Cas. 4=33 P. L. R. 435=A. I. R. 1932 Lah. 295. Where same property has been sold twice in execution of decrees of different decree-holders an application for rateable distribution is put in long before the confirmation of the first sale, but the Court, in ignorance of these facts, confirms the second sale, it has inherent power to avoid abuse of process of Court and to set aside its order of confirmation of second sale on being apprised of the true facts. 11 P. 250=12 P. L. T. 639=134 Ind. Cas. 616. There is no inherent jurisdiction in a Court to set aside a sale outside the provisions of Order 21. 1932 A. L. J. 392=A. I. R. 1932 All. 403; see also 136 Ind. Cas. 755=33 P. L. R. 146=A. I. R. 1932 Lah. 238.

Attachment like any other order can also be revived by the Court under s. 151 if it is necessary in the interest of justice. A. I. R. 1922 Nag. 267=4 N. L. J. 118=18 N. L. R. 152=64 Ind. Cas. 400. There is inherent power in Court to release property from illegal attachment apart from Order 21, rule 56, the Code not being exhaustive in that respect. A. I. R. 1921 Pat. 409=2 P. L. T. 240=(1921) Pat. 205=61 Ind. Cas. 922. To restore execution application under s. 151 strong grounds are necessary as would be required for application for review. A. I. R. 1922 Oudh 201=73 Ind. Cas. 73. *Mesne* profits for period for which decree-holder was out of possession due to pendency of execution owing to filing of appeal which is subsequently dismissed can be awarded by Court under inherent power. 63 Ind. Cas. 43. Where an execution sale admittedly contravenes the express direction of the Court, the Court can *suo motu* set aside the sale under s. 151. 12 Lah. 602=134 Ind. Cas. 292=32 P. L. R. 863=A. I. R. 1931 Lah. 314; see also 143 Ind. Cas. 454=64 M. L. J. 586=A. I. R. 1933 Mad. 399. *Ex parte* order in execution proceeding can be set aside under this section. A. I. R. 1931 Sind 97 (F.B.)=133 Ind. Cas. 65.

*Ex parte* order.—There is no inherent power in Court to set aside *ex parte* decree passed by itself; it can do so only under Order IX, rule 13. A. I. R. 1923 Lah. 147=73 Ind. Cas. 660; A. I. R. 1927 Lah. 372=101 Ind. Cas. 617; A. I. R. 1922 Pat. 479=1 Pat. 277; A. I. R. 1922 All. 441=19 A. L. J. 907=64 Ind. Cas. 527; A. I. R. 1921 Sind 38=15 S. L. R. 61=63 Ind. Cas. 131. But it cannot be laid down as a hard and fast rule that in no circumstances can power of Court under s. 151 of the Code, be exercised except under provisions of Order IX, rule 13. A. I. R. 1921 Pat. 491=2 P. L. T. 251=65 Ind. Cas. 368; see also 34 Bom. L. R. 1425=A. I. R. 1932 Bom. 634; 34 Bom. L. R. 714=138 Ind. Cas. 248=A. I. R. 1932 Bom. 271=A. L. R. 1932 Bom. 596. The inherent power should be exercised *ex debito justitiæ* on sound general principles and so as not to conflict with intentions of legislature. 43 M. 94=37 M. L. J. 599=26 M. L. T. 377=10 L. W. 606=53 Ind. Cas. 847 (F. B.). *Ex parte* order under Order XXI, rule 90, can be set aside under inherent power of Court. A. I. R. 1921 Pat. 293=2 P. L. T. 270=62 Ind. Cas. 113. The applicant is bound to show sufficient cause for his non-appearance at the proper time otherwise it is only in exceptional circumstances that s. 151 can be resorted to. A. I. R. 1927 Sind 223=103 Ind. Cas. 129. Under peculiar circumstances Court can under s. 151 set aside *ex parte* decree at the instance of person not a party to the original suit and make him a defendant and allow him to defend the suit. A. I. R. 1928 Rang. 273=6 Rang. 694=113 Ind. Cas. 811; but see A. I. R. 1922 Mad. 193=42 M. L. J. 563=15 L. W. 586=31 M. L. T. (H. C.) 35=68 Ind. Cas. 910. There is no remedy under s. 151 if an applicant whose application to set aside *ex parte* decree of Small Cause Court has been dismissed does not avail himself of right to go in revision under s. 25, Provincial Small Cause Courts Act. A. I. R. 1927 Nag. 95=98 Ind. Cas. 658. Extension of time granted for filing an appeal on an *ex parte* application can be revoked or altered before the appeal is admitted. 45 Ind. Cas. 725.

*Expunging from record*.—Irrelevant and scandalous matters can be expunged from the judgment of a lower Court by a High Court on an application by a person not a party to the case. But this power is to be exercised only in exceptional cases. 35 M. L. J. 368=47 Ind. Cas. 981. Adverse remarks on the character and credibility of witness cannot be expunged from the judgment of a lower Court unless the same is subject to appeal or revision. A. I. R. 1922 All. 107=44 A. 401=20 A. L. J. 261=4 U. P. L. R. (A) 165=23 Cr. L. J. 349=66 Ind. Cas. 1005. Where Sub-Judge amending "Devasthanam Scheme petition" remarked "trustees did not care for Devasthanam", this is not a case where High Court can expunge the remark by exercising inherent power. 33 Ind. Cas. 608=3 L. W. 283. Where remarks in judgment cast a slur on a department of Government and was uncalled for, the

remarks should be expunged from the judgment. 146 Ind. Cas. 215=34 P. L. R. 919=A. I. R. 1933 Lah. 711.

**Extension of time.**—Ordinary period of limitation cannot be extended under s. 151. A. I. R. 1922 Pat. 479=1 Pat. 277=65 Ind. Cas. 341; see also A. I. R. 1928 Nag. 913=23 N. L. R. 183=107 Ind. Cas. 193; A. I. R. 1926 Lah. 135=89 Ind. Cas. 427; L. R. 1A. 73 Rev.; 27 P. W. R. 1920=116 P. L. R. 1920=55 Ind. Cas. 55; 19 M. L. T. 192=(1916) 1 M. W. N. 179=3 L. W. 271=33 Ind. Cas. 996. Time fixed by a decree for specific performance of a contract to sell cannot be extended either by original or appellate Court under s. 151. 19 M. L. T. 137=3 L. W. 72=32 Ind. Cas. 401; but see 8 Bur. L. T. 83=32 Ind. Cas. 509; A. I. R. 1927 Rang. 311=5 Rang. 615=6 Bur. L. R. 216=105 Ind. Cas. 467. Time fixed by a decree cannot be extended by the executing Court under s. 151. 15 N. L. R. 39=49 Ind. Cas. 840; 42 A. 639=18 A. L. J. 826=57 Ind. Cas. 16. Under s. 151 Court can fix time for filing objections to the Commissioner's report in a petition suit and reject those that are filed afterwards. 17 A. L. J. 498=50 Ind. Cas. 152. Where payment of costs was made a condition precedent for the acceptance of appeal, and such payment was not made within time allowed for the same, time cannot be extended either under s. 151 or s. 148. A. I. R. 1925 Pat. 153=80 Ind. Cas. 575. Order extending time upon application for review cannot be distributed as Court has jurisdiction to grant extension and the order is upon application for extension and not for review. A. I. R. 1925 Pat. 452=90 Ind. Cas. 79. In case of deliberate default of payment, time cannot be extended under this section. 1933 M. W. N. 879.

**Fraud.**—This section can be resorted to, to prevent any miscarriage of justice by reason of any reason of fraud by the parties. A. I. R. 1927 Mad. 813=39 M. L. T. 34=26 L. W. 481. Consent decree can be set aside by a Court under s. 151 on the ground that the consent was caused by fraud. A. I. R. 1923 Pat. 483=(1923) Pat. 197=2 Pat. 731=77 Ind. Cas. 14; but see A. I. R. 1929 Cal. 470=33 C. W. N. 883=115 Ind. Cas. 177; A. I. R. 1929 Nag. 111=118 Ind. Cas. 61; A. I. R. 1924 All. 398=46 A. 245=22 A. L. J. 118=82 Ind. Cas. 1022. Question of fraud should not be looked into except when it works injustice. 48 Ind. Cas. 135=20 Bom. L. R. 929. Execution of *ex parte* decree can be stayed under s. 151 on the ground that it was obtained by fraud but it can be so done under Order XXI, rule 29. A. I. R. 1923 Lah. 514=75 Ind. Cas. 419. Court has inherent jurisdiction under this section to vacate an order obtained by decree-holder by misrepresentation. A. I. R. 1931 Sind 111=131 Ind. Cas. 717. Amendment of decree obtained by fraud upon the Court can be made under this section. But if the fraud has been practised upon the party, the remedy is by way of suit. A. I. R. 1934 Pat. 229. Court can under inherent power restore property wrongfully attached. A. I. R. 1937 Lah. 29. Where an order permitting withdrawal of the suit was obtained by practising fraud upon the Court by defendant acting in collusion with minor plaintiff's next friend and the Court subsequently vacated its order: *Held* that the Court had power under s. 151, C. P. Code to vacate an order obtained by misleading and practising fraud upon Court. A. I. R. 1937 Sind 101.

**Injunction.**—Court possesses inherent powers to act *ex debi to justitiæ*. A strong case must be made out and it must be shown that there is no other remedy open to which party can protect himself from consequences of injury complained of Court will issue temporary injunction, if it is shown to be appropriate relief and unless defendant is forthwith restrained irreparable injury will follow. 2 Lah. L. J. 283=55 Ind. Cas. 403; see also A. I. R. 1925 Lah. 242=78 Ind. Cas. 802; A. I. R. 1927 Lah. 833=9 Lah. L. J. 536=100 Ind. Cas. 544. Injunction against Government officers not subordinate to it cannot be granted by Court as they have no such inherent power. A. I. R. 1926 Lah. 284=27 P. L. R. 11=96 Ind. Cas. 540. If necessary for some reason Court has inherent power to issue temporary mandatory injunction but it should not act under Order 39, rule 2. A. I. R. 1927 Mad. 210=24 L. W. 854=99 Ind. Cas. 566. Section 151 cannot be resorted to for giving injunction restraining execution of decree as other provisions for the same remedy is open. A. I. R. 1927 Mad. 532=52 M. L. J. 670=38 M. L. T. 364=(1927) M. W. N. 259=102 Ind. Cas. 396; see also 102 Ind. Cas. 700=A. I. R. 1927 Mad. 687=38 M. L. T. 358=26 L. W. 899. If a person not within the jurisdiction of a Court submit to its jurisdiction, an injunction can be issued as against such person to meet the error of justice. A. I. R. 1926 Pat. 171=6 P. L. T. 540=85 Ind. Cas. 852. Only chartered High Court



in which suit was filed has inherent powers to issue injunction in certain cases restraining executing Court from executing decree. A. I. R. 1925 Lah. 618=7 Lab. L. J. 457=26 P. L. R. 561=92 Ind. Cas. 259. The High Court has inherent power to order an injunction against a person living within the jurisdiction of another High Court where the circumstances so require. 130 Ind. Cas. 252=57 Cal. 1280=A. I. R. 1931 Cal. 279. But when this jurisdiction is invoked, it is necessary for the plaintiff to establish a strong *prima facie* case that there is no other remedy open to him to protect himself and that if the injunction asked for is not granted irreparable injury or inconvenience would result. 140 Ind. Cas. 843=34 P. L. R. 51=A. I. R. 1933 Lah. 73.

**Procedure, invention of.**—Rules nearest in point with necessary modification should be applied where rights are conferred by sections but no provision is made for particular act of facts. A. I. R. 1931 Mad. 303=(1931) M. W. N. 48=33 C. W. N. 359=131 Ind. Cas. 610. But new form of procedure cannot be introduced by resorting to s. 151. A. I. R. 1912 Cal. 1=80 Ind. Cas. 192.

**Issues, framing of.**—Court can frame such issue and give a decision thereon even after the case has been closed as cut at the root of the subject-matter of the suit. A. I. R. 1922 Pat. 514=2 Pat. 52=4 P. L. T. 239=68 Ind. Cas. 383.

**Errors and mistakes.**—This section can always be resorted to correct mistakes obvious in the face of the record. A. I. R. 1923 Mad. 392=17 C. W. N. 254=74 Ind. Cas. 416; see also 63 C. 1079=40 C. W. N. 680=A. I. R. 1936 Cal. 343; A. I. R. 1924 Lah. 561. Arithmetical or clerical error in the judgment can be corrected under this section. A. I. R. 1927 All. 585=102 Ind. Cas. 124; A. I. R. 1924 Oudh 144=71 Ind. Cas. 563. Court can correct error committed by it not owing to negligence of party but owing to it not being aware of certain facts. A. I. R. 1926 Mad. 980=50 M. 97=51 M. L. J. 219=26 C. W. N. 878=97 Ind. Cas. 1008; see also A. I. R. 1929 All. 147=50 A. 859=114 Ind. Cas. 867. Though there may be no express provision for such mistakes Court has inherent power to correct its own proceedings where misled. A. I. R. 1926 Mad. 119=22 L. W. 629=91 Ind. Cas. 727. Court can correct an obvious mistake in its judgment at a subsequent stage. A. I. R. 1925 Cal. 178=40 C. L. J. 24=82 Ind. Cas. 382; A. I. R. 1924 Nag. 58=69 Ind. Cas. 112. But accidental error in erroneous judgment should not be corrected if third parties have acquired right in the interval. A. I. R. 1924 Oudh 408=11 O. L. J. 227=78 Ind. Cas. 96=80 Ind. Cas. 833. The Court has power to correct the mistake committed inadvertently even apart from s. 151. A. I. R. 1925 All. 622=47 A. 546=23 A. L. J. 405=87 Ind. Cas. 227; A. I. R. 1922 Mad. 485=31 M. L. T. 215. Where a wrong decree was filed in the memo of appeal, s. 151 can be invoked for the correction of the mistake. A. I. R. 1925 Rang. 188=3 Bur. L. J. 325=85 Ind. Cas. 196. Accidental mistake in name of party can be allowed to be corrected under s. 151. 8 Lah. L. J. 391=27 Pat. L. R. 648=96 Ind. Cas. 11. Court has inherent power to set right a wrong done by mistake in ordering execution in belief that the plaintiff had fulfilled terms of decree. A. I. R. 1923 Oudh 16=72 Ind. Cas. 879. Section 151 cannot be invoked to correct mistake in execution sale after three years so as to affect a *bona fide* purchaser for value. A. I. R. 1925 All. 236=47 A. 304=22 A. L. J. 1119=84 Ind. Cas. 746. Where Court has failed to pass personal decree under Order 34, rule 6, through oversight, Court can correct mistake. A. I. R. 1937 Lah. 204. Court has power to vacate judgment and remedy mistake when judgment has been delivered without hearing parties. 40 L. W. 34=A. I. R. 1934 Mad. 506. Order passed by Court under misapprehension of facts, can be set aside under this section. A. I. R. 1934 All. 287=1934 A. L. J. 862. Order of Court based on mistaken basis can be corrected by it in its inherent power. 31 C. L. J. 48=56 Ind. Cas. 4. Mistake committed by oversight or otherwise injurious to either party can be corrected and the decree amended under s. 151. 169 P. W. R. 1916=37 Ind. Cas. 378. Result which amounts to an abuse of the process of Court can be corrected under s. 151. 1 Pat. L. W. 551=2 P. L. J. 361=39 Ind. Cas. 763. Order failing to give effect to the intention can be corrected under s. 151. 40 M. 259=21 M. L. T. 82=32 M. L. J. 477=37 Ind. Cas. 414. It is illegal to appoint guardian *ad litem* without notice to natural guardian and Court has inherent power to correct errors or mistakes committed by itself. A. I. R. 1922 Mad. 485=31 M. L. J. 215=70 Ind. Cas. 867. Insolvency Court has jurisdiction to correct mistake of clerk or parties upon question of fact when it is proved. 1 U. P. L. R. (H. C.) 69=51 Ind. Cas. 55. Court has inherent power to rectify its own or party's errors inadvertently committed. 145 Ind. Cas. 607=1933 A. L. J. 1318=A. I. R. 1933 All. 517; see also 1933

M. W. N. 1309 ; 33 Bom. L. R. 365=144 Ind. Cas. 901=A. I. R. 1933 Bom. 200 ; 1933 A. L. J. 509=A. I. R. 1933 All. 608.

**Parties; addition of**—In proper case Court has inherent power to add parties to appeals whatever its power under Order XLI, r. 20 A. I. R. 1928 Pat. 343=7 Pat. 510=9 L. T. 267=109 Ind. Cas. 609 If justice demands parties can be added or transferred from one category to another by High Court even if the application is time-barred. A. I. R. 1921 Cal. 722=34 C. L. J. 405=67 Ind. Cas. 10 ; 31 C. L. J. 130=56 Ind. Cas. 720 ; A. I. R. 1927 Cal. 37=44 C. L. J. 243=98 Ind. Cas. 822 ; 1933 A. L. J. 1512 ; see also A. I. R. 1932 Cal. 782 ; A. I. R. 1929 Mad. 269 ; 38 M. 406.

**Receiver.**—Receivers can be appointed in the interval between the submission of an award and the final acceptance or rejection of it and where an arbitrator is proceeding with a reference he should be appointed only in exceptional circumstances. A. I. R. 1925 Sind 102=10 S. L. R. 303=78 Ind. Cas. 84.

**Re-construction of Records.**—Records destroyed can be re-constructed by Court under its inherent power. Appellate Court has inherent power to re-construct records of Court from which appeal lies to it. A. I. R. 1923 Mad. 647 (F. B.)=46 M. 679=44 M. L. J. 673=18 L. W. 21=32 M. L. T. 382=(1923) M. W. N. 471=73 Ind. Cas. 1050. A decree can be drawn in accordance with the deposition of a credible witness as to the decision contained in the judgment or part of it. A. I. R. 1923 Rang. 113=4 U. B. R. 135=77 Ind. Cas. 258.

**Refund.**—Refund of excess Court-fees paid by mistake can be ordered under s. 151. 3 P. L. J. 452=(1918) Pat. 273=46 Ind. Cas. 271 ; A. I. R. 1930 All. 471=(1930) A. L. J. 805=122 Ind. Cas. 188 ; 38 L. W. 983 ; 142 Ind. Cas. 633=34 P. L. R. 1=A. I. R. 1933 Lah. 351 ; 34 P. L. R. 275=A. I. R. 1933 Lah. 135=141 Ind. Cas. 400 ; 55 M. 641=A. I. R. 1932 Mad. 438=62 M. L. J. 541 ; 136 Ind. Cas. 559=33 P. L. R. 54=A. I. R. 1932 Lah. 219 ; A. I. R. 1936 Rang. 208 (F. B.)=163 Ind. Cas. 340=14 Rang. 173 ; 39 C. W. N. 1074=A. I. R. 1936 Cal. 347. But the provision of this section cannot be invoked in order to grant a refund of Court-fees, where it is not allowed by the Court Fees Act. A. I. R. 1935 Pesh. 8=154 Ind. Cas. 460. But in cases which are not covered by any express provisions of the Court Fees Act, the High Court has inherent powers to direct a refund of Court-fee under s. 151, C. P. Code if obvious injustice has been done. 39 C. W. N. 1074 ; 38 C. W. N. 185=A. I. R. 1934 Cal 615. In case of payment to wrong person owing to erroneous order of the Court, the Court can order refund under s. 151. A. I. R. 1934 Lah. 142=36 P. L. R. 147=150 Ind. Cas. 174. Court has inherent power to order refund of sum taken in excess by person failing to deduct the smaller sum due by him to the other person under Order 41, rule 19. 24 C. W. N. 465=56 Ind. Cas. 753. Executing Court is competent to order refund of deposit withdrawn by a person having no right or title. A. I. R. 1922 Pat. 166=1 Pat. 336=(1922) Pat. 53=3 P. L. T. 754=65 Ind. Cas. 307. Certificate for renewal or refund of value of stamps used on memo of appeal returned as not properly stamped can be granted by High Court under its inherent power. A. I. R. 1923 Pat. 600=4 P. L. T. 504=72 Ind. Cas. 405. Where a Court sale is subsequently confirmed, the auction-purchaser is bound to refund the purchase-money withdrawn by him from Court when the sale was originally set aside. 5 Pat. L. W. 132=(1918) Pat. 281=46 Ind. Cas. 275 ; see also 1 P. L. W. 551=2 P. L. J. 361=39 Ind. Cas. 763 ; A. I. R. 1933 Lah. 850. Where property is sold in execution of prior mortgage decree and is re-sold in execution of subsequent mortgage decree in proceedings to which judgment-debtor, decree-holder and previous and subsequent purchasers are all parties, Court can direct decree-holder to refund price paid by auction purchaser. A. I. R. 1926 All. 274=4 P. L. T. 504=92 Ind. Cas. 571. Where order under Order XXXII, r. 6, directing next friend to refund money drawn from the bank without the permission of the Court passed on the authority of s. 151, no appeal lies from the order it having been passed under s. 151. A. I. R. 1930 Lah. 496=31 P. L. R. 171=131 Ind. Cas. 282. After disposal of appeal the Court cannot recover the deficit Court-fee on cross-objections. 142 Ind. Cas. 25=1933 M. W. N. 330=37 L. W. 300=A. I. R. 1933 Mad. 321.

**Remand.**—Court can remand case under its inherent power even where Order XLI, rule 23, does not apply. A. I. R. 1930 Mad. 72=119 Ind. Cas. 466. Appellate Court has inherent power to remand case not falling within order XLI, r. 23. 2 U. P. L. R. (Pat) 48=1920 Pat. 222=58 Ind. Cas. 444. Courts should be very cautious in resorting to inherent power where there are express powers. Court has inherent

power to remand in cases not covered by Order XLI, r. 23, C. P. Code. 37 M. L. J. 536=10 L. W. 359; 52 Ind. Cas. 985=29 C. L. J. 419; see also 43 Ind. Cas. 959=3 P. L. J. 253=4 P. L. W. 450; 5 Pat. L. J. 146=58 Ind. Cas. 664; A. I. R. 1922 Cal. 456=35 C. L. J. 345=70 Ind. Cas. 547; A. I. R. 1924 Lah. 245=73 Ind. Cas. 915; A. I. R. 1925 Cal. 1157=87 Ind. Cas. 575; 138 Ind. Cas. 202=33 P. L. R. 285=A. I. R. 1932 Lah. 311; A. I. R. 1932 Lah. 443=33 P. L. R. 487=139 Ind. Cas. 126; A. I. R. 1933 Pat. 706; A. I. R. 1933 Lah. 157=143 Ind. Cas. 685; 141 Ind. Cas. 400=34 P. L. R. 270=A. I. R. 1933 Lah. 135=34 P. L. R. 270; 14 Pat. L. T. 138=A. I. R. 1933 Pat. 220; A. I. R. 1931 Lah. 302=32 P. L. R. 169=133 Ind. Cas. 127; A. I. R. 1931 Mad. 791=60 M. L. J. 475; A. I. R. 1931 Lah. 299=134 Ind. Cas. 495; A. I. R. 1936 Lah. 212=38 P. L. R. 717; 164 Ind. Cas. 1085=A. I. R. 1936 Pat. 491=164 Ind. Cas. 1085; A. I. R. 1935 Mad. 715=41 L. W. 758=1935 M. W. N. 539=156 Ind. Cas. 958. Power under s. 151 is to be used in exceptional cases, and where a remand can be granted under another provision of law by which case is covered is not competent to grant it under s. 151. A. I. R. 1926 Lah. 537=95 Ind. Cas. 109. If justice so demands remand can be ordered under s. 151. A. I. R. 1922 Cal. 279=80 Ind. Cas. 172; 56 Ind. Cas. 834=2 U.P.L.R. (Pat) 136. Order of remand under s. 151 should be made and not under Order XLI, rule 25, in a second appeal involving general difficult points. A. I. R. 1923 Cal. 521=37 C. L. J. 122=74 Ind. Cas. 392. Where trial Court has fully tried and decided all issues, it is not proper for appellate Court, coming to different decision on one issue, to remand the case. A. I. R. 1923 Mad. 113=30 M. L. T. 314=16 L. W. 593=70 Ind. Cas. 665. Power of remand to be exercised in a limited way. Section does not restrict inherent powers under s. 151. 44 C. 929=21 C. W. N. 877=26 C. L. J. 49 (F. B.)=41 Ind. Cas. 598. Only course for appellate Court thinking addition of other parties as defendants and inclusion of other properties in suit necessary is to remand suit under its inherent power for fresh trial from beginning. A. I. R. 1926 Cal. 1076=43 C. L. J. 601=97 Ind. Cas. 188. Where the case is remanded by the lower appellate Court for trial upon issues framed by it, the remand order is one under s. 151 and not under Order XXI, r. 23. A. I. R. 1927 Pat. 296=6 Pat. 380=103 Ind. Cas. 722. Remand given under s. 151 is not without jurisdiction and hence no appeal lies from such an order. A. I. R. 1927 Mad. 335=52 M. L. J. 90=25 L. W. 198=100 Ind. Cas. 135. Single Judge of High Court has inherent power to make order of remand; it is not appealable under the Letters Patent but can be questioned in appeal from the judgment after remand. Judgment after remand is also invalid if order of remand is held invalid. 58 Ind. Cas. 538. Where adjournment is wrongly refused, appellate Court has power to set aside decree and orders retrial. 23 Bom. L. R. 769=63 Ind. Cas. 478. The correctness of a remand order can be investigated even though appeal has been preferred against it. A. I. R. 1925 Pat. 336=78 Ind. Cas. 466.

Remand under s. 151 can be allowed in cases not covered by Order XXIII or XLI. But it shall not be so allowed where it is specifically disallowed by other provisions of the Code. Hence order of remand is not irregular or invalid where it does nothing which is prohibited by the Court. A. I. R. 1930 Lah. 224=31 P. L. R. 50=11 Lah. L. J. 507=122 Ind. Cas. 473; 32 C. W. N. 101=106 Ind. Cas. 512=A. I. R. 1928 Cal. 814; A. I. R. 1928 Mad. 991=112 Ind. Cas. 1. But improper order for remand is open to revision. A. I. R. 1929 Mad. 205=119 Ind. Cas. 705. Where a case has been remanded by the appellate Court but no mention is made of the law under which order of remand was passed, it does not necessarily follow that it is one under s. 151. A. I. R. 1928 Lah. 116=9 Lah. L. J. 543=29 P. L. R. 300=106 Ind. Cas. 842; see also A. I. R. 1928 Lah. 774=30 P. L. R. 541=112 Ind. Cas. 736. Inherent power of remand a case can be exercised only when trial Court has not tried a case properly. A. I. R. 1934 Pat. 284.

**Restitution.**—Scope of section is not enlarged by s. 151 and an application for relief which has nothing to do with restitution cannot be changed into one for restitution. 4 L. W. 400=34 Ind. Cas. 774. If restitution is not possible under s. 144 it may so be given under s. 151 for the purpose of doing justice. A. I. R. 1931 Cal. 42=52 C. L. J. 505=34 C. W. N. 746=130 Ind. Cas. 236; 58 C. 1070=134 Ind. Cas. 906=35 C. W. N. 483; 55 A. 221=A. I. R. 1933 A. 218; A. I. R. 1926 Lah. 685=96 Ind. Cas. 804; A. I. R. 1937 All. 232; A. I. R. 1934 Pat. 150=14 Pat. L. T. 753=149 Ind. Cas. 365; 67 M. L. J. 49=A. I. R. 1934 Mad. 320=1934 M. W. N. 967; A. I. R. 1934 Lah. 1023=36 P. L. R. 119; 60 C. L. J. 44; A. I. R. 1934 Lah. 322=150 Ind. Cas. 924. A. I. R. 1924 All. 718=46 A. 767=22 A. L. J. 673=84 Ind. Cas.

75 ; A. I. R. 1933 Pat. 564 ; A. I. R. 1933 Mad. 888=38 L. W. 874 ; 83 Ind. Cas. 138=A. I. R. 1925 Mad. 365 ; A. I. R. 1924 Lah. 583=75 Ind. Cas. 858 ; 61 P. R. 1917=98 P. W. R. 1917=41 Ind. Cas. 910 ; 63 Ind. Cas. 43 (Lah) ; A. I. R. 1922 Mad. 99=42 M. L. J. 473=1922 M. W. N. 184=15 L. W. 421. Application for compensation by judgment-debtors for period during which they were kept out of possession is one under s. 151 and not under s. 144. 2 Pat. L. J. 206=3 Pat. L. W. 423=39 Ind. Cas. 653. Restitution under section 151 can be granted to the judgment-debtor on the auction sale being set aside. A. I. R. 1922 Nag. 82=18 N. L. R. 24=64 Ind. Cas. 732. Restitution granted in pursuance of sale in execution of decree having been set aside under Order XXI, r. 90, decree remaining intact, is one under s. 151, and not under s. 144. A. I. R. 1930 Pat. 280=11 P. L. T. 156=9 Pat. 685=122 Ind. Cas. 589. Execution application dismissed for default can be restored under s. 151 if necessary, on the interest of justice without notice to other side. A. I. R. 1924 Lah. 350=69 Ind. Cas. 506. Where judgment-debtors were entitled to the refund of the amount claimed and section 144 does not permit restoration, s. 151 can always be resorted to, in the interest of justice. A. I. R. 1922 Cal. 28=26 C. W. N. 408=35 C. L. J. 53=64 Ind. Cas. 864. Stranger purchaser cannot claim refund of money in cases where the proceeds of the execution sale have been rateably distributed among several decree-holders and the execution sale is set aside. A. I. R. 1922 Mad. 228=42 M. L. J. 308=15 L. W. 303=67 Ind. Cas. 369. High Court can under s. 151 in proper case order the respondent to furnish security for restitution although the respondents may have obtained possession thereof without giving any security. A. I. R. 1928 Pat. 187=9 P. L. T. 87=109 Ind. Cas. 323. Equitable restitution is only claimable when complete restoration to the *status quo ante* is possible. A. I. R. 1928 Mad. 945=108 Ind. Cas. 639. Where a Court acting under s. 151 exercises the same jurisdiction which s. 144 gives it, the order made under s. 151 is appealable. 35 C. W. N. 105=53 C. L. J. 49=134 Ind. Cas. 1185=A. I. R. 1931 Cal. 779. An order for restitution of *mesne* profits passed on an erroneous view of the order of the High Court passed on application for stay is open to appeal. 146 Ind. Cas. 301=34 P. L. R. 938=A. I. R. 1933 Lah. 485. Court has inherent power to grant restitution. A. I. R. 1934 Lah. 322 ; A. I. R. 1934 Pat. 150.

**Restoration of suits.**—Court has inherent jurisdiction to restore dismissed suit under this section upon sufficient cause being shown. A. I. R. 1929 Cal. 158=48 C. L. J. 596=114 Ind. Cas. 672 ; see also A. I. R. 1930 Lah. 440=129 Ind. Cas. 755 ; 34 Bom. L. R. 356=138 Ind. Cas. 248=34 Bom. L. R. 714=A. I. R. 1932 Bom. 271 ; 122 Ind. Cas. 585 ; A. I. R. 1929 All. 906=120 Ind. Cas. 559 ; A. I. R. 1929 All. 811=1929 A. L. J. 1183=119 Ind. Cas. 15 ; 34 Bom. L. R. 714=A. I. R. 1932 Bom. 271=138 Ind. Cas. 248 ; A. I. R. 1929 All. 624=(1929) A. L. J. 1082=118 Ind. Cas. 669 ; A. I. R. 1933 Rang. 406 ; A. I. R. 1928 Lah. 534=108 Ind. Cas. 603 ; A. I. R. 1927 Lah. 622=28 P. L. R. 554=103 Ind. Cas. 425 ; A. I. R. 1927 Rang. 58=5 Bur. L. J. 139=69 Ind. Cas. 151 ; 95 Ind. Cas. 533=A. I. R. 1926 Sind 248 ; A. I. R. 1923 Pat. 354=4 P. L. T. 261=2 Pat. 501=72 Ind. Cas. 629 ; A. I. R. 1926 Nag. 409=9 N. L. R. 145 ; 63 Ind. Cas. 440 (Cal.) ; 47 Ind. Cas. 137=5 O. L. J. 259 ; 39 A. 8=14 A. L. J. 818=36 Ind. Cas. 366 ; A. I. R. 1930 All. 644=(1930) A. L. J. 938=128 Ind. Cas. 438 ; A. I. R. 1925 Pat. 435=4 Pat. 180=91 Ind. Cas. 213 ; A. I. R. 1936 Lah. 759 ; 4 A. W. R. 1025. Section 111 can be invoked if restoration is not possible under Order 18 rule 13. Where an *ex parte* decree is set aside both under Order 18, rule 13 and s. 15 the order is irregular and the Court acts over and above its jurisdiction, hence the order is subject to revision. A. I. R. 1930 Cal. 488=52 C. L. J. 524=34 C. W. N. 419=128 Ind. Cas. 94 ; A. I. R. 1930 Rang. 65=126 Ind. Cas. 542 ; 121 Ind. Cas. 659=26 N. L. R. 30=A. I. R. 1930 Nag. 40 ; 103 Ind. Cas. 620=9 P. L. T. 136=A. I. R. 1927 Pat. 369. Restoration of a suit under Order IX, rule 13, when no sufficient cause existed, is acting without jurisdiction, and s. 151 cannot be invoked when specific provisions applicable to the case in hand exist. A. I. R. 1930 Cal. 387=34 C. W. N. 222=126 Ind. Cas. 779 ; see also A. I. R. 1927 Cal. 534=54 C. 405=31 C. W. N. 576=103 Ind. Cas. 69 ; 143 Ind. Cas. 158=A. I. R. 1933 Pesh. 59 ; A. I. R. 1933 Mad. 485. Order by the successor in office admitting a suit rejected under Order VII, rule 13, is neither one which could be viewed as a review nor can such an order be passed under s. 151 and hence should be reversed. 1929 M. W. N. 140. *Ex parte* decree was passed against tenant but set aside on the ground of his minority and non-representation in the suit. Landlord's application for restoration of suit on the tenant's attaining majority can be allowed under s. 151. A. I. R. 1928 Nag. 106=106 Ind. Cas. 575. The Court has no inherent power to restore an appli-

cation to restore a suit after that application was itself time-barred. 143 Ind. Cas. 240=1933 M. W. N. 216=37 L. W. 48=A. I. R. 1933 Mad. 258=65 M. L. J. 193.

**Restoration of application.**—Section 151 can be resorted to in case of restoration application dismissed for default. A. I. R. 1925 All. 773=22 A. L. J. 817=89 Ind. Cas. 350; A. I. R. 1923 Bom. 386=80 Ind. Cas. 182; A. I. R. 1926 Pat. 218=7 P. L. T. 13=5 Pat. 361 (F. B.)=93 Ind. Cas. 939; 107 Ind. Cas. 729=A. I. R. 1928 Cal. 179=57 C. L. J. 87; A. I. R. 1929 All. 721=(1929) A. L. J. 1078=51 A. 901=119 Ind. Cas. 851; A. I. R. 1929 Cal. 17=32 C. W. N. 81=115 Ind. Cas. 357; A. I. R. 1922 Nag. 267=18 N. L. R. 152=4 N. L. J. 118=64 Ind. Cas. 420; 1931 A. L. J. 622=A. I. R. 1931 All. 594

**Restoration of execution petition.**—Court has inherent power to restore execution application dismissed for default and should do so if satisfied that it should exercise it *ex debito justitiæ*. A. I. R. 1926 Lah. 534=95 Ind. Cas. 924; see also A. I. R. 1930 Nag. 134=120 Ind. Cas. 405; A. I. R. 1930 Lah. 20=11 Lah. 93=31 P. L. R. 325=119 Ind. Cas. 494; 142 Ind. Cas. 686=34 P. L. R. 70=13 Lah. 761=A. I. R. 1933 Lah. 99; 117 Ind. Cas. 372 Lah.; A. I. R. 1928 Oudh 478=5 O. W. N. 895=141 Ind. Cas. 128; A. I. R. 1925 Cal. 184=78 Ind. Cas. 816; 145 Ind. Cas. 995=1933 A. L. J. 1034=A. I. R. 1933 All. 783 (F. B.); A. I. R. 1923 Nag. 18=38 Ind. Cas. 643; 143 Ind. Cas. 584=29 N. L. R. 176=A. I. R. 1933 Nag. 176; A. I. R. 1921 Lah. 67=2 Lah. 66=64 P. L. R. 1921=60 Ind. Cas. 720; *contra*; A. I. R. 1927 Mad. 335=52 M. L. J. 123=25 L. W. 192=99 Ind. Cas. 954. Execution application dismissed for default cannot be restored on the ground that fresh application would be time-barred. Mere fact that law of limitation steps in and prevents Court from claiming relief under procedure laid down by law, is not sufficient justification for granting relief under s. 151. A. I. R. 1926 Mad. 980=50 M. 67=51 M. L. J. 219=(1926) M. W. N. 890=26 L. W. 878=97 Ind. Cas. 1008. Execution application dismissed for default cannot be restored under s. 151. The remedy is to apply for fresh execution. 5 P. L. W. 208=4 Pat. L. J. 330=(1918) Pat. 265=47 Ind. Cas. 154.

**Restoration of appeal.**—In case of miscarriage of justice High Court can under ss. 151 and 115 set aside order of dismissal and direct restoration add re-hearing of appeal. 9 L. W. 513=52 Ind. Cas. 540. Court has inherent power to restore and re-hear appeal where it has been disposed of on an assumption that matters could be fully investigated in separate suit but were not so tried. 31 C. L. J. 48=56 Ind. Cas. 4. To exercise inherent power, laches of advocate or careless mistake of clerk is not good ground to restore appeal dismissed for default. A. I. R. 1926 Rang. 50=3 Rang. 488=92 Ind. Cas. 208. In a suit dismissed under Order XXVII, rule 3, appeal was preferred but dismissed for want of subsisting decree. During the pendency of an appeal application for restoration was allowed, but in revision preferred by the defendant against order restoring the suit was set aside. Appeal was revised and it was held that there was sufficient ground to restore the appeal under s. 151. A. I. R. 1930 All. 100=122 Ind. Cas. 402. Appeal dismissed for default can be re-admitted under s. 151. A. I. R. 1921 Bom. 20=45 B. 649=23 Bom. L. R. 110. Appeal dismissed for default of payment of printing charges can be restored under this section in a suitable case. A. I. R. 1931 Sind 153=134 Ind. Cas. 1169.

**Retrial.**—When adequate procedure is not provided for retrial can be ordered by appellate Court in exceptional circumstances under s. 151. 64 Ind. Cas. 599. Appellate Court apart from provision of Order XLI, rr 33 and 23, can grant retrial under this section whenever it finds necessary in the interest of justice. A. I. R. 1922 Bom. 267=46 B. 184=23 Bom. L. R. 769=63 Ind. Cas. 428; see also A. I. R. 1921 All. 335=19 A. L. J. 553=63 Ind. Cas. 501; A. I. R. 1927 Lah. 480=9 Lah. L. J. 268=28 P. L. R. 679. Decision passed in appeal in ignorance of party's death is not a nullity and the appeal could be ordered to be re-heard paying due consideration to the party's death. A. I. R. 1923 Cal. 676=37 C. L. J. 494=14 Ind. Cas. 545. Re-hearing under s. 151 cannot be asked for case where r. 3, Chapter 7, Allahabad High Court Rules has not been complied with being a mere irregularity not affecting case on merits. A. I. R. 1929 All. 403=(1929) A. L. J. 713=116 Ind. Cas. 23.

**Review.**—Court can under s. 151 review its judgment by setting aside order passed under mistake or by fraud upon the Court. 32 Ind. Cas. 527; A. I. R. 1925 Rang. 192=2 Rang. 659=85 Ind. Cas. 284; A. I. R. 1924 Pat. 673=5 P. L. T. 425=3 Pat. 930=80 Ind. Cas. 667; A. I. R. 1923 Pat. 354=2 Pat. 504=4 P. L. T. 261=72 Ind. Cas. 629; 53 Ind. Cas. 56=37 M. L. J. 162; 1932 M. W. N. 72=35 L. W.

57=A. I. R. 1932 Mad. 223 ; 30 C. L. J. 1=53 Ind. Cas. 39. But order properly made cannot be set aside under s. 151 unless express power to that effect is given. 9 S. L. R. 132=32 Ind. Cas. 575 ; A. I. R. 1926 All. 50=48 A. 162=23 A. L. J. 1029=89 Ind. Cas. 946. Review cannot be granted under s. 151 if forbidden by C. P. Code or other statutory provision. 45 C. 519=26 C. L. J. 325=32 C. W. N. 446=42 Ind. Cas. 711 ; A. I. R. 1927 Cal. 920=36 C. W. N. 822=104 Ind. Cas. 136. Appellate Court in a proper case restore appeal and re-hear it. 47 Ind. Cas. 917. Where powers under other provision of Code do exist, s. 151 should not be resorted to. A. I. R. 1924 Cal. 1054=28 C. W. N. 928=84 Ind. Cas. 278. Review cannot be granted on the ground that order has been passed on misconception of law. A. I. R. 1929 Cal. 162=48 C. L. J. 594=115 Ind. Cas. 268. If justice so requires interlocutory orders can be revised under s. 151 though the application for the purpose does not come in language of Order XLVII. A. I. R. 1930 Bom. 294=32 Bom. L. R. 665=125 Ind. Cas. 690. Court has no power under s. 151 to review its order dismissing plaintiff's suit under Order XI, rule 21, the order being appealable. A. I. R. 1927 Cal. 158=98 Ind. Cas. 70. Where a Judge refuses to exercise his discretion under s. 151, C. P. Code, and grant a review, his order not being a judgment is not subject to appeal. 12 Pat. 202=142 Ind. Cas. 458=14 P. L. T. 1=A. I. R. 1933 Pat. 139. Recourse to inherent powers of Court is not permissible to justify the Court in granting a review which is specifically provided for by Order 47, rule 1. 141 Ind. Cas. 188=34 P. L. R. 88=A. I. R. 1933 Lah. 169.

**Security.**—There is no provision in C. P. Code, for calling upon the next friend to provide security for costs though it is open to the Court to make an order after the hearing, for costs against a next friend and to call on him to provide security in the event of retiring. A. I. R. 1934 All. 458.

**Stay of proceedings.**—High Court can order stay of suit to avoid multiplicity or for the ends of justice. A. I. R. 1926 All. 212=24 A. L. J. 375=48 A. 356=93 Ind. Cas. 285 ; 7 O. W. N. 386=123 Ind. Cas. 50 ; A. I. R. 1929 Oudh 341=4 Luck. 573=7 O. W. N. 157=114 Ind. Cas. 775 ; 55 B. 801=133 Ind. Cas. 864=33 Bom. L. R. 702=A. I. R. 1931 B. 384 ; A. I. R. 1929 Lah. 12=10 Lah. L. J. 470=113 Ind. Cas. 783 ; 54 A. 344=1932 A. L. J. 43=A. I. R. 1932 All. 238 ; 1932 A. L. J. 861 ; A. I. R. 1928 Lah. 912=110 Ind. Cas. 912 ; 163 Ind. Cas. 895=A. I. R. 1936 Pat. 40 ; A. I. R. 1934 Lah. 909 ; A. I. R. 1934 Lah. 238=36 P. L. R. 138=150 Ind. Cas. 47 ; A. I. R. 1934 Pat. 66=15 Pat. L. T. 783. Superior Court can under s. 151 stay proceedings under s. 476, Cr. P. Code, pending in lower Court. A. I. R. 1925 Lah. 323=7 Lah. L. J. 73=26 Cr. L. J. 1166=88 Ind. Cas. 526. Power under s. 151 is not to be capriciously or arbitrarily exercised. It is to be exercised to facilitate proper administration of justice. Court can under s. 151 order stay of cross-suit or postpone the hearing pending the decision of a selected action. A. I. R. 1924 Cal. 757=28 C. W. N. 295=86 Ind. Cas. 1023. If the order under s. 151 staying the suit is passed without jurisdiction it can be set aside in revision. A. I. R. 1927 Bom. 79=51 B. 26=28 Bom. L. R. 1442=101 Ind. Cas. 154. Order refusing stay of suit or its execution is an interlocutory order and cannot therefore be revised under s. 151. A. I. R. 1930 Lah. 525=31 P. L. R. 174=128 Ind. Cas. 49. Criminal case of which subject-matter is same as in Civil suit should be stayed pending trial of the latter. A. I. R. 1927 Lah. 17=27 Cr. L. J. 1114=97 Ind. Cas. 426. Where an order passed under this section amounts to refusal of jurisdiction conferred on Court under Order 21, rr. 97 and 98, it should not be passed. A. I. R. 1929 Lah. 694=119 Ind. Cas. 488. Where order staying execution would merely impede execution of final decree without good and sufficient cause, High Court should not exercise its inherent power to pass such order. 89 Ind. Cas. 558. Stay of execution should be ordered where to do so, is not detrimental to the interest of the decree-holder. A. I. R. 1925 Mad. 42=48 M. 494=20 L. W. 175=84 Ind. Cas. 134. High Court has inherent power as Court of Appeal to stay proceedings in lower Court as ancillary to its power of reversing lower Court's order. (1919) Pat. 145=4 Pat. L. J. 371=52 Ind. Cas. 185. Execution of decree can be stayed under s. 151 prior to granting of certificate. A. I. R. 1925 Sind 216=82 Ind. Cas. 739. Pending insolvency proceedings stay of execution proceedings should be ordered where the property attached is not subject to decay or it is not of such a nature that the delay would seriously depreciate its value. A. I. R. 1924 Sind 69=76 Ind. Cas. 380 ; but see 32 Ind. Cas. 897=3 L. W. 250. Pending appeal to Privy Council, High Court can both under s. 151 and Order XLV, rule 13, order stay of proceedings where it having been set aside an *ex parte* decree, orders re-hearing of the suit. A. I. R. 1931 Cal. 79=

34 C. W. N. 631=129 Ind. Cas. 833. In a fit case where Order 41, rule 5, does not apply, the Court is competent to order stay under s. 151. 1932 A. L. J. 582=A. I. R. 1932 All. 654; see also 65 M. L. J. 138=38 L. W. 20=A. I. R. 1933 Mad. 563=143 Ind. Cas. 903. This section is not applicable to the stay of a suit connected with a pending appeal. But the Court has inherent jurisdiction to stay the suit if that is in the interest of both the parties. 144 Ind. Cas. 107=I. R. 1933 Lah. 50. Where the case does not attract the provisions of s. 10, C. P. Code, and it appears that the subject-matter of the two suits are different, the Court cannot exercise its power under s. 151 to stay one suit till the disposal of the other suit by another Court. 132 Ind. Cas. 257=14 O. L. J. 430=8 O. W. N. 644=A. I. R. 1931 Oudh 313; see also 133 Ind. Cas. 222=53 C. L. J. 619=A. I. R. 1931 Cal. 779. Order 45, rule 13, has no application where the party applied for the stay of proceedings in the Court below as distinct from the stay of execution of a decree. A. I. R. 1934 All. 585. Where there has been an appeal to the Privy Council against the preliminary mortgage decree High Court can stay further proceedings as to final decree under s. 151. A. I. R. 1934 Lah. 238.

**Security for cost.**—The mere fact that a case does not fall within the four corners of order 25 does not prevent the Court from acting under s. 151 *ex debito justitiæ* and to prevent the abuse of its process if there be any occasion of it. 26 S. L. R. 21=140 Ind. Cas. 233=A. I. R. 1932 Sind 33.

**Set-off.**—The provisions as to set-off contained in Order 21, r. 18, are exhaustive. So this section cannot be invoked for granting set-off on grounds not mentioned in rule 18. 138 Ind. Cas. 285=33 P. L. R. 671=A. I. R. 1932 Lah. 537.

**Surety bond.**—Where a surety bond does not fall under s. 145, the Court has inherent power to enforce the bond with a suit. 145 Ind. Cas. 1004=1933 M. W. N. 1005=A. I. R. 1933 Mad. 722=38 L. W. 450=65 M. L. J. 507; see also 56 M. 989=145 Ind. Cas. 1011=1933 M. W. N. 985=38 L. W. 385=A. I. R. 1933 Mad. 691=65 M. L. J. 342.

**Strike out pleadings, etc.**—Court can strike out pleadings and proceed *ex parte* when the costs for adjournments are not paid. A. I. R. 1925 All. 280=47 A. 538=23 A. L. J. 212=86 Ind. Cas. 862; see also 34 L. W. 864=61 M. L. J. 477. Where a suit was declared to be not within the jurisdiction of Civil Courts but within the jurisdiction of Revenue Court, s. 151 cannot be resorted to, to bring the same within the jurisdiction of Civil Court. 85 Ind. Cas. 702. Order of Court in striking out evidence on persistent failure of defendant to attend Court when ordered to do so and even an attempt by Court to persuade him to appeal, is not objectionable as Court has inherent power to do so. A. I. R. 1928 Oudh 262=50 W. N. 291=111 Ind. Cas. 473.

**Transfer of a case.**—Transfer of a case under this section can be allowed on the ground of expression of strong opinion by Judge regarding evidence. 133 Ind. Cas. 876=32 P. L. R. 388. If it appears that the plaintiff has chosen a *forum* in utter disregard of convenience of both parties, for some ulterior object and in abuse of his position as *dominus lites* the High Court can, in the exercise of its inherent power, determine which of the two Courts having jurisdiction should try the suit. 1933 A. L. J. 1507.

**Appeal.**—An appeal lies under s. 151 where Court exercises the same jurisdiction as under s. 144. 35 C. W. N. 105=53 C. L. J. 49; see also A. I. R. 1927 Cal. 285=31 C. W. N. 290=100 Ind. Cas. 735. Ordinarily an order under s. 151 is not appealable. But if it in substance purports to be under some other provision from which an appeal lies, then an appeal lies from it. A. I. R. 1930 Lah. 468=127 Ind. Cas. 159; see also 119 Ind. Cas. 883=A. I. R. 1929 Pat. 232; A. I. R. 1930 Nag. 199=124 Ind. Cas. 246=26 N. L. R. 187; A. I. R. 1929 Lah. 834=123 Ind. Cas. 876; A. I. R. 1930 Lah. 20=11 Lah. 93; 31 P. L. R. 375=119 Ind. Cas. 494; A. I. R. 1930 Lah. 789=31 P. L. R. 477=12 Lah. L. J. 71=122 Ind. Cas. 102; see also A. I. R. 1927 Cal. 167=104 Ind. Cas. 331; A. I. R. 1928 Lah. 802; A. I. R. 1934 Lah. 349; A. I. R. 1927 Mad. 859=103 Ind. Cas. 670; A. I. R. 1927 Mad. 1190=1927 M. W. N. 286=102 Ind. Cas. 28; A. I. R. 1922 Cal. 450=37 C. L. J. 99=73 I. C. 306; 73 P. L. R. 1916=105 P. W. R. 1916=35 Ind. Cas. 633; see also A. I. R. 1934 Lah. 349; A. I. R. 1934 Lah. 233=36 P. L. R. 99=149 Ind. Cas. 1050; A. I. R. 1936 Sind 166=30 S. L. R. 166; A. I. R. 1936 Mad. 636=43 L. W. 773; A. I. R. 1936 Pat. 491; 38 P. L. R. 717=A. I. R. 1936 Lah. 212; 37 P. L. R. 674; A. I. R. 1934 Lah. 233=36 P. L. R. 99; 36 P. L. R. 142. Refusal to act

under section 151 can not be appealed against. A. I. R. 1922 Pat. 479=65 Ind. Cas. 341=1 Pat. 277. Order of remand is appealable only when it amounts to a decree. A. I. R. 1926 Pat. 457=6 Pat. 160=7 P. L. T. 535=(1926) Pat. 333=97 Ind. Cas. 105; see also A. I. R. 1928 Cal. 211=117 Ind. Cas. 678. If the order of remand is passed under the inherent powers of the Court given by section 151 it is not appealable. A. I. R. 1929 Mad. 205=119 Ind. Cas. 705; see also A. I. R. 1929 Lah. 245=118 Ind. Cas. 530=230 P. L. R. 604; A. I. R. 1926 Pat. 516=7 P. L. T. 811=(1926) Pat. 302=96 Ind. Cas. 440; 92 Ind. Cas. 684=A. I. R. 1925 Pat. 760. An appeal may lie if order passed under s. 151 is one which in substance comes under s. 47 or s. 144, Civil Pro. Code. A. I. R. 1937 Cal. 152. Right to appeal is determined by what it ought to have been done, hence order of remand under Order XLI, r. 23, which in reality should have been under s. 151 can be appealed from. A. I. R. 1928 Lah. 341=107 Ind. Cas. 284. An order made under s. 151, is not subject to an appeal and if a Judge having no jurisdiction to entertain the appeal entertains one, his judgment is *coram none iudic* and must be set aside. 12 Lah. 602=134 Ind. Cas. 292=32 P. L. R. 863=A. I. R. 1931 Lah. 344; 18 N. L. J. 72. An order passed under inherent power is not appealable. But under special circumstances Memorandum of Appeal may be taken as a petition for revision. A. I. R. 1933 Pat. 564; 34 P. L. R. 51=A. I. R. 1933 Lah. 73. An order of remand under s. 151, C. P. Code, is appealable only when it amounts to a decree. A. I. R. 1935 Pat. 49=154 Ind. Cas. 859. The propriety of an order under s. 151, C. P. Code, cannot be questioned under s. 115, C. P. Code. 59 C. L. J. 389=A. I. R. 1934 Cal. 780.

**Appellate Court—power of.**—Appellate Court has an inherent power to grant special leave to appeal, and here it where it has been refused under s. 106 (a), Presidency Towns Insolvency Act, if a question of principle is involved. A. I. R. 1923 Bom. 245=25 Bom. L. R. 161=72 Ind. Cas. 261. Decision not appealed against is not generally reversed but when justice so demand, appellate Court can set aside a decision on point not appealed against. A. I. R. 1927 Oudh 455=4 O. W. N. 862=104 Ind. Cas. 824. Jurisdiction to allow appellant to continue appeal in *forma pauperis* can be exercised only if Court is of opinion on passing decree and judgment that the decree is contrary to law. (1920) M. W. N. 277=38 M. L. J. 146=10 L. W. 659=54 Ind. Cas. 761.

**Limitation.**—An application for restitution either under s. 144 or under s. 151 is subject to the rule of limitation as mentioned in Art. 181 of the Limitation Act. 3 P. 371=78 Ind. Cas. 200=A. I. R. 1925 Pat. 1 (F. B.).

**152. [New.]** Clerical or arthmetical mistakes in judgments, decrees or orders arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

**Scope.**—This section applies both to judgments and decrees. A. I. R. 1929 Lah. 400. Decree in conformity with judgment cannot be amended. A. I. R. 1927 Pat. 405=9 P. L. T. 15=103 Ind. Cas. 298. Where in a mortgage suit a judgment contains two contradictory directions as regards the decree in a mortgage suit and the decree is technically in accordance with the earlier operative part of the judgment, no application for amendment of decree lies. A. I. R. 1930 Lah. 589=125 Ind. Cas. 374. Application for amendment filed in appellate Court should not be dismissed merely because mistake was not brought to the notice when appeal was heard. A. I. R. 1929 Mad. 830=123 Ind. Cas. 355. Ordinarily where there is a discrepancy between the decree and the judgment and the decree-holder accepts payment of the amount due under the decree, he is not by that circumstance alone, debarred from taking proper steps to have the decree brought in accordance with the judgment. A. I. R. 1929 Mad. 830=(1929) M. W. N. 729=123 Ind. Cas. 355. Where final decree omitted clause regarding interest in the preliminary decree for sale, omission can be rectified at any time by Court. A. I. R. 1926 Oudh 223=91 Ind. Cas. 29. Court can add a necessary direction in its judgment accidentally omitted after the judgment is signed. A. I. R. 1927 Pat. 25=8 P. L. T. 81=97 Ind. Cas. 386. Correction involving payment of larger amount should not be allowed long after satisfaction was recorded. A. I. R. 1926 Mad. 516=(1926) M. W. N. 180=50 M. L. J. 655=94 Ind. Cas. 453. Where a decree is drawn up in pursuance of a judgment, successor of the Judge cannot amend the decree so as to bring it in con-



formity with it. A. I. R. 1926 Cal. 1100=96 Ind. Cas. 195. Under certain circumstances a decree in conformity with judgment can be amended. A. I. R. 1927 Mad. 435=1927 M. W. N. 38=99 Ind. Cas. 655. Where property is sold at a Court sale and made over to the auction-purchaser, the Court which has ordered the sale, cannot set it aside under its inherent powers on the ground that the sale was ordered by a mistake for a sum larger than what was due under the decree. A. I. R. 1925 Bom. 389=27 Bom. L. R. 657=89 Ind. Cas. 589. Dower decree making all defendants liable jointly and severally for the whole dower debt can be amended. A. I. R. 1924 All. 690=82 Ind. Cas. 627 ; see also A. I. R. 1923 Bom. 414=80 Ind. Cas. 180 ; 76 Ind. Cas. 198=A. I. R. 1924 Lah. 621. Court can correct mistake in final form in order due to original mistake in party's application. A. I. R. 1924 All. 520=22 A. L. J. 215=78 Ind. Cas. 166. Mistake in description of property in plaint and decree can be amended. A. I. R. 1935 Oudh 92=1935 O. W. N. 31. Revisional Court has no power to amend a decree of the first Court, where the petition for revision is dismissed. 156 Ind. Cas. 585=A. I. R. 1935 Pesh. 91.

Court cannot amend a decree when it is in conformity with the judgment, even if there is an error apparent on the face of the judgment. A. I. R. 1924 Mad. 225=18 L. W. 876=33 M. L. T. 221=76 Ind. Cas. 786. Section 152 is the widest possible law justifying the amendment of misdescription of lands in the plaint. A. I. R. 1923 All. 349=21 A. L. J. 328=72 Ind. Cas. 483. Where the District Munsiff when shorthand transcription reached him entirely changed the effect of what he dictated in open Court, the revision was held incompetent. A. I. R. 1923 Mad. 663=18 L. W. 105=72 Ind. Cas. 688. It was wrong for Court to pass order describing person as appellant who was never an appellant before it. A. I. R. 1923 All. 119=20 A. L. J. 980=71 Ind. Cas. 424. Where the whole system of calculation adopted by the Court was challenged in plaintiff's application and there was no more allegation of an arithmetical or clerical mistake, *held* that although Court purported to act under s. 152, it must be considered legally to have acted under Order XLVII. A. I. R. 1921 Lah. 250=3 Lah. L. J. 341=66 Ind. Cas. 992. Application to correct decree as to costs can be made under s. 152. 54 Ind. Cas. 821 ; see also 57 Ind. Cas. 739. Decree passed on award, embodying terms as to costs not contained in award can not be amended, the only way to cure the defect being an appeal or application for review. 3 L. W. 499=34 Ind. Cas. 787. An error in its final decree copied from High Court's preliminary decree cannot be amended by District Court. 31 Ind. Cas. 320. The remedy where decree does not accord with the judgment is amendment of decree and not a suit to set aside. 43 C. 217=19 C. W. N. 1228=31 C. 13. A decree against a person cannot be amended so as to add another as judgment-debtor against whom a decree is not passed. 40 Ind. Cas. 47. Parties are not to be driven to subsequent suit where delivery of properties not covered by decree is ordered. Court should correct its mistake. 49 Ind. Cas. 1948. This section is available not only in cases where the mistake or error arose for the first time in the plaint or after the institution of the suit but is also available where the mistake originates in a document which has been copied into the plaint or at some time anterior to the plaint. There is nothing which limits the power of the Court under s. 152 to correcting errors, mistakes or omissions which arise in the suit. 131 Ind. Cas. 6=34 L. W. 955=A. I. R. 1933 Mad. 260=61 M. L. J. 805. An order setting aside an *ex parte* decree is a judgment within the meaning of s. 2 (9) and cannot be lightly set aside save as provided by s. 152 or on review. 145 Ind. Cas. 302=10 O. W. N. 794=A. I. R. 1933 Oudh 385.

**Clerical or Arithmetical Errors**—Section 152 deals with amendments of clerical errors in order or decrees of Court itself which are drawn up and which do not properly represent what the Court decides. A. I. R. 1927 All. 585=102 Ind. Cas. 124 ; A. I. R. 1928 All. 458=26 A. L. J. 1323=111 Ind. Cas. 245 ; 24 Ind. Cas. 283 ; 12 A. L. J. 185=23 Ind. Cas. 344 ; 29 Ind. Cas. 144, 22 Ind. Cas. 774=15 M. L. T. 102=(1914) M. W. N. 107 ; A. I. R. 1934 All. 128=149 Ind. Cas. 919 ; A. I. R. 1934 Oudh 352=11 O. W. N. 550 ; 7 S. L. R. 53=21 Ind. Cas. 540 ; 16 C. L. J. 517 ; 9 Ind. Cas. 433 ; 108 Ind. Cas. 737 ; A. I. R. 1925 All. 187=47 A. 44=82 Ind. Cas. 1030 ; A. I. R. 1923 Pat. 218=81 Ind. Cas. 295 ; 62 Ind. Cas. 652=14 L. W. 445 ; 1 U. P. L. R. (H. C.) 69=51 Ind. Cas. 55 ; 4 Pat. L. J. 205=50 Ind. Cas. 497 ; 44 Ind. Cas. 248=7 L. W. 8 ; A. I. R. 1932 A. L. J. 587=1932 A. L. J. 784 ; 12 L. R. 383=8 O. W. N. 1238 ; 140 Ind. Cas. 113. Where the applicant is guilty of laches, an application to correct a clerical error will be refused. 37 P. L. R. 623.

**Accidental slip or omission.**—Where omission is not a deliberate one but is merely due to inadvertence, the judgment and the decree based on it can be amended even where the right of appeal was not availed of. A. I. R. 1930 Lah. 210=125 Ind. Cas. 355; see also A. I. R. 1931 Mad. 260=131 Ind. Cas. 6. The Judicial Committee of the Privy Council has also jurisdiction to recommend alteration of a former order in Council on the ground that by inadvertence it does not give effect to the intention of the Board as expressed in their judgment. A. I. R. 1931 P. C. 1042=35 C. W. N. 583=(1931) M. W. N. 620=131 Ind. Cas. 309. After confirmation of lower Court's decree in appeal, jurisdiction of that Court to amend decree ceases. A. I. R. 1929 Mad. 830=(1929) M. W. N. 729=123 Ind. Cas. 355; see also A. I. R. 1930 Nag. 138=120 Ind. Cas. 735. Amendment of decree prejudicing rights of third parties should not be allowed. A. I. R. 1931 Mad. 399=54 M. 184=32 L. W. 919=124 Ind. Cas. 818=(1930) M. W. N. 1152. This section empowers Court not only to correct clerical or arithmetical mistakes but also errors arising therein from any accidental slip or omission, which may be done at any time and even without application from any parties. A. I. R. 1929 All. 337=51 A. 672=(1929) A. L. J. 505=119 Ind. Cas. 287; 108 Ind. Cas. 737; 108 Ind. Cas. 622=A. I. R. 1928 Lah. 636; A. I. R. 1927 Pat. 25; 13 O. C. 114; 91 Ind. Cas. 29; 37 A. 323=13 A. L. J. 449; A. I. R. 1931 Oudh 422=8 O. W. N. 1121; 4 O. L. J. 475=42 Ind. Cas. 66; 67 Ind. Cas. 310=A. I. R. 1923 Nag. 109; A. I. R. 1929 All. 147=50 A. 859=114 Ind. Cas. 867; A. I. R. 1928 Lah. 636=108 Ind. Cas. 622; 93 Ind. Cas. 799=A. I. R. 1927 Rang. 57=4 Rang. 347; A. I. R. 1927 Pat. 25=8 P. L. T. 81=97 Ind. Cas. 386; 1925 Oudh 418=12 O. L. J. 246=2 O. W. N. 218=87 Ind. Cas. 987; A. I. R. 1925 Oudh 373=12 O. L. J. 141=87 Ind. Cas. 333; 73 Ind. Cas. 679=A. I. R. 1923 Lah. 147; A. I. R. 1921 Oudh 190=8 O. L. J. 416=65 Ind. Cas. 693; A. I. R. 1922 Mad. 192=15 L. W. 393; A. I. R. 1924 Rang. 104=74 Ind. Cas. 1020; A. I. R. 1924 All. 127=74 Ind. Cas. 442; 1932 A. L. J. 784=A. I. R. 1932 All. 587=139 Ind. Cas. 491; 136 Ind. Cas. 850=1931 M. W. N. 1329=35 L. W. 322=A. I. R. 1932 Mad. 275=62 M. L. J. 350; 140 Ind. Cas. 15=A. I. R. 1932 Lah. 619; 9 O. W. N. 633=A. I. R. 1932 Oudh 291=139 Ind. Cas. 367; 133 Ind. Cas. 366=12 Pat. L. T. 466=A. I. R. 1931 Pat. 296; A. I. R. 1931 All. 427=132 Ind. Cas. 562. This section is wide enough to cover the correction of mistakes made by the parties. 1932 A. L. J. 784=139 Ind. Cas. 491=A. I. R. 1932 All. 587. An amendment of a decree should not be allowed as to prejudice the rights of third parties. 54 M. 184=129 Ind. Cas. 818=1930 M. W. N. 1152=32 L. W. 919=A. I. R. 1931 Mad. 399=60 M. L. J. 721. The Court has inherent power to vary or amend its own decree or order so as to carry out its own meaning. A. I. R. 1935 Bom. 75=36 Bom. L. R. 1217=59 Bom. 158. But where the error does not arise from accidental slip or omission, no amendment should be allowed. A. I. R. 1935 Pesh. 104; A. I. R. 1936 Sind 53.

**May at any time corrected.**—Although there is no limitation for a case under s. 152, no amendment should be allowed where laches may disentitle a party to relief. A. I. R. 1928 Nag. 149=109 Ind. Cas. 727; but see A. I. R. 1924 Oudh 408=78 Ind. Cas. 96=11 O. L. J. 227=80 Ind. Cas. 833 (where amendment was granted after 20 years); A. I. R. 1924 Cal. 895=28 C. W. N. 873=80 Ind. Cas. 55. Court is not bound to grant application for amendment in every case. Court can dismiss application filed 3 years after full satisfaction of mortgage decree. A. I. R. 1925 All. 556=23 A. L. J. 518=88 Ind. Cas. 396. Application for amendment under s. 152 is not maintainable after discharge and satisfaction of a decree. A. I. R. 1925 All. 556=23 A. L. J. 518=88 Ind. Cas. 396. Exercise of power to amend under s. 152 is discretionary and necessarily so when no period of limitation is provided for application for its exercise. An application for amendment should therefore be rejected as too late if the rights of third parties acting in good faith have intervened. A. I. R. 1923 Mad. 57=16 L. W. 623=43 M. L. J. 559=69 Ind. Cas. 977; A. I. R. 1924 Oudh 408=78 Ind. Cas. 96=11 O. L. J. 227=80 Ind. Cas. 833. A decree can be brought into conformity with judgment even after the lapse of years. 60 Cal. 753=146 Ind. Cas. 658=37 C. W. N. 500=A. I. R. 1933 Cal. 627. The power under this section is discretionary and the High Court will not interfere unless the lower Court has exercised the discretion in such a manner that it is obviously wrong and unjust to make the order it did. A. I. R. 1933 Oudh 425=10 O. W. N. 958; see also 10 O. W. N. 1087=A. I. R. 1933 Oudh 529; 146 Ind. Cas. 310=10 O. W. N. 884=A. I. R. 1933 Oudh 466; 15 N. L. R. 124=142 Ind. Cas. 880.

**Consent decree.**—Consent decree cannot be amended without consent. A. I. R. 1931 Cal. 51=130 Ind. Cas. 907=57 C. 1143; A. I. R. 1935 Pesh. 104. Application

to amend consent decree on the ground of fraud is outside s. 152. A. I. R. 1929 Cal. 470=33 C. W. N. 883=124 Ind. Cas. 525. Where suit is compromised in appeal but the judgment omitted certain terms of compromise, Court would pass an order correcting the omission under s. 152. A. I. R. 1928 Lah. 352=9 Lah. 176=30 P. L. R. 135=119 Ind. Cas. 257. In an application by judgment-debtor for amendment of compromise decree, decree-holder cannot plead that compromise was obtained by fraud. A. I. R. 1929 Lah. 400. Even in compromise decree accidental slip can be corrected. A. I. R. 1929 Lah. 254=116 Ind. Cas. 706. The test for determination of an application for amendment under s. 152 is whether the decree is or is not in accordance with the intention of the Judge who decided the case. Where the intention of the Judge apparently was to pass a decree in terms of compromise, but the decree was passed contrary to the judgment and the terms of the compromise, an application for amendment should be allowed. 8 O. W. N. 1121=134 Ind. Cas. 1009=A. I. R. 1931 Oudh 422 ; see also A. L. R. 1933 Pat. 135.

**Power of Court passing the decree.**—A Court cannot set aside its own decree except under s. 152 or on review. A. I. R. 1925 Pat. 36=3 Pat. 778=6 P. L. T. 309=84 Ind. Cas. 320. If the error has been committed deliberately, s. 152 cannot be invoked for the purpose of correcting it. A. I. R. 1924 Oudh 408=78 Ind. Cas. 96=11 O. L. J. 227=80 Ind. Cas. 833. Court can amend a record even after an appeal is brought. A. I. R. 1924 Pat. 528=2 Pat. L. R. Civ. 6=5 P. L. T. 588=78 Ind. Cas. 794 ; A. I. R. 1924 All. 127=74 Ind. Cas. 842. When lower Court's decree has been superseded by that of appellate Court, lower Court cannot amend its decree. A. I. R. 1921 U. B. 5=4 U. B. R. 1=66 Ind. Cas. 799 ; 63 Ind. Cas. 840 ; A. I. R. 1921 All. 130=19 A. L. J. 375=62 Ind. Cas. 910. An application for amendment of a decree is maintainable under s. 152 where the question of award of costs is not in dispute but only the method of assessments or any item awarded is in controversy. 165 Ind. Cas. 904=A. I. R. 1936 Pesh. 196. Application by the plaintiff to amend the decree so as to bring its terms in conformity with judgment must be made to the Court which passed it and not to the appellate Court. 57 Ind. Cas. 710. When decree is confirmed on appeal, appellate Court alone can amend the decree even when appeal is dismissed under Order XLI, r. 11. 55 Ind. Cas. 305 ; see also 43 Ind. Cas. 360. When High Court refuses to revise decree of Small Cause Court it must remain as the decree of the original Court and an application for the amendment of it must be made to the original and not to the High Court. 1 Lah. 342=56 P. L. R. 1921=81 P. W. R. 1920=58 Ind. Cas. 630. Where lower Court's decree has been superseded by High Court, application for amendment should be made to the High Court. 42 Ind. Cas. 970 ; A. I. R. 1921 All. 130=19 A. L. J. 375=62 Ind. Cas. 910 ; 31 M. L. J. 438=(1916) 2 M. W. N. 249=4 L. W. 225=35 Ind. Cas. 891 ; 16 A. L. J. 451=46 Ind. Cas. 376 ; 45 Ind. Cas. 246. Successor in office of Judge can rectify an accidental error in judgment of his predecessor. 18 A. L. J. 501=2 U. P. L. R. All. 195=55 Ind. Cas. 963 ; see also 44 C. 28=38 Ind. Cas. 584 ; 139 Ind. Cas. 903=13 P. L. T. 576=A. I. R. 1932 Pat. 331. Court in s. 152 does not mean the presiding Judge but the Court means whoever may be the presiding officer. 2 Pat. 296=63 Ind. Cas. 840. The mere fact of an appeal being filed does not oust the jurisdiction of original Court to amend plaint or decree on account of clerical error. When the trial Court's decree is merged into appellate decree then only the jurisdiction of the original Court is ousted. 1931 A. L. J. 536=A. I. R. 1931 All. 736 ; see also 36 C. W. N. 665. Where an appeal has been summarily dismissed under Order 41, rule 11, by the High Court, the application for amendment of the decree should be made to the lower Court. 11 Pat. 409=138 Ind. Cas. 908=13 Pat. L. T. 489=A. I. R. 1932 Pat. 238.

**Appeal and revision.**—No appeal lies against order amending decree nor can order directing amendment be challenged in appeal against amended decree. 120 Ind. Cas. 174 ; see also 30 C. 679 ; A. I. R. 1927 Lah. 68=68 Ind. Cas. 883 ; 73 Ind. Cas. 679=97 Ind. Cas. 66=A. I. R. 1926 Lah. 664. But where Court wrongly declines to amend decree, it is failure to exercise jurisdiction vested in the Court, and the High Court can interfere in revision. A. I. R. 1929 Lah. 664=30 P. L. R. 663=115 Ind. Cas. 542. Order amending decree without giving opportunity to party against whom amendment was to operate to show cause against it, is open to review. A. I. R. 1926 All. 384=48 A. 281=24 A. L. J. 266=94 Ind. Cas. 877. Where the order is under order 47 and not under s. 152 an appeal lies. 3 Lah. L. J. 341=66 Ind. Cas. 992.

**Delay.**—Where the delay on the part of the applicant for correction of a decree is not capable of satisfactory explanation the Court may reject the application. 139 Ind. Cas. 528=36 C. W. N. 97=A. I. R. 1932 Cal. 563.

**153. [New.]** The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend

General power to amend. any defect or error in any proceeding in a suit ; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

**Scope**—Any defect or error in any proceeding can be amended. An application not signed by the parties, though it ought to have been or should be allowed to be signed by way of amendment. A. I. R. 1924 All. 804=L. R. 5 A. 565 Civ.=82 Ind. Cas. 65. The filing of an appeal is included in the term "any proceeding." A. I. R. 1930 All. 131=123 Ind. Cas. 824. Pending the decision of appeal from it the decree of the trial Court remains in force and can be amended by the Court passing it. The jurisdiction of the trial Court to interfere with the decree ceases only when decree is passed in appeal. A. I. R. 1926 All. 304=48 A. 224=24 A. L. J. 149=92 Ind. Cas. 264 ; but see A. I. R. 1924 Bom. 166=25 Bom. L. R. 888=77 Ind. Cas. 171. Where a mistake as to description of village in which mortgaged property is situate is found in appeal the appellate Court should allow amendment of plaint to rectify the mistake. A. I. R. 1922 All. 81=20 A. L. J. 159=66 Ind. Cas. 208. A clerical error in the plaint about description of property can be corrected by the High Court even after decree is passed in whatever subsequent record it is repeated by mistake. 14 L. W. 445=62 Ind. Cas. 652. This section has no application where an order is passed dismissing an application under Order IX, r. 13, for default as the dismissal order is not an error or defect in the proceedings, though it may be an erroneous order as made on merits. A. I. R. 1922 Pat. 121=1922 Pat. 5=60 Ind. Cas. 152. Where judgment and decree granted possession but omitted to make any mention of *mesne* profits, such accidental omission is covered by s. 152. A. I. R. 1937 Oudh 191. Under the provisions of s. 153 a Court may, subject to the provisions of s. 5, Limitation Act, allow the amendment of an appeal against the person who had died before the date of the presentation of the memorandum, although it is found that no appeal in law exists. A. I. R. 1934 Nag 274. Where a vakil's name is not included in the body of the *vakalatnama* but the *vakalatnama* is executed with the intention of appointing the vakil and the vakil accepts the *vakalatnama* and presents the plaint, the Court can correct the *vakalatnama* on a subsequent application praying for the same and the presentation of the plaint is valid. A. I. R. 1934 All. 810. The fact that the dead man had been made a party by mistake does not deprive the Court of the power to implead his legal representatives and proceed with the hearing of the appeal. Section 153, C. P. Code, allows the Court a discretion to do so in a fit case. *e. g.*, where the mistake is a *bona fide* one. A. I. R. 1936 Pesh. 192.

A party should not be punished for inapt procedure when its right is clear, and there can be no misunderstanding, surprise or prejudice to other side. Where parties, and the Court have understood real meaning of application it ought to be amended in suitable form. A. I. R. 1921 All. 321=19 A. L. J. 549=63 Ind. Cas. 184. It is an abuse of the process of the Court to overvalue a suit and the plaint should be returned for presentation to proper Court. A. I. R. 1925 All. 142=83 Ind. Cas. 1. Where an appeal is presented against a person who was dead at the date of presentation the cause title may be amended or the appeal memo may be returned for amendment and re-presentation. A. I. R. 1925 Mad. 1210=49 M. L. J. 590=49 M. 18=23 L. W. 418 ; see also 75 Ind. Cas. 739=43 M. L. J. 231. An amendment asked for, before any prejudice could have arisen and which would raise no question of limitation should be allowed. A. I. R. 1922 Mad. 417=43 M. L. J. 184=16 L. W. 178=(1922) M. W. N. 514=70 Ind. Cas. 743.

Notice by Court should be given by Court to judgment-debtor in case of application for amendment of sale certificate by the auction purchaser. A. I. R. 1922 Mad. 63=(1922) M. W. N. 130=16 L. W. 760=65 Ind. Cas. 732. Rules of Courts are only provisions intended to secure the proper administration of justice and they should therefore be subordinate to that purpose so that full powers of amendment must be enjoyed and should always be exercised liberally but nonetheless one distinct cause of action cannot be substituted for another, nor can the subject-matter of the suit be changed by amendment. A. I. R. 1922 P. C. 249=24 Bom. L. R. 682=30 M. L. T. 28=48 I. A. 214=48 C. 832=(1921) M. W. N. 396 (P. C.)=63 Ind. Cas. 914. Ss. 151,

152 and 153 are very salutary provisions of law and are meant to invest the Court with authority to see that the object for which the Court exists is carried out and that the merest technicality may not be allowed to stand in the way of substantial justice. 55 A. 216=A. I. R. 1933 All. 295=145 Ind. Cas. 437=1933 A. L. J. 110. Where the verification in an application for leave to appeal lies *forma pauperis* not being in the manner prescribed by the Code, the Court should allow the applicant a chance to correct the defect of the verification before rejecting the application itself. A. I. R. 1937 Nag. 108.

154. [S. 3, third para.] Nothing in this Code shall affect any present right of appeal which shall have accrued to any party at its commencement.

**Scope.**—The right of appeal is substantive right and as such this section does not touch the right existing at the passing of the statute. *Colonial Sugar Refining Co. v. Irving*, (1905) A. C. 369=74 L. J. P. C. 77=21 T. L. R. 513=92 L. T. 738; see also 54 L. A. 421=47 C. L. J. 1=A. I. R. 1927 P. C. 242. Express saving of pending rights of appeal do not imply repeal of other vested rights. A. I. R. 1921 Mad. 126=13 L. W. 37=(1921) M. W. N. 181=61 Ind. Cas. 979. The fact that the execution sale took place and the application is set aside on the ground of fraud was made before the new Code of Civil Procedure came into operation does not make the order passed on the application after the new Code came into force subject to a second appeal under the provisions of the old Code. 17 C. W. N. 524; 17 C. W. N. 525n. Section 154 of the Code shows that the legislature in enacting it considered that it might and would interfere with rights and the argument that such a view would cause hardship, as previously existing rights would be imperilled, overlooks the provision which prescribed that the Code, although passed in March, 1908, should not come into force until January, 1909, and thus afforded opportunity to all persons having rights under the old Code to enforce them before the new Code came into operation. 17 C. W. N. 622. Section 154 means that nothing shall prejudicially affect any present right of appeal. It can have no bearing on the powers of an appellate Court in dealing with appeals before it. 9 Ind. Cas. 815; see also 9 M. L. T. 259=21 M. L. J. 631=9 Ind. Cas. 937; 8 Ind. Cas. 8=7 A. L. J. 1070; 15 Ind. Cas. 725=84 P. W. R. 1912; 16 C. W. N. 1015.

155. [New.] The enactments mentioned in the Fourth Schedule are hereby amended to the extent specified in the fourth column thereof.

156. [Repeals.] Repealed by s. 3 and Schedule II of the Second Repealing and Amending Act, 1914 (XVII of 1914.)

157. [S. 3, second sentence.] Notifications published, declarations and rules made, places appointed, agreements filed, scales prescribed, forms framed, appointments made and powers conferred under Act VIII of 1859 or under any Code of Civil Procedure or any Act amending the same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf.

**Scope.**—Section 157, C. P. Code, is an enabling and not a repealing section. The words "so far as they are inconsistent with this Code" which occur in this section do not impliedly repeal rules framed under s. 269, C. P. Code of 1882. 24 M. L. J. 637=20 Ind. Cas. 775 (F. B.). The term "rules made" means rules made by the proper authority having jurisdiction. Rules under the old Code which were then *ultra vires* are not valid because they could be made under the new Code. 29 M. L. J. 663=31 Ind. Cas. 924.

158. [S. 3, second para.] In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any Chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same

Reference to Code of Civil Procedure and other repealed enactments.

or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding Part, Order, section or rule.

**Scope.**—Alterations in procedure are always retrospective unless there lie some good reasons against it. 7 Ind. Cas. 11. In the absence of provisions to the contrary the expired or the repealed Act is considered to have never been in existence except as to matters and transactions past and closed. *Sustees v. Ellison*, 9 B. & C. 752. *Churchill v. Crease*, 5 Bing. 177. But a repeal does not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. *Lewis v. Hughes* (1916). 1 K. B. 813 C. A.

## THE FIRST SCHEDULE.

### ORDER I.

#### *Parties to Suits.*

#### RULES.

1. Who may be joined as plaintiffs.
2. Power of Court to order separate trials.
3. Who may be joined as defendants.
4. Court may give judgment for or against one or more of joint parties.
5. Defendant need not be interested in all the relief claimed.
6. Joinder of parties liable on same contract.
7. When plaintiff in doubt from whom redress is to be sought.
8. One person may sue or defend on behalf of all in same interest.
9. Misjoinder and non-joinder.
10. Suit in name of wrong plaintiff.  
Court may strike out or add parties.  
Where defendant added, plaint to be amended.
11. Conduct of suit.
12. Appearance of one of several plaintiffs or defendants for others.
13. Objections as to non-joinder or misjoinder.

### ORDER II.

#### *Frame of Suit.*

1. Frame of suit.
2. Suit to include the whole claim.  
Relinquishment of part of claim.  
Omission to sue for one of several reliefs.
3. Joinder of causes of action.
4. Only certain claims to be joined for recovery of immovable property.
5. Claims by or against executor, administrator or heir.
6. Power of Court to order separate trials.
7. Objections as to misjoinder.

### ORDER III.

#### *Recognized Agents and Pleaders.*

#### RULES.

1. Appearances, etc., may be in person, by recognised agent or by pleader.
2. Recognized agents.
3. Service of process on recognized agent.
4. Appointment of pleader.
5. Service of process on pleader.
6. Agent to accept service.  
Appointment to be in writing and to be filed in Court.

### ORDER IV.

#### *Institution of Suits.*

1. Suit to be commenced by plaint.
2. Register of suits.

### ORDER V.

#### *Issue and Service of Summons. Issue of summons.*

1. Summons.
2. Copy or statement annexed to summons.
3. Court may order defendant or plaintiff to appear in person.
4. No party to be ordered to appear in person unless resident within certain limits.
5. Summons to be either to settle issues or for final disposal.
6. Fixing day for appearance of defendant.
7. Summons to order defendant to produce documents relied on by him.
8. On issue of summons for final disposal, defendant to be directed to produce his witnesses.

## RULES.

*Service of Summons.*

9. Delivery or transmission of summons for service.
10. Mode of service.
11. Service on several defendants.
12. Service to be on defendant in person when practicable, or on his agent.
13. Service on agent by whom defendant carries on business.
14. Service on agent in charge in suits for immovable property.
15. Where service may be on male member of defendant's family.
16. Person served to sign acknowledgment.
17. Procedure when defendant refuses to accept service or cannot be found.
18. Endorsement of time and manner of service.
19. Examination of serving officer.
20. Substituted service.  
Effect of substituted service.  
Where service substituted, time for appearance to be fixed.
21. Service of summons where defendant resides within jurisdiction of another Court.
22. Service, within Presidency-towns and Rangoon, of summons issued by Courts outside.
23. Duty of Courts to which summons is sent.
24. Service on defendant in prison.
25. Service where defendant resides out of British India and has no agent.
26. Service in foreign territory through Political agent or Court.
27. Service on civil public officer or on servant of railway company or local authority.
28. Service on soldiers.
29. Duty of persons to whom summons is delivered or sent for service.
30. Substitution of letter for summons.

## ORDER VI.

*Pleading generally.*

1. Pleading.
2. Pleading to state material facts and not evidence.
3. Forms of pleading.
4. Particulars to be given where necessary.
5. Further and better statement, or particulars.
6. Condition precedent.
7. Departure.
8. Denial of contract.
9. Effect of document to be stated.
10. Malice, knowledge, etc.
11. Notice.
12. Implied contract, or relation.

## Rules.

13. Presumptions of law.
14. Pleading to be signed.
15. Verification of pleadings.
16. Striking out pleadings.
17. Amendment of pleadings.
18. Failure to amend after order.

## ORDER VII.

*Plaint.*

1. Particulars to be contained in plaint.
2. In money suits.
3. Where the subject-matter of the suit is immovable property.
4. When plaintiff sues as representative.
5. Defendant's interest and liability to be shown.
6. Grounds of exemption from limitation law.
7. Relief to be specifically stated.
8. Relief founded on separate grounds.
9. Procedure on admitting plaint.  
Concise statements.
10. Return of plaint.  
Procedure on returning plaint.
11. Rejection of plaint.
12. Procedure on rejecting plaint.
13. Where rejection of plaint does not preclude presentation of fresh plaint.  
*Documents relied on in plaint.*
14. Production of document on which plaintiff sues.  
List of other documents.
15. Statement in case of documents not in his possession or power.
16. Suits on lost negotiable instruments.
17. Production of shop-book.  
Original entry to be marked and returned.
18. Inadmissibility of document not produced when plaint filed.

## ORDER VIII.

*Written Statement and Set-off.*

1. Written statement.
2. New facts must be specially pleaded.
3. Denial to be specific.
4. Evasive denial.
5. Specific denial.
6. Particulars of set-off to be given in written statement.  
Effect of set-off.
7. Defence or set-off founded on separate grounds.
8. New ground of defence.
9. Subsequent pleadings.
10. Procedure when party fails to present written statement called for by Court.

## ORDER IX.

*Appearance of parties and Consequence of non-appearance.*

## Rules.

1. Parties to appear on day fixed in summons for defendant to appear and answer.
2. Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.
3. Where neither party appears, suit to be dismissed.
4. Plaintiff may bring fresh suit or Court may restore suit to file.
5. Dismissal of suit where plaintiff, after summons returned unserved, fails for a year to apply for fresh summons.
6. Procedure when only plaintiff appears.  
When summons duly served.  
When summons not duly served.  
When summons served, but not in due time.
7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.
8. Procedure where defendant only appears.
9. Decree against plaintiff by default bars fresh suits.
10. Procedure in case of non-attendance of one or more of several plaintiffs.
11. Procedure in case of non-attendance of one or more of several defendants.
12. Consequence of non-attendance, without sufficient cause shown, of party ordered to appear in person.  
*Setting aside Decree ex parte.*
13. Setting aside decree *ex parte* against defendant.
14. No decree to be set aside without notice to opposite party.

## ORDER X.

*Examination of Parties by the Court.*

1. Ascertainment whether allegations in pleadings are admitted or denied.
2. Oral examination of a party, or companion of party.
3. Substance of examination to be written.
- 4. Consequence of refusal or inability of pleader to answer.

## ORDER XI.

*Discovery and Inspection.*

1. Discovery by interrogatories.
2. Particular interrogatories to be submitted.

## Rules.

3. Costs of interrogatories.
4. Form of interrogatories.
5. Corporations.
6. Objections to interrogatories by answer.
7. Setting aside and striking out interrogatories.
8. Affidavit in answer filing.
9. Form of affidavit in answer.
10. No exception to be taken.
11. Order to answer or answer further.
12. Application for discovery of documents.
13. Affidavit of documents.
14. Production of documents.
15. Inspection of documents referred to in pleading or affidavits.
16. Notice to produce.
17. Time for inspection when notice given.
18. Order for inspection.
19. Verified copies.
20. Premature discovery.
21. Non-compliance with order for discovery.
22. Using answers to interrogatories at trial.
23. Order to apply to minors.

## ORDER XII.

*Admissions.*

1. Notice of admission of case.
2. Notice to admit documents.
3. Form of notice.
4. Notice to admit facts.
5. Form of admissions.
6. Judgment on admissions.
7. Affidavit of signature.
8. Notice to produce documents.
9. Costs.

## ORDER XIII.

*Production, Impounding and Return of Documents.*

1. Documentary evidence to be produced at first hearing.
2. Effect of non-production of documents.
3. Rejection of irrelevant or inadmissible documents.
4. Endorsements on documents admitted in evidence.
5. Endorsements on copies of admitted entries in books, accounts and records.
6. Endorsements on documents rejected as inadmissible in evidence.
7. Recording of admitted and return of rejected documents.



## Rules.

8. Court may order any document to be impounded.
9. Return of admitted documents.
10. Court may send for papers from its own records or from other Courts.
11. Provisions as to documents applied to material objects.

## ORDER XIV.

*Settlement of Issue and Determination of Suit on Issues of Law or on Issues agreed upon.*

1. Framing of issues.
2. Issues of law and of fact.
3. Materials from which issues may be framed.
4. Court may examine witnesses or documents before framing issues.
5. Power to amend, and strike out issues.
6. Questions of fact or law may by agreement be stated in form of issues.
7. Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

## ORDER XV.

*Disposal of the Suit at the first hearing.*

1. Parties not at issue.
2. One of several defendants not at issue.
3. Parties at issue.
4. Failure to produce evidence.

## ORDER XVI.

*Summoning and Attendance of Witnesses.*

1. Summons to attend to give evidence or produce documents.
2. Expenses of witness to be paid into Court on applying for summons.  
Experts.  
Scale of expenses.
3. Tender of expenses to witness.
4. Procedure where insufficient sum paid in.  
Expenses of witness detained more than one day.
5. Time, place and purpose of attendance to be specified in summons.
6. Summons to produce document.
7. Power to require persons present in Court to give evidence or produce document.
8. Summons how served.
9. Time for serving summons.
10. Procedure where witness fails to comply with summons.

## Rules.

11. If witness appears, attachment may be withdrawn.
12. Procedure if witness fails to appear.
13. Mode of attachment.
14. Court may of its own accord summon as witnesses strangers to suit.
15. Duty of persons summoned to give evidence or produce document.
16. When they may depart.
17. Application of rules 10 to 13.
18. Procedure where witness apprehended cannot give evidence or produce document.
19. No witness to be ordered to attend in person unless resident within certain limits.
20. Consequence of refusal of party to give evidence when called on by Court.
21. Rules as to witnesses to apply to parties summoned.

## ORDER XVII.

*Adjournments.*

1. Court may grant time and adjourn hearing.  
Costs of adjournment.
2. Procedure if parties fail to appear on day fixed.
3. Court may proceed notwithstanding either party fails to produce evidence, etc.

## ORDER XVIII.

*Hearing of the Suit and Examination of Witnesses.*

1. Right to begin.
2. Statement and production of evidence.
3. Evidence where several issues.
4. Witnesses to be examined in open Court.
5. How evidence shall be taken in appealable cases.
6. When deposition to be interpreted.
7. Evidence under section 138.
8. Memorandum when evidence not taken down by Judge.
9. When evidence may be taken in English.
10. Any particular question and answer may be taken down.
11. Questions objected to and allowed by Court.
12. Remarks on demeanour of witnesses.
13. Memorandum of evidence in unappealable cases.
14. Judge unable to make such memorandum to record reasons of his inability.

## RULES.

15. Power to deal with evidence taken before another Judge.
16. Power to examine witness immediately.
17. Court may recall and examine witness.
18. Power of Court to inspect.

## ORDER XIX.

*Affidavits.*

1. Power to order any point to be proved by affidavit.
2. Power to order attendance of deponent for cross-examination.
3. Matters to which affidavits shall be confined.

## ORDEER XX.

*Judgment and Decree.*

1. Judgment when pronounced.
2. Power to pronounce judgement written by Judge's predecessor.
3. Judgement to be signed.
4. Judgements of Small Cause Courts.
5. Court to state its decision on each issue.
6. Contents of decree.
7. Date of decree.
8. Procedure where Judge has vacated office before signing decree.
9. Decree for recovery of immovable property.
10. Decree for delivery of movable property.
11. Decree may direct payment by instalments.  
Order, after decree, for payment by instalments.
12. Decree for possession and *mesne* profits.
13. Decree in administration-suit.
14. Decree in pre-emption-suit.
15. Decree in suit for dissolution of partnership.
16. Decree in suit for account between principal and agent.
17. Special directions as to accounts.
18. Decree in suit for partition of property or separate possession of a share therein.
19. Decree when set-off is allowed.  
Appeal from decree relating to set-off.
20. Certified copies of judgment and decree to be furnished.

## ORDER XXI.

*Execution of Decrees and Orders  
Payment under Decree.*

## RULES.

1. Modes of paying money under decree.
2. Payment out of Court to decree-holder.

*Courts executing Decrees.*

3. Lands situate in more than one jurisdiction.
4. Transfer to Court of Small Causes.
5. Mode of transfer.
6. Procedure where Court desires that its own decree shall be executed by another Court.
7. Court receiving copies of decree, etc., to file same without proof.
8. Execution of decree or order by Court to which it is sent.
9. Execution by High Court of decree transferred by other Court.

*Application for Execution.*

10. Application for execution.
11. Oral application.  
Written application.
12. Application for attachment of movable property not in judgment-debtor's possession.
13. Application for attachment of immovable property to contain certain particulars.
14. Power to require certified extract from Collector's register in certain cases.
15. Application for execution by joint decree-holder.
16. Application for execution by transferee of decree.
17. Procedure on receiving application for execution of decree.
18. Execution in case of cross-decrees.
19. Execution in case of cross-claims under same decree.
20. Cross-decrees and cross-claims in mortgage-suits.
21. Simultaneous execution.
22. Notice to show cause against execution in certain cases.
23. Procedure after issue of notice.

*Process for Execution.*

24. Process for execution.
25. Endorsement on process.

*Stay of Execution.*

26. When Court may stay execution.  
Power to require security from, or impose conditions upon, judgment-debtor.
27. Liability of judgment-debtor discharged.

## RULES.

28. Order of Court which passed decree or of appellate Court to be binding upon Court applied to.
29. Stay of execution pending suit between decree-holder and judgment-debtor.

*Mode of Execution.*

30. Decree for payment of money.
31. Decree for specific movable property.
32. Decree for specific performance for restitution of conjugal rights or for an injunction.
33. Discretion of Court in executing decrees for restitution of conjugal rights.
34. Decree for execution of documents, or endorsement of negotiable instrument.
35. Decree for immovable property
36. Decree for delivery of immovable property when in occupancy of tenant.

*Arrest and Detention in the Civil Prison.*

37. Discretionary power to permit judgment-debtor to show cause against detention in prison.
38. Warrant for arrest to direct judgment-debtor to be brought up.
39. Subsistence-allowance.
40. Proceedings on appearance of judgment-debtor in obedience to notice or after arrest.

*Attachment of Property.*

41. Examination of judgment-debtor as to his property.
42. Attachment in case of decree for rent or *mesne* profits or other matter, amount of which to be subsequently determined.
43. Attachment of movable property, other than agricultural produce, in possession of judgment-debtor.
44. Attachment of agricultural produce.
45. Provisions as to agricultural produce under attachment.
46. Attachment of debt, share and other property not in possession of judgment-debtor.
47. Attachment of share in movables.
48. Attachment of salary or allowances of public officer or servant of railway company or local authority.
49. Attachment of partnership property.
50. Execution of decree against firm.
51. Attachment of negotiable instruments.
52. Attachment of property in custody of Court or public officer.
53. Attachment of decrees.
54. Attachment of immovable property.

## RULES.

55. Removal of attachment after satisfaction of decree.
56. Order for payment of coin or currency notes to party entitled under decree.
57. Determination of attachment.

*Investigation of claims and objections.*

58. Investigation of claims to, and objections to attachment of, attached property.  
Postponement of sale.
59. Evidence to be adduced by claimant.
60. Release of property from attachment.
61. Disallowance of claim to property attached.
62. Continuance of attachment subject to claim of incumbrancer.
63. Saving of suits to establish right to attached property.

*Sale generally.*

64. Power to order property attached to be sold and proceeds to be paid to person entitled.
65. Sales by whom conducted and how made.
66. Proclamation of sales by public auction.
67. Mode of making proclamation.
68. Time of sale.
69. Adjournment or stoppage of sale.
70. Saving of certain sales.
71. Defaulting purchaser answerable for loss on re-sale.
72. Decree-holder not to bid for or buy property without permission.  
Where decree-holder purchases, amount of decree may be taken as payment.
73. Restriction on bidding or purchase by officers.

*Sale of Movable Property.*

74. Sale of agricultural produce.
75. Special provisions relating to growing crops.
76. Negotiable instrument and shares in corporations.
77. Sale by public auction.
78. Irregularity not to vitiate sale, but any person injured may sue.
79. Delivery of movable property, debts and shares.
80. Transfer of negotiable instruments and shares.
81. Vesting order in case of other property.

*Sale of immovable property.*

82. What Courts may order sales.

## Rules.

83. Postponement of sale to enable judgment-debtor to raise; amount of decree.
84. Deposit by purchaser and re-sale on default.
85. Time for payment in full of purchase-money.
86. Procedure in default of payment.
87. Notification on re-sale.
88. Bid of co-sharer to have preference.
89. Application to set aside sale on deposit.
90. Application to set aside sale on ground of irregularity or fraud.
91. Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest.
92. Sale when to become absolute or be set aside.
93. Return of purchase-money in certain cases.
94. Certificate to purchaser.
95. Delivery of property in occupancy of judgment-debtor.
96. Delivery of property in occupancy of tenant.

*Resistance to delivery of possession to Decree-holder or Purchaser.*

97. Resistance or obstruction to possession of immovable property.
98. Resistance or obstruction by judgment-debtor.
99. Resistance or obstruction by *bona fide* claimant.
100. Dispossession by decree-holder or purchaser.
101. *Bona fide* claimant to be restored to possession.
102. Rules not applicable to transferee *pendente lite*.
103. Orders conclusive subject to regular suit.

## ORDER XXII.

*Death, Marriage and Insolvency of Parties.*

1. No abatement by party's death, if right to sue survives.
2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.
3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.
4. Procedure in case of death of one of several defendants or of sole defendant.
5. Determination of question as to legal representative.
6. No abatement by reason of death after hearing.

## Rules.

7. Suit not abated by marriage of female party.
8. When plaintiff's insolvency bars suit.  
Procedure where assignee fails to continue suit or give security.
9. Effect of abatement or dismissal.
10. Procedure in case of assignment before final order in suit.
11. Application of Order to appeals.
12. Application of Order to proceedings.

## ORDER XXIII.

*Withdrawal and Adjustment of Suits.*

1. Withdrawal of suit or abandonment of part of claim.
2. Limitation law not affected by first suit.
3. Compromise of suit.
4. Proceedings in execution of decrees not affected.

## ORDER XXIV.

*Payment into Court.*

1. Deposit by defendant of amount in satisfaction of claim.
2. Notice of deposit.
3. Interest on deposit not allowed to plaintiff after notice.
4. Procedure where plaintiff accepts deposit as satisfaction in part.
5. Procedure where he accepts it as satisfaction in full.

## ORDER XXV.

*Security for Costs.*

1. When security for costs may be required from plaintiff.  
Residence out of British India.
2. Effect of failure to furnish security.

## ORDER XXVI.

*Commissions.**Commissions to examine Witnesses.*

1. Cases in which Court may issue commission to examine witness.
2. Order for commission.
3. Where witness resides within Court's jurisdiction.
4. Persons for whose examination commission may issue.
5. Commission or Request to examine witness not within British India.
6. Court to examine witness pursuant to commission.

## RULES.

7. Return of commission with depositions of witnesses.
8. When depositions may be read in evidence.

*Commissions for Local Investigations.*

9. Commissions to make local investigations.
10. Procedure of Commissioner. Report and depositions to be evidence in suit. Commissioner may be examined in person.

*Commissions to examine Accounts.*

11. Commission to examine or adjust accounts.
12. Court to give Commissioner necessary instructions. Proceedings and report to be evidence. Court may direct further inquiry.

*Commissions to make Partitions.*

13. Commission to make partition of immovable property.
14. Procedure of Commissioner.

*General Provisions.*

15. Expenses of commission to be paid into Court.
16. Powers of Commissioners.
17. Attendance and examination of witnesses before Commissioner.
18. Parties to appear before Commissioner.
19. Commission issued at the instance of foreign tribunals.

## ORDER XXVII.

*Suits by or against the Government or Public Officer in their Official capacity.*

1. Suits by or against Government.
2. Persons authorized to act for Government.
3. Plaints in suits by or against Government.
4. Agent for Government to receive process.
5. Fixing of day for appearance on behalf of Government.
6. Attendance of person able to answer questions relating to suit against Government.
7. Extension of time to enable public officer to make reference to Government.
8. Procedure in suits against public officer.

## ORDER XXVIII.

*Suits by or against Military Men or Airmen.*

## Rules.

1. Officers of soldiers who cannot obtain leave may authorize any person to sue or defend for them.
2. Persons so authorized may act personally or appoint pleader.
3. Service on person so authorized, or on his pleader, to be good service.

## ORDER XXIX.

*Suits by or against Corporations.*

1. Subscription and verification of pleading.
2. Service on corporation.
3. Power to require personal attendance of officer of corporation.

## ORDER XXX.

*Suits by or against Firms and Persons carrying on business in names other than their own.*

1. Suing of partners in name of firm.
2. Disclosure of partners' names.
3. Service.
4. Right of suit on death of partner.
5. Notice in what capacity served.
6. Appearance of partners.
7. No appearance except by partners.
8. Appearance under protest.
9. Suits between co-partners.
10. Suit against person carrying on business in name other than his own.

## ORDER XXXI.

*Suits by or against Trustees, Executors and Administrators.*

1. Representation of beneficiaries in suits concerning property vested in trustees, etc.
2. Joinder of trustees, executors and administrators.
3. Husband of married executrix not to join.

## ORDER XXXII.

*Suits by or against Minors and Persons of Unsound Mind.*

1. Minor to sue by next friend.
2. Where suit is instituted without next friend, plaint to be taken off the file.
3. Guardian for the suit to be appointed by Court for minor defendant.

## Rules.

4. Who may act as next friend or be appointed guardian for the suit.
5. Representation of minor by next friend or guardian for the suit.
6. Receipt by next friend or guardian for the suit of property under decree for minor.
7. Agreement or compromise by next friend or guardian for the suit.
8. Retirement of next friend.
9. Removal of next friend.
10. Stay of proceedings or removal, etc., of next friend.
11. Retirement, removal or death of guardian for the suit.
12. Course to be followed by minor plaintiff or applicant on attaining majority.
13. Where minor co-plaintiff attaining majority desires to repudiate suit.
14. Unreasonable or improper suit.
15. Application of rules to persons of unsound mind.
16. Saving for Princes and Chiefs.

## ORDER XXXIII.

*Suits by Paupers.*

1. Suits may be instituted *in forma pauperis*.
2. Contents of application.
3. Presentation of application.
4. Examination of applicant.  
If presented by agent. Court may order applicant to be examined by commission.
5. Rejection of application.
6. Notice of day for receiving evidence of applicant's pauperism.
7. Procedure at hearing.
8. Procedure if application admitted.
9. Dispaupering.
10. Costs where pauper succeeds.
11. Procedure where pauper fails.
12. Government may apply for payment of Court-fees.
13. Government to be deemed a party.
14. Copy of decree to be sent to Collector.
15. Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.
16. Costs.

## ORDER XXXIV.

*Suits relating to Mortgages of Immoveable Property.*

1. Parties to suits for foreclosure, sale and redemption.
2. Preliminary decree in foreclosure-suit.

## Rules.

3. Final decree in foreclosure-suit.  
Power to enlarge time.  
Discharge of debt.
4. Preliminary decree in suit for sale.  
Power to decree sale in foreclosure-suit.
5. Final decree in suit for sale.
6. Recovery of balance due on mortgage in suit for sale.
7. Preliminary decree in redemption-suit.
8. Final decree in redemption-suit.
- 8A. Recovery of balance due on mortgage in suit for redemption.
9. Decree where nothing is found due or where mortgagee has been overpaid.
10. Costs of mortgagee subsequent to decree.
11. Payment of interest.
12. Sale of property subject to prior mortgage.
13. Application of proceeds.
14. Suit for sale necessary to bring mortgaged property to sale.
15. Mortgages by the deposit of title-deeds and charges.

## ORDER XXXV.

*Interpleader.*

1. Plaint in interpleader-suit.
2. Payment of thing claimed into Court.
3. Procedure where defendant is suing plaintiff.
4. Procedure at first hearing.
5. Agents and tenants may not institute interpleader-suits.
6. Charge for plaintiff's costs.

## ORDER XXXVI.

*Special Case.*

1. Power to state case for Court's opinion.
2. Where value of subject-matter must be stated.
3. Agreement to be filed and registered as suit.
4. Parties to be subject to Court's jurisdiction.
5. Hearing and disposal of case.

## ORDER XXXVII.

*Summary procedure on Negotiable Instruments.*

1. Application of order.
2. Institution of summary suits upon bills of exchange, etc.

## RULES.

3. Defendant showing defence on merits to have leave to appear.
4. Power to set aside decree.
5. Power to order bill, etc., to be deposited with officer of Court.
6. Recovery of cost of nothing non-acceptance of dishonoured bill or note.
7. Procedure in suits.

## ORDER XXXVIII.

*Arrest and Attachment before Judgment.  
Arrest before Judgment.*

1. Where defendant may be called upon to furnish security for appearance.
2. Security.
3. Procedure on application by surety to be discharged.
4. Procedure where defendant fails to furnish security or find fresh security.

*Attachment before Judgment.*

5. Where defendant may be called upon to furnish security for production of property.
6. Attachment where cause not shown or security not furnished.
7. Mode of making attachment.
8. Investigation of claim to property attached before judgment.
9. Removal of attachment when security furnished or suit dismissed.
10. Attachment before judgment not to affect rights of strangers, nor bar decree-holder from applying for sale.
11. Property attached before judgment not to be re-attached in execution of decree.
12. Agricultural produce not attachable before judgment.
13. Small Cause Court not to attach immovable property.

## ORDER XXXIX.

*Temporary Injunctions and Interlocutory Orders.**Temporary Injunctions.*

1. Cases in which temporary injunction may be granted.
2. Injunction to restrain repetition or continuance of breach.
3. Before granting injunction, Court to direct notice to opposite party.
4. Order for injunction may be discharged, varied or set aside.
5. Injunction to corporation binding on its officers.

## Rules.

*Interlocutory Orders.*

6. Power to order interim sale.
7. Detention, preservation, inspection, etc., of subject-matter of suit.
8. Application for such orders to be after notice.
9. When party may be put in immediate possession of land, the subject-matter of suit.
10. Deposit of money, etc., in Court.

## ORDER XL.

*Appointment of Receivers.*

1. Appointment of Receivers.
2. Remuneration.
3. Duties.
4. Enforcement of Receiver's duties.
5. When Collector may be appointed Receiver.

## ORDER XLI.

*Appeals from Original Decrees.*

1. Form of appeal.  
What to accompany memorandum.  
Contents of memorandum.
2. Grounds which may be taken in appeal.
3. Rejection or amendment of memorandum.
4. One of several plaintiffs or defendants may obtain reversal of whole decree where it proceeds on ground common to all.

*Stay of Proceedings and of Execution.*

5. Stay by Appellate Court.  
Stay by Court which passed the decree.
6. Security in case of order for execution of decree appealed from.
7. No security to be required from the Government or a public officer in certain cases.
8. Exercise of powers in appeal from order made in execution of decree.

*Procedure on Admission of Appeal.*

9. Registry of Memorandum of Appeal.  
Register of appeals.
10. Appellate Court may require appellant to furnish security for costs.  
Where appellant resides out of British India.
11. Power to dismiss appeal without sending notice to lower Court.
12. Day for hearing appeal.
13. Appellate Court to give notice to Court whose decree appealed from.  
Transmission of papers to appellate Court.  
Copies of exhibits in Court whose decree appealed from.

## RULES.

14. Publication and service of notice of day for hearing appeal. Appellate Court may itself cause notice to be served.
15. Contents of notice.

*Procedure on Hearing.*

16. Right to begin.
17. Dismissal of appeal for appellant's default.  
Hearing appeal *ex parte*.
18. Dismissal of appeal where notice not served in consequence for appellant's failure to deposit costs.
19. Re-admission of appeal dismissed for default.
20. Power to adjourn hearing, and direct persons appearing interested to be made respondents.
21. Re-hearing on application of respondent against whom *ex parte* decree made.
22. Upon hearing, respondent may object to decree as if he had preferred separate appeal.  
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## THE FIRST SCHEDULE.

## ORDER 1.

*Parties to Suits.*

1. [S. 26, R. S. C. O. 16. r. 1.] All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

**Scope.**—This rule in the main is based upon Order XVI, rule 1 of the Supreme Court Practice and s. 26 of the old Code. According to *Lord Justice Bowen* it is not the intention of the rule to allow writs to be issued under which any number of plaintiffs might join any number of causes of action, or that a writ should be like an omnibus travelling on a certain route into which any number of persons may get as passengers for the journey. (1893) 2 Q. B. 422. This rule relates only to joinder of parties on the same causes of action. (1894) A. C. 494; (1899) 1 Q. B. 840; but see (1907) 1 K. B. 264, 274, *per Cosens Hardy L. J.* "Rule 1, order 1 of Act V of

1908, which brings the Indian practice into line with English rule, provides as follows.....It seems to their Lordships that under this rule the contingent reversioners may be joined as plaintiffs in the presumptive reversioner's suit." *Per Amir Ali J.* in 19 C. W. N. 641 P. C.=38 M. 405=17 Bom. L. R. 468. According to recent decision in England this rule relates to joinder of causes of action as well. (1907) 1 K. B. 264 (274); (1910) 2 K. B. 354 (365). So the joinder of plaintiffs is allowed in cases where (1) the right to relief claimed by them arises in each of their cases out of the same transaction or series of transactions, and where (2) some common question of law or fact arises. In order to bring a case within the rule both these conditions must be complied with, and if they are not the rule does not justify the joinder of several plaintiffs. *Per Chitty J.* in *Stroud v. Lawson*, (1898) 2 Q. B. 44 (52); *Oxford and Cambridge Universities v. Gill*, (1899) 1 Ch. 55 (59); *Yearly Practice*, 1921, p. 155. In a recent case the Calcutta High Court has held that rule, applies not only to the joinder of plaintiffs, but also to the joinder of causes of action in one suit. So under this rule several causes of action can be joined in one suit if some common question of law or fact would arise. 41 C.W.N. 27=A.I.R. 1936 Cal. 650. It is not, however, it seems, necessary that the whole of a transaction should be involved in each of the cause of action joined. (1898) 2 Q. B. at p. 54. Where a suit for arrears of maintenance by two widows is based on the same award in the partition suit and as such each relief arises out of the same transaction and in each case a common question of fact or law is involved, the two widows can be joined as plaintiffs and separate suits are not necessary. A. L. R. 1933 Pat. 128=A. I. R. 1933 Pat. 644. Where each of the plaintiffs received hurts from a body of persons and each of them could have brought a suit for damages against all those persons they should be deemed to be acting strictly in accordance with the law in bringing a joint suit against all the defendants. 1932 A. L. J. 497=A. I. R. 1932 All. 401=138 Ind. Cas. 77. Joinder of the two plaintiffs and the causes of actions are not allowed in a suit, unless the reliefs claimed therein arise out of the same act or transaction or series of acts or transactions. A. I. R. 1933 Pat. 411=73 Ind. Cas. 71. Co-plaintiffs claiming alternatively can be joined provided common question of law is raised. 10 P. R. 1916=69 P.L.R. 1917=204 P.W.R. 1915=32 Ind. Cas. 526; see also A. I. R. 1922 Mad. 174=(1922) M.W.N. 316=16 L.W. 185=43 M.L.J. 277=70 Ind. Cas. 684.

**Joint interest.**—This rule is permissive and not mandatory. 24 C. 388; 9 A. 491. Where two different sets of persons join together to eject a trespasser there is no misjoinder. A. I. R. 1929 All. 790. The *karta* of a joint Hindu family can effectively represent all other members of the family. A. I. R. 1929 Pat. 741=8 Pat. 788=11 P. L. T. 237=121 Ind. Cas. 330. Co-sharers can also join. A. I. R. 1929 All 668=(1929) A. L. J. 1098=51 A. 994=122 Ind. Cas. 602. All living joint-promisee must join in suit to enforce a debt due to them under s. 45 of the Contract Act. A. I. R. 1928 Bom. 191=30 Bom. L. R. 117=109 Ind. Cas. 99; see also A. I. R. 1927 Mad. 84=51 M. L. J. 648=98 Ind. Cas. 549. Persons having joint right must join in an action to assert their right and one or two of them cannot bring a suit for the assertion of that right on behalf of all without joining them as defendants. A. I. R. 1927 Mad. 984=39 M. L. J. 442=106 Ind. Cas. 140; see also A. I. R. 1928 Sind 16=105 Ind. Cas. 544; A. I. R. 1927 Oudh 484=1 Luck. 546=105 Ind. Cas. 473; A. I. R. 1927 Mad. 491=52 M. L. J. 318=25 L. W. 388=100 Ind. Cas. 616; A. I. R. 1927 Lah. 129=99 Ind. Cas. 565; A. I. R. 1925 Bom. 542=27 Bom. L. R. 1107=90 Ind. Cas. 558; A. I. R. 1925 Nag. 288=8 N. L. J. 3=89 Ind. Cas. 888; A. I. R. 1926 Cal. 188=89 Ind. Cas. 177; A. I. R. 1926 Cal. 417=42 C. L. J. 30=87 Ind. Cas. 159; A. I. R. 1924 Rang. 201=2 Bur. L. J. 266=83 Ind. Cas. 329; A. I. R. 1925 Oudh 71=80 Ind. Cas. 285; A. I. R. 1925 Sind 181=17 S. L. R. 324=79 Ind. Cas. 914; A. I. R. 1923 Mad. 85=16 L. W. 527=68 Ind. Cas. 927; A. I. R. 1922 Sind 13=15 S. L. R. 152=65 Ind. Cas. 26; A. I. R. 1927 Mad. 337=17 L. W. 241=44 M. L. J. 249=72 Ind. Cas. 63; A. I. R. 1921 Pat. 53=2 P. L. T. 217=6 Pat. L. J. 48=63 Ind. Cas. 788; A. I. R. 1921 Nag. 9=4 N. L. J. 58=63 Ind. Cas. 419; 33 Ind. Cas. 564; 1 P. L. J. 573=1 P. L. W. 35=35 Ind. Cas. 868; 38 Ind. Cas. 13=1 Pat. L. J. 437=3 Pat. L. W. 31; 42 Ind. Cas. 92; 37 M. L. J. 483=17 A. L. J. 997=(1919) M. W. N. 821=22 Bom. L. R. 1=24 C. W. N. 297=46 I. A. 272=53 Ind. Cas. 131 (P. C.); 58 C. L. J. 133; A. I. R. 1931 Lah. 447=32 P. L. R. 385=133 Ind. Cas. 871; 35 C. W. N. 473; 56 Ind. Cas. 761.

**Suit for ejectment.**—In a suit for ejectment of trespasser all the joint owners are not necessary parties. A. I. R. 1933 Lah. 999. Co-owner in sole possession can alone sue for trespass. 3 L. W. 542=35 Ind. Cas. 147; A. I. R. 1926 Mad. 809=

24 L. W. 181=1926 M. W. N. 398=95 Ind. Cas. 856; 95 Ind. Cas. 121=A. I. R. 1926 Lah. 545; A. I. R. 1925 Mad. 63=75 Ind. Cas. 112.

**Necessary party.**—In a scheme suit, alienee of trust property, or trespassers are not necessary parties. 38 M. 1064=33 Ind. Cas. 45. Some trustees alone can sue for rent of temple property. (1916) 1 M. W. N. 181=30 M. L. J. 619=33 Ind. Cas. 52. Mortgage suit by manager on behalf of all members is maintainable. 5 L. W. 120=39 Ind. Cas. 427. Where 59 plaintiffs sued as reversioners and nearly 20 other parties in addition to the parties in possession were added as *pro forma* defendants the procedure was condemnable. 1 P. W. R. 1919=21 Bom. L. R. 232=24 M. L. T. 429=28 C. L. J. 530=28 P. L. R. 1919 P. C.=48 Ind. Cas. 540. Unnecessary parties should not be joined. A. I. R. 1918 P. C. 49=22 Bom. L. R. 232=28 C. L. J. 530=28 P. L. R. 1919=48 Ind. Cas. 540 (P. C.). Joining as co-plaintiffs of persons having rival claims is not contemplated. 57 Ind. Cas. 784. Other coparceners are not necessary parties in a suit by manager of undivided family on a promissory-note. A. I. R. 1922 Bom. 281=46 B. 358=23 Bom. L. R. 1135=64 Ind. Cas. 966. Persons with derivative interest are not entitled to be associated in a decree in favour of persons having the real title, merely because added as co-plaintiffs. A. I. R. 1925 P. C. 168=6 Lah. 388=22 L. W. 304=30 C. W. N. 56 P. C.=26 P. L. R. 524=23 A. L. J. 643=52 I. A. 211=(1925) M. W. N. 534=50 M. L. J. 118=88 Ind. Cas. 198. The fact that the *benamidar* is a party to suit does not make the real owner party to the suit. A. I. R. 1930 Cal. 263=33 C. W. N. 997=125 Ind. Cas. 861. Dormant partner is not a necessary party in a suit by firm on contract. (1915) M. W. N. 864=31 Ind. Cas. 913.

2. [R. S. C. O. 16 r. 1.] Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their election or order separate trials or make such other order as may be expedient.

**Notes.**—Where 59 plaintiffs sued as reversioners and nearly 20 other parties in addition to the parties in possession were added as *pro forma* defendants the procedure is condemnable. 1 P. W. R. 1919=21 Bom. L. R. 232=9 L. W. 416=24 M. L. T. 429=28 C. L. J. 530=28 P. L. R. 1919 (P. C.)=48 Ind. Cas. 540; see also *Peninsular and Oriental Steam v. Kijima*, (1895) A. C. 661; *Smurthwaite v. Hannay*, (1894) A. C. 494. This rule does not refer to election of causes of action joined. Order of election must be reversed. A. I. R. 1922 Mad. 436=43 M. L. J. 218=16 L. W. 175=(1922) M. W. N. 453=69 Ind. Cas. 966.

3. [S. 28.] All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise.

**Scope.**—This rule applies to joinder of causes as well as to joinder of parties. 136 Ind. Cas. 497=A. I. R. 1932 Bom. 1; A. I. R. 1934 Mad. 367; A. I. R. 1926 Mad. 911=49 M. 836 (F. B.); 45 C. 111=41 Ind. Cas. 944. Language of this rule is much more favourable to plaintiffs in this country than the corresponding English rule. *Ibid.* Order 1, rule 3, is the provision governing the question of multifariousness, it applies to joinder of parties as well as joinder of causes of action. 57 M. 1031=150 Ind. Cas. 601=30 L. W. 404=1934 M. W. N. 347=A. I. R. 1934 Mad. 367=66 M. L. J. 451. Before a plaintiff can join several defendants in the same suit, both the conditions laid down in the rule must be fulfilled. A. I. R. 1934 Sind 176; see also A. I. R. 1934 Cal. 405=60 C. L. J. 159=151 Ind. Cas. 257. This rule not only refers to parties to actions but also to causes of action. The mere fact that there are several defendants in the suit, is not decisive. A person can sue for partition and join as defendants several alienees or mortgagees from different members of the family. So also, a reversioner or an adopted son can bring a suit to recover property to which he is entitled notwithstanding the alienation made by the widow in favour of different persons. The defendants may be claiming under different titles, but if the plaintiff is entitled to a relief in respect of an act, or transaction or series of acts or transactions against the defendants jointly, severally, or in the alternative, and if common questions of law or fact are likely to arise, the

suit would not be liable to be dismissed on the ground of misjoinder of causes of action. In a suit for possession all persons claiming by derivative titles from a trespasser as a common source may be joined as defendants. 33 Bom. L. R. 624 = A. I. R. (1931) Bom. 330. Unless the right to relief against all the defendants arises out of the same act or transaction or series of acts or transactions, they cannot be joined in the same suit, even though the question of law or fact which arising between the plaintiff and the two sets of defendants are identical. A. I. R. 1933 Pat. 65; see also A. I. R. 1933 All. 957; A. I. R. 1933 All. 147; A. I. R. 1933 Lah. 901; A. L. R. 1933 Mad. 303 = 144 Ind. Cas. 202 = 37 L. W. 681; A. I. R. 1932 Bom. 1 = 136 Ind. Cas. 497. A question of paramount title ought not to be agitated in a mortgage suit since it introduces a different cause of action, in which only some of the several defendants are likely to be substantially interested. 59 C. 548 = A. I. R. 1932 Cal. 512 = 138 Ind. Cas. 671. The strangers to a trust are not proper or necessary parties to a suit under s. 92 for the administration of trust. 10 Rang. 342 = 140 Ind. Cas. 317 = A. I. R. 1932 Rang. 132. To make parties defendants common interest in cause of action and involving same question of law and facts are essential. If by joinder of party misjoinder of causes of action results it is material irregularity. A. I. R. 1926 Mad. 135 = 90 Ind. Cas. 721; see also A. I. R. 1926 Sind 66 = 19 S. L. R. 395 = 90 Ind. Cas. 97; A. I. R. 1930 All. 180 = 1930 A. L. J. 90 = 123 Ind. Cas. 324. A plaintiff may not only join different causes of action against the same defendants when such defendants are jointly interested, but he may also join different causes of action against different defendants if covered by the purview of Order 1, rule 3. A. I. R. 1926 Sind 66 = 19 S. L. R. 395 = 90 Ind. Cas. 970; see also A. I. R. 1923 Mad. 331 = 7 L. W. 25 = 69 Ind. Cas. 402. Misjoinder of parties and causes of action depends on the allegation in the plaint. 45 C. 111 = 21 C. W. N. 794 = 27 C. L. J. 158 = 41 Ind. Cas. 944. Under this rule the test is not whether the decree awarded is joint but whether it is alleged in the plaint that there is against the said defendants any right to relief in respect of the same act or transaction. 13 S. L. R. 183 = 53 Ind. Cas. 32. Causes of action can be joined in suit for share of rent by co-sharer landlord against tenant and other co-sharers alternatively. 48 Ind. Cas. 726. Liability joint or several for one cause of action and involving some question of law or fact are conditions of joining parties. A. I. R. 1925 Oudh 75 = 77 Ind. Cas. 1028. Whether joinder of cause of action is proper is to be determined with reference to facts of each case. A. I. R. 1934 Mad. 367. There was no misjoinder where in a suit against a fraudulent trustee for embezzlement of money, his several agents who had connived at breach of trust were also impleaded. A. I. R. 1934 Mad. 361.

**Necessary parties.**—In a suit for specific performance of contract of sale and not for delivery of possession persons claiming adverse possession is not a necessary or proper parties. (1916) 2 M. W. N. 191 = 4 L. W. 397 = 35 Ind. Cas. 868. In partition suit strangers are not necessary parties though they may be in a suit for possession. 15 L. W. 207 = 39 Ind. Cas. 160. In a suit to declare marriage of Hindu minor invalid, both the parties to marriage are necessary parties. 119 P. L. R. 1917 = 158 P. W. R. 1917 = 42 Ind. Cas. 420. Where the right of irrigation from a private water course of a canal is claimed but no relief is asked against Government, the latter is not a necessary party. 177 P. W. R. 1918 = 50 Ind. Cas. 299. Unnecessary parties should not be joined. A. I. R. 1918 P. C. 49 = 22 Bom. L. R. 232 = 28 C. L. J. 530 = 28 P. L. R. 1919 = 48 Ind. Cas. 540 P. C. In a suit for dissolution of partnership, person not in partnership as members of firm but in superior partnership with whole firm as other partner need not be joined. A. I. R. 1927 P. C. 70 = 53 M. L. J. 245 = 4 O. W. N. 491 = 31 C. W. N. 857 = 25 A. L. J. 487 = 26 L. W. 265 = 101 Ind. Cas. 17 (P. C.); see also A. I. R. 1927 Bom. 470 = 29 Bom. L. R. 937 = 51 B. 800 = 104 Ind. Cas. 764. In a suit by an adopted son against the widow of adoptive father, for possession of property remote reversioner need not be a party. A. I. R. 1926 Nag. 354 = 94 Ind. Cas. 918. In a suit for recover of possession of land, a person claiming possession as tenant of another person and his landlord is a necessary party. 163 Ind. Cas. 630 = A. I. R. 1936 Rang. 241. In a suit for declaration of right of easement, every owner of servient tenement who denies plaintiff's right is a necessary party. A. I. R. 1936 Cal. 534. Receiver of property of party to suit is not a necessary party if no attempt is made thereby to interfere with the right of the Receiver. 38 C. W. N. 996. In a suit for declaration that the plaintiff's possess certain rights in the *Shamilat* all the proprietors should be made defendants. A. I. R. 1934 Lah. 366 = 35 P. L. R. 420 = 151 Ind. Cas. 225. The execution of a promissory-note and the subsequent guarantee of the debt on that promissory-

note are a series of transactions within the meaning of Order 1, rule 3, Civil Procedure Code. A. I. R. 1937 Rang. 197.

In a partition suit persons not having present interest are not the necessary parties though all the shareholders must be represented before the Court. A. I. R. 1923 Cal. 221=49 C. 1043=36 C. L. J. 217=70 Ind. Cas. 687; 2 O. C. 62=7 O. L. J. 158=56 Ind. Cas. 304. In a suit for partition by a transferee, co-sharer vendors are proper though not necessary parties. A. I. R. 1923 Pat. 162=68 Ind. Cas. 804. Where a tenancy is not represented in its entirety in a suit for arrears of rent, decree against such of the tenants as are before the Court cannot be passed. 25 C. W. N. 525=62 Ind. Cas. 464. Remotely interested persons in the subject-matter of the suit, is not a necessary party thereto. 59 Ind. Cas. 292. Receiver appointed in a suit for dissolution of partnership need not be joined in a suit against partnership. 14 S. L. R. 171=60 Ind. Cas. 279.

In a suit for damages by the real owner against the creditor of an insolvent at whose instance the Receiver took possession of the property as belonging to the insolvent and on objection was restored to the real owner, Receiver is not a necessary party. 43 A. 452=19 A. L. J. 277=60 Ind. Cas. 821. Heirs in possession are the only necessary parties in a suit for arrears of rent for the period that they were in possession and not the other heirs of the tenant. 48 C. 518=63 Ind. Cas. 949. Easement suit must be dismissed in which one of the defendants being a minor, is not represented for no effective decree can be passed thereon. 64 Ind. Cas. 90. In a suit for removal of obstruction to the exercise of easement right, non-obstructing servient owners need not be made parties. A. I. R. 1926 Cal. 462=88 Ind. Cas. 970. Landlord is a necessary party in a suit between lessees for possession. A. I. R. 1926 Oudh 422=94 Ind. Cas. 3. In an administration suit the debtors to the estate of the deceased are not necessary parties. A. I. R. 1926 Mad. 110=24 L. W. 425=98 Ind. Cas. 838. In a suit for accounts every partner must be made a party. A. I. R. 1930 Mad. 714=58 M. L. J. 613=31 L. W. 757=130 Ind. Cas. 453. All persons entitled to easement are not necessary parties unless their right is interfered with. Question of parties is to be determined from pleadings. A. I. R. 1924 Cal. 1050=40 C. L. J. 74=84 Ind. Cas. 467. Owners of servient tenement not resisting plaintiffs' right of easement are not necessary parties. A. I. R. 1926 Cal. 1201=96 Ind. Cas. 665. Partition can be effected only of that part of the property of which all the co-shares are made parties to the suit for partition. A. I. R. 1925 Cal. 754=85 Ind. Cas. 662; see also 91 Ind. Cas. 567=A. I. R. 1926 Cal. 744. Joinder by permission of Court should not be allowed to prejudice the party. A. I. R. 1924 Oudh 337=27 O. C. 35=83 Ind. Cas. 850. In a suit to set aside mother's alienation various alienees can be joined. A. I. R. 1928 Mad. 820=110 Ind. Cas. 672. Where son claims independent title in a suit for specific performance of a contract against father, he is necessary and proper party. A. I. R. 1929 Cal. 957=33 C. W. N. 687=123 Ind. Cas. 657. Where only by one contract a master and a member of servants agree that they will work together and that the whole profits would be divided among them in certain proportions, a suit for account by one servant will be bad if all others also are not impleaded. A. I. R. 1930 Mad. 714=58 M. L. J. 613=31 L. W. 757=130 Ind. Cas. 453. Persons having no cause of action against each other should not be ordered to be joined in suits and suits having different causes of action should not be consolidated. A. I. R. 1930 Lah. 84=31 P. L. R. 976=127 Ind. Cas. 353.

Co-heirs of mortgagee claiming independent title may be joined as defendant. A. I. R. 1931 Nag. 20=26 N. L. R. 359=130 Ind. Cas. 105. In a suit for possession of a house sold in execution by third person against purchaser decree-holder is not necessary party. A. I. R. 1930 Lah. 45=116 Ind. Cas. 186. Where tenant pleads payment of rent to third person such person is invariably impleaded as co-defendants. A. I. R. 1929 Oudh 459=113 Ind. Cas. 794. Reversioners can implead all the alienees of the widows. A. I. R. 1926 Nag. 316=9 N. L. J. 17=98 Ind. Cas. 819. In a suit for possession the tenants are not necessary parties. A. I. R. 1924 Cal. 977=79 Ind. Cas. 1038. Joining of several defendants in possession of plots declared by survey officer not included in plaintiff's village is not bad as common question is involved. A. I. R. 1925 Mad. 1237=49 M. L. J. 420=(1925) M. W. N. 629=90 Ind. Cas. 748. New defendant can be joined on defendant's allegations and amendment cannot be objected. A. I. R. 1928 Bom.

91=9 Bom. L. R. 162=109 Ind. Cas. 191. In an administration suit person alleging to be adopted son must be joined even in stage of appeal. A. I. R. 1927 Rang. 192=5 Rang. 159=103 Ind. Cas. 22. In a suit against trustee his alienee should be joined. A. I. R. 1925 All. 683=23 A. L. J. 601=47 A. 770=89 Ind. Cas. 40. Impleading persons claiming paramount title in mortgage suit is an irregularity but does not vitiate the trial. 29 C. W. N. 784=88 Ind. Cas. 866. In suit for correction of entry and for possession all persons recorded as in possession are necessary parties. A. I. R. 1925 Pat. 218=82 Ind. Cas. 204.

In a suit to set aside alienations to various persons on different occasions, all alienees can be joined in one suit. 40 B. 351=18 Bom. L. R. 45=33 Ind. Cas. 950. Suit for damages against several persons making defamatory statements will not lie unless defendants acted jointly. 41 Ind. Cas. 12. In a suit for specific performance of a contract by a member of an undivided Hindu family to sell his share, other members of the family cannot be joined as defendants. 32 M. L. J. 575=40 M. 365=5 L. W. 797=21 M. L. T. 385 (F. B.)=40 Ind. Cas. 429.

Sub-partners are not necessary parties in a suit for dissolution of partnership. (1916) M. W. N. 18=4 L. W. 10=20 M. L. T. 134=34 Ind. Cas. 543. A suit for declaration of title, *mesne* profits and possession of the property purchased by different sets of defendants is bad for multifariousness. 40 A. 7=15 A. L. J. 809=42 Ind. Cas. 856. Persons disclaiming mortgagee's right to mortgage money can be impleaded in suit against mortgagor for declaration by plaintiff for being entitled to mortgage money. A. I. R. 1921 Cal. 653=33 C. L. J. 369=63 Ind. Cas. 244. In a claim for easements all owners of servient tenements must be made parties but co-sharers may not be impleaded. A. I. R. 1924 Cal. 369=69 Ind. Cas. 183. The landlord can sue all the heirs of the deceased tenant for the entire rent without making the other tenant a party thereto. A. I. R. 1923 Cal. 615=27 C. W. N. 521=77 Ind. Cas. 364. Persons in possession and not persons in receipt of rent and profits should be made parties in ejectment suit. A. I. R. 1924 Pat. 172=72 Ind. Cas. 1038. Several persons resisting possession of several parts of same plots on different grounds can be joined in one suit. A. I. R. 1924 Nag. 55=19 N. L. R. 178=77 Ind. Cas. 761. In a suit for possession by mortgagor transferees from mortgagee may be made parties. A. I. R. 1922 Bom. 350=24 Bom. L. R. 762=46 B. 993=68 Ind. Cas. 487. Single suit against different persons in respect of different holdings causes misjoinder of causes of action. 1 Pat. L. R. 456=81 Ind. Cas. 648. In a partition suit by sons, grandsons are not necessary parties. A. I. R. 1922 Pat. 96=1 Pat. 361=3 P. L. T. 238. Heirs of deceased tenants not in possession are not necessary parties to suit for rent against heirs in possession accrued during their possession. A. I. R. 1921 Cal. 81=48 C. 518=63 Ind. Cas. 946. Unobstructing servient owners are not necessary parties in easement suit. A. I. R. 1923 Pat. 65=4 P. L. T. 81=2 Pat. 110=69 Ind. Cas. 947. In a suit for declaration of rights in a *shamilat*, all proprietors are necessary parties. A. I. R. 1934 Lah. 366. In a suit for declaration that Collector's appointment of defendant as *Karnam* is wrongful, the Collector is a proper party and in his absence dismissal of suit is proper. A. I. R. 1934 Mad. 293. Where in a suit against a pleader for wrongful act of substitution of defendant, pleader pleads authority of plaintiff's *Naib* and *Patwari*, *Naib* and *Patwari* should also be impleaded as defendants in as much as common question would arise if separate suits be brought against them. A. I. R. 1934 Cal. 405.

Court may give judgment for or against one or more of joint parties.

4. [Ss. 26, 28.] Judgment may be given without any amendment—

(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to ;

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities.

Defendant need not be interested in all the relief claimed.

5. [R. S. C. O. 16. r. 5.] It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.

Scope.—Defendants liable in the alternative may be joined. (1896) 2 Q. B. 464 ; (1903) 2 K. B. 533 ; (1867) 2 Ex. D. P. 305 ; (1918) 87 L. J. Ch. 335.

6. [S. 29.] The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, *hundis* and promissory-notes.

**Scope.**—This rule is confined to suits on contracts. 18 Ind. Cas. 181. Contractual liability may be several, joint or joint and several. In a suit for negotiable instrument the holder is not bound to sue all the parties liable to him. 1 A. 392; 3 C. 541. In a suit for compensation for shortage of delivery against different carriers for some goods for same journey, all the carriers are necessary parties. 108 Ind. Cas. 591 = A. I. R. 1928 Cal. 490. Where several persons are jointly and severally liable for a single liability, all of them are not necessary parties to a suit against some of them only and they may not be added even as "proper" parties when suit can be decided without them and no multiplicity of suit would arise. A. I. R. 1934 Pesh. 94.

7. [R. S. C. O. 16 r. 7.] Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

**Scope.**—Defendants who are liable in the alternative may in some cases be joined. In this respect there is no distinction between actions arising from breach of contract or torts. *Bullock v. London* (1907), 1 K. B. 271. This rule applies where the plaintiff is in doubt as to the liability of the person to be sued. Claims in contract against two defendants jointly or in the alternative separately can be joined. *Bullock v. London General Omnibus Co.*, (1907) 1 K. B. 271. In a suit for possession all persons in possession are proper parties. A. I. R. 1922 Bom. 273 = 46 B. 526 = 23 Bom. L. R. 1251 = 64 Ind. Cas. 692.

8. [S. 30, S. 32, fourth para.] (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons, either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit.

**Scope.**—This rule is enacted to avoid multiplicity of suits. A. I. R. 1929 Mad. 44 = 27 L. W. 212 = 107 Ind. Cas. 789. This rule is a rule of convenience founded on the old chancery practice to prevent delay, expense and multiplication of suit to establish the same right. 39 C. W. N. 303 = 60 C. L. J. 556 = A. I. R. 1935 Cal. 413. This is an exception to the general rule that all persons interested in a suit must be made parties. 28 B. 214. This section is an enabling rule of convenience prescribing the conditions upon which persons when not made parties to a suit may still be bound by the proceedings. For the section to apply the absent persons must be (1) numerous; (2) they must have the same interest in the suit, which so far as its representative, must be brought or prosecuted with; (3) the permission of the Court. On such permission being given it becomes the imperative duty of the Court to direct notice to be given to the absent parties in such of the ways prescribed as the Court in each case may require, while liberty is reserved to any represented person to apply to be made a party to the suit. The obtaining of the judicial permission and compliance with the succeeding orders as to notice are the condition on which the further proceedings in the suit become binding on persons other

than those actually parties thereto and their privies. 60 I. A. 278=56 M. 657=57 C. L. J. 528=35 Bom. L. R. 827=1933 A. L. J. 762=1933 M. W. N. 758=37 C. W. N. 853=A. I. R. 1933 P. C. 183=65 M. L. J. 87 (P. C.); see also 108 Ind. Cas. 330=7 P. 197=9 P. L. T. 113=A. I. R. 1928 Pat. 205. The principle of this rule can be given effect to in a proper case by the appellate Court. 132 Ind. Cas. 657=A. I. R. 1931 Lah. 610. This rule is only intended to enable some of a class of persons *e. g.*, shareholders of a company, to sue on behalf of all of them. It is not intended to enable individuals to sue on behalf of the general public. 12 P. L. T. 885=10 Pat. 566=A. I. R. 1931 Pat. 418. Title of suit must indicate that suit is representative suit *i. e.*, filed under Order 1, rule 8. But a suit may be a representative suit notwithstanding that it does not so appear from the title of the suit. 56 B. 242=34 Bom. L. R. 343=137 Ind. Cas. 461=A. I. R. 1932 B. 122 (F. B.). This rule is a rule of procedure made for the purpose of convenience and saving of trouble and expense, and there is no reason why its provisions should not be applied to an application under s. 14 of the Arbitration Act to set aside an award. 60 B. 645=163 Ind. Cas. 532=38 Bom. L. R. 380=A. I. R. 1936 Bom. 259. This rule is only an enabling enactment. It in no way debars a member of community from maintaining a suit in his own right, although the act complained of may also be injurious to the whole community. 58 C. L. J. 534=A. I. R. 1934 Cal. 345=150 Ind. Cas. 364. It is not necessary that all persons having common interest should agree before one of them should be allowed to bring a suit as their representatives. A. I. R. 1934 Rang. 347. This rule is applicable even when the dispute is between two groups *inter se* of the same centre or body. All that is required that there should exist a common interest and a common grievance. A. I. R. 1935 Mad. 542=1935 M. W. N. 523=41 L. W. 574=156 Ind. Cas. 956. Shortness of notice is no excuse where the parties are not prejudiced. A. I. R. 1937 Cal. 245. Where the Court proceeds to act under Order 1, rule 8 without being moved by the plaintiff to that effect, the procedure is misconceived. 138 Ind. Cas. 509=33 P. L. R. 221. There can be no hard and fast rule as to how many persons should represent the public or the rest of the class of the persons of the same interest. 145 Ind. Cas. 387=14 Pat. L. T. 361=A. I. R. 1933 Pat. 302. In a representative suit there is only one party on either side, whatever the number may be on each side, but a personal decree is deprecated. 42 B. 556=19 Bom. L. R. 650=42 Ind. Cas. 9. Technical error under this section is covered by s. 99. A. I. R. 1929 Cal. 445=49 C. L. J. 357=125 Ind. Cas. 299.

**Numerous.**—There is nothing in this rule which justifies that numerous persons mean person capable of being ascertained. A. I. R. 1933 Lah. 749=143 Ind. Cas. 742=34 P. L. R. 608. This rule applies if there are about 100 persons interested in the suit. A. I. R. 1929 Mad. 44=27 L. W. 212=107 Ind. Cas. 789. Representative suit is not maintainable for damages suffered by an un-incorporated association by publication of libel. A. I. R. 1930 Rang. 177=8 Rang. 250=132 Ind. Cas. 277. Suit on behalf of a community is competent. A. I. R. 1928 Cal. 741=48 C. L. J. 276=114 Ind. Cas. 411; 24 C. W. N. 296=54 Ind. Cas. 742; see also 21 C. 180; 31 C. 839; 23 M. 28; 22 A. 269; 72 Ind. Cas. 95=A. I. R. 1923 Mad. 434=44 M. L. J. 240=1923 M. W. N. 237; 40 B. 158=18 Bom. L. R. 1=33 Ind. Cas. 264; A. I. R. 1921 Mad. 682=33 M. L. T. H. C. 47=64 Ind. Cas. 618. This rule is an enabling rule for the purpose of making it practicable to bring to trial, a suit in which numerous persons would otherwise have to be made parties, whose number might make the trial embarrassing. 33 B. L. R. 1575.

**Same interest.**—Substance of the suit and not the form of the pleading decides the nature of the suit. A. I. R. 1928 Mad. 445=54 M. L. J. 587=27 L. W. 769=109 Ind. Cas. 199. Representatives must have the same interest as those whom he represents. A. I. R. 1927 All. 96=98 Ind. Cas. 553; A. I. R. 1926 Pat. 321=5 Pat. 539=7 P. L. T. 679=94 Ind. Cas. 433. Common interest is absolutely necessary. A. I. R. 1924 Mad. 883=47 M. L. J. 449=(1924) M. W. N. 522=82 Ind. Cas. 492. Any of the persons having a common interest may bring a representative suit and the decree if obtained shall be equally shared. 37 Ind. Cas. 384; see also 22 B. 646. Consultation with the community need not be proved. A. I. R. 1929 Mad. 44=27 L. W. 212=107 Ind. Cas. 789.

**Permission of Court.**—Representative suit is not maintainable unless Court's permission is obtained. This provision is imperative. A. I. R. 1929 All. 806=(1930) A. L. J. 197=122 Ind. Cas. 750. 35 P. L. R. 420=A. I. R. 1934 Lah. 366. Implied permission may be inferred from Court's proceedings. A. I. R. 1929 Mad. 451=117



Ind. Cas. 725=(1928) M. W. N. 867. Where Court orders publication of notice, permission may be inferred. *Ibid*; see also A. I. R. 1927 Cal. 608=101 Ind. Cas. 738. Where suit was entertained without permission, permission obtained afterwards gives the Court jurisdiction. A. I. R. 1927 Rang. 134=6 Bur. L. J. 16=101 Ind. Cas. 200. Permission to sue need not necessarily be obtained before the suit is filed. A. I. R. 1928 Nag. 39=105 Ind. Cas. 113. Permission may be implied. I. R. 1933 Lah. 382=143 Ind. Cas. 742=34 P. L. R. 608=A. I. R. 1933 Lah. 749; but see 9 Bur. L. T. 247=38 Ind. Cas. 572; 44 C. 258=21 C. W. N. 1144=39 Ind. Cas. 773. The really effective parties to the litigation in such a case are the persons who have been permitted to sue, or be sued, on behalf of, or for the benefit of all the persons equally interested with them, and, until the persons who have been permitted to be so represented or some of them choose to apply under sub-rule (2) to put an end to their representation by the persons appointed under sub-rule (1) and have themselves placed on the record as effective parties, the persons appointed under sub-rule (1) are the only necessary parties for the conduct of the suit and the others need not be shown as parties at all, or if they are so shown, it is done merely for facility of reference and with a view to have a record of the persons who are to be ultimately bound by the decree. A. I. R. 1931 Lah. 610=132 Ind. Cas. 657=13 Lah. 195; see also A. I. R. 1935 Lah. 33=157 Ind. Cas. 733. Leave to sue is unnecessary if interested persons have notice of suit and may be given after institution of the suit. A. I. R. 1923 Bom. 305=25 Bom. L. R. 689=47 B. 809=83 Ind. Cas. 856; see also A. I. R. 1924 Cal. 998=84 Ind. Cas. 79. Fresh permission is unnecessary for the purposes of an appeal, where permission is validly granted for the suit. A. I. R. 1927 Cal. 608=101 Ind. Cas. 733. A person can be ordered to represent the public even against his wishes. A. I. R. 1927 Cal. 608=101 Ind. Cas. 738. Authority to represent must be legally expressed and the representatives must be capable in law to represent. A. I. R. 1927 All. 122=98 Ind. Cas. 998. In case of withdrawal of some representatives after leave, fresh leave is necessary. A. I. R. 1925 Cal. 547=80 Ind. Cas. 26.

**Notice.**—Notice to other members is essential. 56 M. 657=A. I. R. 1933 P. C. 183=37 C. W. N. 853 (P. C.); A. I. R. 1922 Bom. 109=46 B. 132=23 Bom. L. R. 972; A. I. R. 1922 All. 16=44 A. 231=20 A. L. J. 73 (F. B.)=65 Ind. Cas. 259; 35 P. L. R. 420. Notice of institution includes the names of persons permitted to represent others. A. I. R. 1927 Cal. 608=101 Ind. Cas. 738. In case of defective notice decree is binding as against persons appearing and contesting the suit. A. I. R. 1927 Cal. 608=101 Ind. Cas. 738; see also A. I. R. 1927 Pat. 221=8 P. L. T. 267=101 Ind. Cas. 500. Notice is not a mere matter of formality but failure to give it does not incur dismissal of suit. A. I. R. 1925 Cal. 547=80 Ind. Cas. 26; see also 34 P. L. R. 608=143 Ind. Cas. 742=A. I. R. 1933 Lah. 749. Under Order 1, rule 8, it is the duty of the Court to give notice to all persons whom the plaintiff claims to represent. A. I. R. 1933 Pat. 302=14 P. L. T. 361=145 Ind. Cas. 387; see also 143 Ind. Cas. 742=34 P. L. R. 608=A. I. R. 1933 Lah. 749. Notice must be given in the language of the persons whom the plaintiffs claim to represent. 34 P. L. R. 608=A. I. R. 1933 Lah. 749. In application for filing award of arbitration without intervention of Court in representative action, two separate notices under Order 1, rule 8 and Sch. 2, para 20, are not necessary. A. I. R. 1934 Bom. 6. In the absence of leave and notice the suit is not representative but is one between named plaintiffs and named defendants. A. I. R. 1934 Lah. 366.

**Death of one of the parties.**—Where sanction is originally given by the Court to a certain number of persons either to prosecute or defend a suit in a representative capacity and one of them dies his heirs are not competent to continue the suit, because the sanction was accorded to certain persons and not to their heirs. In such a case, the proper procedure is for the remaining persons to apply to the Court for direction as to whether the remaining number is sufficient or whether it is necessary that additional persons who need not necessarily be the legal representatives of the deceased person should be joined. 54 M. 527=34 L. W. 214=130 Ind. Cas. 761=1931 M. W. N. 353=A. I. R. 1931 Mad. 452=61 M. L. J. 135; see also A. I. R. 1931 Lah. 610=132 Ind. Cas. 657; 66 M. L. J. 175=A. I. R. 1934 Mad. 202=1937 M. W. N. 907=150 Ind. Cas. 26. The same is applicable if any of the representative defendants dies. 59 C. 961=138 Ind. Cas. 4=55 C. L. J. 8=A. I. R. 1932 Cal. 275. In a representative suit, death of one of the two parties does not entail the dismissal of the suit. Any person interested may be added as a party. (1916) 1 M. W. N. 402=31 M. L. J. 279=40 M. 110=3 L. W. 305=34 Ind.

Cas. 384. Appeal will abate, if legal representatives of non-appearing defendants who have died, are not brought on record. A. I. R. 1926 Lah. 31=89 Ind. Cas. 328. Where some persons are suing on behalf of a body, fresh sanction of the Court to continue the suit is not necessary on the death of one of the plaintiffs. A. I. R. 1925 Lah. 598=7 Lah. L. J. 517=26 P. L. R. 732=88 Ind. Cas. 478.

**Sub-rule (2).**—When the Court once gives permission to sue under Order 1, rule 8, it is not permissible to the Court to dismiss the suit subsequently, simply on the ground that some persons object to the plaintiff carrying on the suit. The proper procedure is to bring those persons on the record as parties under clause (2) of the rule. A. I. R. 1932 Bom. 65=33 Bom. L. R. 1575=135 Ind. Cas. 806. Where an application under this sub-rule has been made *malafide*, the order of the Court dismissing the petition is not subject to interference by the High Court under s. 115. 114 Ind. Cas. 904=A. I. R. 1933 All. 154.

**Resjudicata.**—The object of instituting a representative suit under this rule is to create a bar of *res judicata* by reason of Explanation 6 to s. 11. But in any case the persons whom the plaintiff represents cannot be saddled with costs of the suit if the plaintiff should fail to win the case. 155 Ind. Cas. 236=1935 O. W. N. 471=A. I. R. 1935 Oudh 369. Unless permission is obtained by the person suing or defending the suit, his action has no binding effect on the persons he chooses to represent, *i.e.*, the judgment in such a case does not bind those whose names are not on the record. In order that the suit under Order 1, rule 8 may have the benefit of Explanation 6 to s. 11 of the C. P. Code the condition of rule 8 of Order 1, must have been complied with fully. The observance of these requirements as to notice, etc., is essential. 56 M. 657=A. I. R. 1933 P. C. 183=143 Ind. Cas. 665=37 C. W. N. 853=38 L. W. 16=65 M. L. J. 87=57 C. L. J. 528=1933 A. L. J. 762=1933 M.W.N. 758 (P. C.). The dismissal of a suit regarding the public right does not bind the persons who are quite foreign to the suit in legal conceptions. 42 Ind. Cas. 275; see also 42 Ind. Cas. 543; 49 Ind. Cas. 796.

**Individual suit for public right.**—No individual can sue for declaration of a public right unless he suffers some special damages in exercising it. (1918) M. W. N. 175=8 L. W. 377=44 Ind. Cas. 367; 62 Ind. Cas. 888=A. I. R. 1921 Lah. 76. No leave of the Court is required for a suit, by the worshippers of a mosque even when no special damage be caused to prove the invalidity of the transfers. 23 C. W. N. 115=49 Ind. Cas. 355; 58 Ind. Cas. 585=1920 M. W. N. 393=38 M. L. J. 226=43 M. 410; see also A. I. R. 1921 Lah. 76=3 Lah. L. J. 384=62 Ind. Cas. 888; 13 Bur. L. T. 183=63 Ind. Cas. 953; 1922 Oudh 1=9 O. L. J. 111=26 O. C. 82; 66 Ind. Cas. 415=A. I. R. 1922 Oudh 142=8 O. L. J. 395; A. I. R. 1923 Mad. 276=33 M. L. T. 133=1923 M. W. N. 84=17 L. W. 14=44 M. L. J. 116=71 Ind. Cas. 463; A. I. R. 1923 Pat. 475=9 Pat. 391=4 P. L. T. 675=74 Ind. Cas. 403. This rule in no way debars a member of a community from maintaining a suit in his own right, although the act complained of may also be injurious to the whole community. 56 M. 657 P. C.=57 C. L. J. 528=37 C. W. N. 853=35 Bom. L. R. 827=1933 A. L. J. 762=A. I. R. 1933 P. C. 183=143 Ind. Cas. 665; see also 52 I.A. 61=29 C. W. N. 486 (P. C.). When a particular individual is affected by any act which amounts to a public nuisance, suit by him individually to remove such nuisance is not maintainable unless he suffers special damage. The proper remedy is to bring a representative suit. 62 C. 692=39 C. W. N. 590=61 C. L. J. 182. In the above case *Nasim Ali J.* observed: "The next contention of the learned advocate is that in any view of the case the road being public roads plaintiff is entitled to bring suits to remove the obstructions, even if the special damage pleaded by him is not established. The obvious answer to his argument is that in that case he would be hit by section 91 of the Civil Procedure Code as the acts committed by the defendants amounts to public nuisance. The learned advocate for the appellant, relying on the decisions in the case of *Mauzber Hasan v. Mohammad Zanan*, (52 I. A. 61=29 C. W. N. 486) and *Mandukini Debi v. Basanta Kumari Debi* (60 C. 1003), argued that the plaintiff was entitled to sue for the removal of the obstruction in these suits in their present forms. In the first case in which *Shiah* prayed for a declaration of their right to go in procession in *Madam* on a public road and for perpetual injunction against the *sunnis* interfering with them, *Lord Dunedin* observed that special damage other than the obstruction of the procession was not needed. The facts of the second case show that the plaintiff in that suit was put to much inconvenience as no large articles could be brought into her house along the public road which was the only means of entering into her house

on account of the narrowing down of the passage by the defendant by the erection of the wall and privy. In view of these facts *Jack J.* relying on the said observation of *Lord Dunedin* in *Mauzur Hasan's* case (52 I. A. 61=29 C. W. N. 486) held that no special damage was required further than the plaintiff's inability to carry large articles into her house owing to obstructions. The plaintiff in the present suit being one of the members of the public, is equally affected by the obstruction with the other members of the public. He has suffered no special damage. His claim is not in respect of a wrong to him individually. He is one of the numerous persons affected by the obstruction and therefore having the same interest in the matter. Consequently the proper course for him was to bring a representative suit in conformity with the provisions of Order 1, r. 8 of the C. P. Code. See *Batiram v. Sibram* (25 C. W. N. 95), and *Kenaravelu v. Ramaswami* (37 C. W. N. 853 P. C.=56 M. 657).

**When representative is competent.**—Devotees of *mult* can bring a representative suit for the possession of the endowed property and to prohibit its wrongful transfer. 41 M. 124=33 M. L. J. 867=22 M. L. T. 218=42 Ind. Cas. 366. Under this section some of the landlords are competent to sue on behalf of all. 34 P. L. R. 1035=146 Ind. Cas. 841=A. I. R. 1933 Lah. 654. Some members of the managing committee of a school are not competent to bring a representative suit. 37 C. W. N. 497=60 C. 794=A. I. R. 1933 Cal. 329=143 Ind. Cas. 457. Where plaintiff has no especial interest, the permission of the Court is necessary. A. I. R. 1934 Cal. 345.

9. [S. 31.] No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

**Scope.**—Non-joinder or misjoinder of parties is not fatal to a suit. A. I. R. 1922 All. 404=70 Ind. Cas. 613. Non-joinder or misjoinder is not fatal only where the Court can deal with the matter in controversy with regard to the rights and the interests of the parties actually before it. 1 U. P. L. R. (H. C.) 7=52 Ind. Cas. 18 ; 215 P. L. R. 1914. A suit in which no effective decree can be made in the absence of an interested party must not be entertained. A. I. R. 1921 Cal. 623=25 C. W. N. 249=62 Ind. Cas. 425 ; see also 24 Ind. Cas. 831=10 N. L. R. 72 ; 35 A. 441=11 A. L. J. 630 ; 62 C. 324=A. I. R. 1935 Cal. 269 ; 1934 A. L. J. 1006=152 Ind. Cas. 1008. Non-joinder of parties is not fatal to the suit and the Court can proceed with the suit and decide matter in controversy so far as regards the interests and right of the parties actually before it. A. I. R. 1929 All. 439=116 Ind. Cas. 813. The provisions of this rule have no application to an appeal before the Board in a case where the defect has been brought to the notice of the party concerned from the outset of the proceedings, and he has had ample opportunity of remedying it in India. (1931) A. L. J. 797=A. I. R. (1931) 229=35 C. W. N. 977=54 C. L. J. 274=61 M. L. J. 294. Order 1, rule 9, applies to mortgage suits as well as to any other suit. A. I. R. 1934 Oudh 220=11 O. W. N. 524=148 Ind. Cas. 903.

**Misjoinder of parties.**—Where misjoinder has not in any way prejudiced defence, the Court is not justified in dismissing the suit on that ground. 30 P. L. R. 1092=59 Ind. Cas. 522 ; see also 12 Ind. Cas. 206=4 Bur. L. T. 255 ; 17 C. W. N. 128=18 Ind. Cas. 117 ; 6 C. 815 ; 67 P. R. 1894. This section provides against dismissal in case of non-joinder or misjoinder of parties. The only course open to the Court under such circumstances is formally to call upon the plaintiff to make his election and confine the suit to one set of defendants. 142 Ind. Cas. 542=15 N. L. J. 111.

**Non-joinder of parties.**—Non-joinder of parties does not cause the dismissal of the suit. 19 C. L. J. 316 ; 19 C. L. J. 455 ; 41 C. 581 ; A. I. R. 1930 Rang. 295=129 Ind. Cas. 508. The parties must be allowed to amend the plaint. The Court of Appeal cannot of its own accord take objection for non-joinder. A. I. R. 1930 Rang. 295=129 Ind. Cas. 508. In case of non-joinder of parties, Court should either add them of its own motion, or direct the plaintiff to do so but should not dismiss the suit for that reason. 8 O. L. J. 310=63 Ind. Cas. 548. A suit by some of several servient owners for a declaration of their right should not be dismissed for non-joinder of the other servient owners. Court can adjudicate on the rights of the parties actually before it. A. I. R. 1924 Pat. 303 ; 78 Ind. Cas. 431 ; see also A. I. R.

1924 Cal. 1050=40 C. L. J. 74=84 Ind. Cas. 467. The view of the Calcutta High Court is that a mortgagee is not a necessary party to a partition suit provided the question of the mortgagor's interest is not in controversy. 134 Ind. Cas. 307=35 C. W. N. 296=A. I. R. 1931 Cal. 594. An appeal cannot be dismissed for non-joinder of parties. 32 Ind. Cas. 749. In a suit for partition in a joint Hindu family, the grandsons are not necessary parties and are represented by their father. A. I. R. 1922 Pat. 4=3 P. L. T. 238=67 Ind. Cas. 156. The *puisne* mortgagee is a proper but not a necessary party to the suit by a prior mortgagee and the suit cannot be dismissed if he is brought on record after the period of limitation. A. I. R. 1922 Pat. 651=4 P. L. T. 698=2 Pat. 175=69 Ind. Cas. 677.

In order that a defendant may be considered a necessary party there must be a right to some relief against him in respect of the matter involved in the suit, and secondly, his presence is necessary in order to effectually and completely adjudicate upon and settle all the questions involved in the suit. A. I. R. 1922 Pat. 651=(1922) Pat. 326=4 Pat. 174=4 P. L. T. 698=69 Ind. Cas. 677. A suit cannot be dismissed for non-joinder. All that the Court can do is to add parties itself or cause them to be so added. A. I. R. 1921 Oudh 148=8 O. L. J. 310=63 Ind. Cas. 548. Where a plaintiff fails to add necessary parties or refuses to do so when so required by the Court, the Court can dismiss the suit. 19 A. L. J. 525=63 Ind. Cas. 548. Where in a suit for a declaration of a right of way and for removal of an obstruction, persons interested in servient tenement is not made a party, suit cannot be entertained. 25 C. W. N. 249=62 Ind. Cas. 425. In case of mortgage suits, Order 1, rule 9, is controlled by Order 34, rule 1. 60 C. 777. Where a party takes objection on the ground of non-joinder, he must show which of the parties are absent. A. I. R. 1934 Pat. 44. In a suit for redemption by one heir of the mortgagor non-joinder of other heirs is not fatal. A. I. R. 1934 Oudh 220.

**Non-joinder, if fatal.**—Where a Court directs the addition of parties under Order 1, rule 10, the plaintiff must obey the order of Court, and cannot proceed with the suit as originally constituted. 5 L. W. 207 ; 15 R. D. 657=39 Ind. Cas. 160. If a necessary party is not on record the proper course is to apply to have him joined. If he is not brought on record or if when brought on record the suit against him is barred, the suit will be dismissed. 36 Ind. Cas. 77 ; 1930 A. L. J. 247. Rule 9 which provides that no suit can fail for non-joinder of parties does not mean that only one trustee may be sued in contravention of Order 31, rule 2, and a decree passed against the trustee singled out for the suit. 55 A. 687=1933 A. L. J. 1933. Whether a person is a necessary party to the suit in the sense that it cannot proceed in his absence must depend upon whether the decision would necessarily affect the interest of that party. A. I. R. 1922 Pat. 651=2 Pat. 175=69 Ind. Cas. 677. The general rule laid down by the legislature is that no suit shall be defeated by reason of non-joinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. There is, however an exception to this rule general and that rule is that a Court will refrain from having a decree which would be ineffective and infructuous. But this rule has no application to cases in which, notwithstanding the fact that some of the persons interested in the subject-matter of the suit are not parties to the suit, the Court is in a position to pass a decree that is capable of execution and cannot be rendered nugatory at the instance of the persons not parties to the suit. 152 Ind. Cas. 1008=1934 A. L. J. 1006 ; A. I. R. 1934 Lah. 657=34 P. L. R. 598. Where a party to a suit contends that the suit is defective for want of parties, the party that puts forward this point has to show which, if any, of the parties are absent from the record. A. I. R. 1934 Pat. 44. In a matter in which the deity is vitally interested the deity should be made a party and if the *shebais* have got any interest adverse to that of the deity, it is necessary that the idol should be represented by a perfectly disinterested person. A. I. R. 1937 Cal. 338. Where the plaintiff is one of the dominant owner and brings a suit for the removal of the alleged obstruction to easement and if other dominant owners do not feel aggrieved by the alleged obstruction, it is not necessary that they must join with the plaintiff in the suit as they are not necessary parties under Order 1, rule 9, C. P. Code and the suit does not fail in their absence. A. I. R. 1937 Cal. 355. In a suit by some of several trustees with regard to trust properties all co-trustees must be made parties. A. I. R. 1922 Mad. 317=15 L. W. 283=(1922) M. W. N. 106=42 M. L. J. 133=70 Ind. Cas. 645. If the defendants are in no way prejudiced by non-joinder of plaintiffs, such non-joinder is not fatal. A. I. R. 1922 Bom. 354=48 B. 1022=24 Bom. L. R. 826. If a necessary party is not impleaded

within limitation period the suit is barred. A. I. R. 1929 Cal. 591=125 Ind. Cas. 109. A suit cannot be dismissed where the defect of multifariousness is patent on the face of pleadings. A. I. R. 1930 All. 180=(1930) A. L. J. 99=123 Ind. Cas. 324. This section has no application to a case where there is no party on the one side present in Court at all. A. I. R. 1928 Lah. 375=9 Lah. 588=30 P. L. R. 41=110 Ind. Cas. 384. Omission to join within limitation a subsequent mortgagee as a party to a mortgage suit for sale is not fatal to the suit; suit can proceed only the decree cannot affect the rights and interests of the subsequent mortgagee. A. I. R. 1927 All. 488=101 Ind. Cas. 775. But omission to join a real defendant with an interest to oppose the suit is fatal. A. I. R. 1927 All. 290=100 Ind. Cas. 198. Non-joinder of any party making it impossible to deal equitably and sufficiently with the matter in controversy between the parties to the appeal cannot be condoned by the appellate Court under Order 1, rule 9, read with s. 107. A. I. R. 1925 Oudh 606=87 Ind. Cas. 904; see also A. I. R. 1927 Cal. 208=44 C. L. J. 557=99 Ind. Cas. 901. Non-compliance with the provisions of Order 34, rule 1, is not fatal to a suit for enforcing a mortgage and the provisions of Order 1, rule 9, are applicable to a mortgage suit. 36 C. W. N. 1138; 54 C. L. J. 113; but see 1 Pat. L. J. 468=36 Ind. Cas. 542. The provisions of this rule does not apply to an appeal in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings and he has had ample opportunity of remedying it in the previous stages which, however, he failed to avail himself of. 54 C. L. J. 274=35 C. W. N. 977=A. I. R. 1931 P. C. 229=61 M. L. J. 294 (P. C.)=1931 A. L. J. 797 (P. C.).

**Amendment of plaint**—In case of non-joinder or misjoinder of parties the suit should not be dismissed. The parties must be allowed to amend the plaint. A. I. R. 1930 Rang. 295=129 Ind. Cas. 508; 6 C. 815; 8 C. 49; 10 Ind. Cas. 212=132 P. L. R. 1911=248 P. W. R. 1911; 21 Ind. Cas. 182; 19 C. L. J. 316; 28 A. L. J. 247=122 Ind. Cas. 507; 62 C. 324=A. L. R. 1935 Cal. 269=A. I. R. 1936 Cal. 193. One of the defendants not standing in a relation of a tenant in a suit for ejectment by the landlord does not require the plaintiff to amend his pleading. A. I. R. 1930 Cal. 42=33 C. W. N. 769=57 C. 349=125 Ind. Cas. 726. A suit should not be dismissed for multifariousness, opportunity should be given to the plaintiff to amend plaint and elect. A. I. R. 1934 Mad. 367.

#### 10. [Ss. 27, 32, 33.] (1) Where a suit has been instituted in the name

Suit in name of wrong plaintiff. of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) The Court may, at any stage of the proceedings, either upon or without the application of either party, and on Court may strike out or add such terms as may appear to the Court to be just, parties. order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as Where defendant added, may be necessary, and amended copies of the plaint to be amended. summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the \*Indian Limitation Act, 1877,† section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

**Scope of sub-rule (1).**—A sub-rule (1) is taken from rule 2, order 16 of the Supreme Court Practice. This sub-rule deals with the substitution or addition of plaintiffs after action is brought. To bring a case within the four corners of this sub-rule it must be shown (1) that the action was commenced in the name of the original plaintiff by mistake and (2) that the substitution or addition is necessary for the determination of the real matter in dispute. Joinder of plaintiffs under Order 1, rule 10, is subject to provisions under Order 1, rule 1. A. I. R. 1927 Mad. 834 = 53 M. L. J. 269 = 1927 M. W. N. 903 = 105 Ind. Cas. 114. Where a suit brought in the name of a firm carrying on business outside British India, is found not maintainable on preliminary issue and plaintiff thereupon applies for amendment of the plaint by striking out his name and inserting those of the parties, the application must be deemed to be an application for substitution of plaintiffs. A. I. R. 1928 Bom. 191 = 30 Bom. L. R. 117 = 109 Ind. Cas. 99. In a suit by a *benamidar* in his own name, the Court can make the real owner a party, if it think that his presence is necessary for the proper determination of the suit. A. I. R. 1929 Mad. 268 = 55 M. L. J. 856 = 29 L. W. 56 = 115 Ind. Cas. 340. A suit which is instituted in the name of a sole plaintiff dead at the time of the institution of the suit cannot be amended in any way. A. I. R. 1927 Cal. 880 = 104 Ind. Cas. 623. A person can be added or substituted as plaintiff without the consent of the existing plaintiff, and before he can be so added or substituted it must be shown that the action was commenced in the name of the original plaintiff by mistake and that the substitution or addition is necessary for the determination of real matter in dispute. A. I. R. 1927 Cal. 340 = 45 C. L. J. 146 = 101 Ind. Cas. 527; see also 12 C. L. J. 537 = 8 Ind. Cas. 87; 30 M. 419; 9 Ind. Cas. 254. Mistake may either be of fact or law. 66 Ind. Cas. 873; A. I. R. 1921 Sind 59 = 16 S. L. R. 71; *Hughes v. Pump House*, (1902) 2 K. B. 485 C. A.; *Valde Travers v. London Tramway*, 48 L. J. C. P. 312; *Ducket v. Gover*, (1877) 6 Ch. D. 82; 17 C. W. N. 462. This rule is not meant to give the Judge unlimited discretion to remodel pleadings. *Per Miller J.* in *Turquand v. Feason*, 4 Q. B. D. 280. Order 1, rule 10, C. P. Code, enables the Court to add a third party where it is necessary so to do in order to enable the Court to effectively adjudicate and settle all the questions involved in the suit. A. I. R. 1935 Mad. 353. Under this rule a person may be added as a party to a suit in the following two cases: (1) When he ought to have been joined as plaintiff or defendant, and not so joined or (2) when without his presence the question in suit cannot be completely decided. A. I. R. 1935 Sind 194 = 158 Ind. Cas. 814. The word "wrong person" appearing in Order 1, rule 10, cannot be construed as dead person. A. I. R. 1934 Nag. 55 = 148 Ind. Cas. 241. The Court has power under subsection 1 to substitute a right plaintiff in place of wrong one only if the right to sue is not barred under s. 22 of the Limitation Act on the date of institution. 58 B. 536 = 36 Bom. L. R. 814 = A. I. R. 1934 Bom. 385. Where a person who has wrongly filed a suit in his name does not desire to clothe himself with a right to sue, but by an application he expressly divests himself of any claim and prays for the substitution of a person who has a cause of action, admitting that he himself has none, the case clearly falls within Order 1, rule 10. A. I. R. 1934 Nag. 159 = 150 Ind. Cas. 895. As regards meaning of the words "*bona fide* mistake" *vide* A. I. R. 1936 Mad. 960 = 71 M. L. J. 614 = 1936 M. W. N. 1184. Living person's name cannot be substituted under Order 1, rule 10, in place of dead person. A. I. R. 1937 Sind 92; but see A. I. R. 1937 Sind 47. The underlying principle regarding the addition of parties is that there must be finality to litigation and to secure that purpose it would be incumbent upon the Court to add a party whose presence could be necessary to put an end to all the controversy in the litigation finally. A. I. R. 1937 Mad. 200; see also A. I. R. 1937 Oudh 229. Adding a new co-plaintiff without paying additional Courts-fees cannot be allowed if the original plaintiff is proved to be incompetent. 8 Bur. L. T. 283 = 8 L. B. R. 302 = 31 Ind. Cas. 332.

A suit can be continued by substitution of right plaintiff if *bona fide* mistake was committed in the institution of it. A. I. R. 1923 Mad. 180 = 1922 M. W. N. 817 = 16

\* See now the Indian Limitation Act, 1908 (IX of 1908), s. 22.

† XV of 1877.

L. W. 826=69 Ind. Cas. 413 ; 50 Ind. Cas. 128. Due care and caution is not always necessary. It is sufficient where mistake is made honestly and not deliberately. 20 C. W. N. 49=22 C. L. J. 279=29 Ind. Cas. 680 ; 27 N. L. R. 335. It is a *bona fide* one where different Courts have taken different views on a point of law in which the plaintiff's case depends. A. I. R. 1923 Mad. 180=(1922) M. W. N. 817=16 L. W. 836=69 Ind. Cas. 413. If a plaintiff who is a major is wrongly described as a minor, the Court can strike off the name of such plaintiff. A. I. R. 1924 Oudh 428=11 O. L. J. 154=83 Ind. Cas. 833. But where a suit is instituted on behalf of a minor by his next friend, and the minor is found to have died before the institution of the suit the Court cannot allow the amendment of the plaint by substitution of legal representatives, especially when it is not shown that the mistake is *bona fide*. A. I. R. 1923 Lah. 652=79 Ind. Cas. 284. The question of *bona fide* mistake arises only under cl. (1) and not under cl. (2). 137 Ind. Cas. 89=33 P. L. R. 253=A. I. R. 1932 Lah. 214. The High Court has inherent power under s. 151 to add parties or transpose a party from one category to another under s. 151. A. I. R. 1927 Cal. 37=41 C. L. J. 243=98 Ind. Cas. 822 ; see also A. I. R. 1929 Mad. 403=115 Ind. Cas. 812. Amendment may be allowed on payment of cost. 35 C. W. N. 432=134 Ind. Cas. 1200=A. I. R. 1931 Cal. 770. Misdescription of defendant's name can be corrected. 26 S. L. R. 158=A. I. R. 1932 Sind 164=139 Ind. Cas. 848. Where through a *bona fide* belief the plaintiff is described as a minor and is represented by his next friend provided the suit is instituted by the right person, though through another purporting to act as his next friend, the suit is maintainable. A. I. R. 1927 Cal. 417=100 Ind. Cas. 469.

**At any stage.**—This rule authorises substitution at any stage of the suit. 25 B. 433 (464) ; see also 20 M. 467 ; 154 Ind. Cas. 465=A. I. R. 1935 Rang. 23 ; A. I. R. 1934 Pat. 370 ; 17 N. L. J. 266.

**Necessary for the determination of the real matter.**—In a suit by an administrator for account of *mesne profits* against the heir of the deceased intestate, who had acted as executor *de son tort* the other heirs though not necessary parties are proper parties. A. I. R. 1929 Lah. 753.

**Sub-rule (2).**—This sub-rule is only intended to apply where either one or other of the parties makes an application to the Court or the Court itself is of opinion that some other persons ought to be brought into the proceedings in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit ; that is to say, the questions which were involved in the suit as originally framed between the parties to the suit. 59 C. 329=138 Ind. Cas. 104=A. I. R. 1932 Cal. 448. The expression "all the questions involved in the suit" refers only to questions between the parties to the litigation. A. I. R. 1926 Mad. 836=50 M. 34=51 M. L. J. 148=24 L. W. 738=95 Ind. Cas. 214 ; A. I. R. 1935 Sind 194. A suit by manager alone is valid though plaintiff not described as manager. Co-parceners can however be added as parties afterwards. A. I. R. 1934 Bom. 178. Parties can be added or substituted even though Order 1, rule 10, does not apply. A. I. R. 1934 All. 4. Where necessary parties are not impleaded due to gross negligence, amendment cannot be allowed. A. I. R. 1934 Lah. 36. Legal representatives of appellant already dead cannot be substituted. A. I. R. 1934 Nag. 55. Action cannot proceed where necessary party has not been joined. A. I. R. 1934 Pat. 106. Person financing litigation is not a necessary party. 68 M. L. J. 236=A. I. R. 1935 Mad. 394=41 L. W. 126. Under sub-section (2) the Court has power to add parties in two cases only. The first is where he ought to have been joined and has not been joined. The second case in which a party may be added under rule 10 is when his presence is necessary to enable the Court to make a complete adjudication upon questions involved in a suit. A. I. R. 1934 Nag. 228=148 Ind. Cas. 720. A written statement requesting the Court to add parties is an application under Order 1, rule 10. A. I. R. 1937 Rang. 176.

**Addition of parties.**—This rule for addition cannot be invoked if such addition would alter the nature of the suit. A. I. R. 1925 Cal. 26=28 C. W. N. 805=82 Ind. Cas. 369. But the power under this rule can ordinarily be exercised only in proceedings not concluded by a decree unless the person to be added is a subsequent transferee. A. I. R. 1924 Oudh 33=26 O. C. 317=10 O. L. J. 232=72 Ind. Cas. 1031. The power to add a party under Order 1, rule 10, can be exercised at any stage even at such a late stage at the time of decree. A. I. R. 1929 Bom. 337=31 Bom. L. R. 476=122 Ind. Cas. 66. Before an application to be added as party

under Order 1, rule 10, to a suit under Order 1, rule 8, can be allowed, the applicant must prove that suit originally instituted was in the name of a wrong person through a *bona fide* mistake. A. I. R. 1924 Mad. 883=47 M. L. J. 540=82 Ind. Cas. 492. When parties are added under rule 10 (2) the date when they are added is to be deemed to be the date of the institution of suit so far as they are concerned for purposes of limitation. A. I. R. 1927 P. C. 252=26 A. L. J. 371=30 Bom. L. R. 220=32 C. W. N. 281=47 C. L. J. 136=54 M. L. J. 88=107 Ind. Cas. 237. If a person who applies to be added as a party is only a permissible party, he cannot be so added against the wishes of the person to fight whom he is sought to be brought on record. A. I. R. 1926 Mad. 836=50 M. 34=(1926) M. W. N. 575=51 M. L. J. 148=24 L. W. 738=95 Ind. Cas. 214. Court has authority to make those persons parties to the suit whose presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. A. I. R. 1923 Mad. 521=44 M. L. J. 322=17 L. W. 329=72 Ind. Cas. 156. The Court can impose terms on a person who seeks to be added as a party to the suit. The Court can also allow a party to be added on condition that he can only intervene at a particular stage in a suit and cannot question an order passed before he applied to the Court. 58 C. 801=35 C. W. N. 122=134 Ind. Cas. 1279=A. I. R. 1931 Cal. 580. The Court can allow a person to be added as a party even when it decided against the issue previously. 33 Bom. L. R. 601=A. I. R. 1931 Bom. 408=134 Ind. Cas. 365. In a partition suit, the Court can order the inclusion of a person as a party even after the preliminary decree when he is a proper party. 131 Ind. Cas. 643=33 L. W. 734=A. I. R. 1931 Mad. 357=60 M. L. J. 229. It is hardly in accordance with precedent that a Court of Appeal should after sending a case back to the trial Judge for the purpose of having a necessary party brought before the Court to indicate the order which the trial Judge should make when he tries the case in the presence of the proper parties. 136 Ind. Cas. 632=36 L. W. 135=A. I. R. 1932 P. C. 146=63 M. L. J. 369 (P. C.). In a suit for partition of Hindu joint family properties alienees of joint family properties may be made parties. A. I. R. 1930 Mad. 913=(1930) M. W. N. 679=59 M. L. J. 524=129 Ind. Cas. 235. Worshippers of a temple applying to be made parties to the suit for partition of joint family property alleging that a large fund in the hands of the family was really a fund held in trust for the benefit of the deity should be added as parties. A. I. R. 1931 Mad. 357=60 M. L. J. 229=131 Ind. Cas. 643 Costs of persons unnecessarily impleaded at the instance of a defendant, should be directed to be paid by such defendant. A. I. R. 1930 Mad. 913=50 M. L. J. 524=129 Ind. Cas. 235. An action is not defeated by the non-joinder of parties as the Court has wide powers of adding necessary parties. But if necessary parties are not joined, the action cannot proceed. A. I. R. 1934 Pat. 106; see also 148 Ind. Cas. 329=A. I. R. 1934 Lah. 36. In a proper case the Court can add a person as a defendant to a suit even in opposition to the wishes of the plaintiffs. 40 C. W. N. 677.

In a suit for rent by a landlord against a tenant, a person alleging to be a transferee with consent of the landlord claiming to be real tenant of the holding can claim to be added as a party. A. I. R. 1930 Pat. 323=11 P. L. T. 43=125 Ind. Cas. 119. In a suit against a company liquidator or trustees in bankruptcy added as parties to the suit otherwise than under Order XXII, rule 10, must be considered to have been so added under Order 1, rule 10. A. I. R. 1930 Cal. 113=50 C. L. J. 208=57 C. 70=123 Ind. Cas. 250. A stranger who has no personal interest in any one of the reliefs claimed by the plaintiff in a suit cannot be joined as co-plaintiff. A. I. R. 1930 Sind 73=120 Ind. Cas. 17. Before a person is added as party on his own motion the Court ought to see whether there is anything which cannot be determined owing to his absence or whether he will be prejudiced by his not being joined as a party. A. I. R. 1929 Mad. 291=116 Ind. Cas. 137. In an administration suit, an order adding party to watch the proceedings is wrong and has no meaning. A. I. R. 1929 Cal. 477=56 C. 447=119 Ind. Cas. 21. A new party can be impleaded as defendant even against the consent of the plaintiff, even though such addition may enable him to counter-claim against the plaintiff. A. I. R. 1929 Mad. 443=29 L. W. 753=118 Ind. Cas. 780. In a suit which is merely for compelling the registration of a certain document, no third parties can be added as parties to the suit on their own motion. A. I. R. 1929 Bom. 353=31 Bom. L. R. 672=53 B. 598=119 Ind. Cas. 654. An intervenor claiming to be a transferee of the interest of tenant can be added as party to a rent suit for he is to be tenant in possession. 10 P. L. T. 442.



An order allowing an alleged purchaser of the holding to be added as a defendant to landlord's rent suit against recorded tenant is an order without jurisdiction. A. I. R. 1928 Pat. 281=9 P. L. T. 437=107 Ind. Cas. 539. If in a suit between a *benamidar* and real purchaser a third person claims that he is the real purchaser adversely to the pleas of both plaintiff and defendant, he must file his own suit and he cannot claim to be joined as party to the suit. A. I. R. 1927 Mad. 834=53 M. L. J. 269=105 Ind. Cas. 114. A party should not be added to a rent suit if such addition has the effect of changing the rent suit into title suit as regards property in respect of which rent is claimed. A. I. R. 1927 Cal. 340=45 C. L. J. 146. Where a defendant is discharged and again reinstated as defendant the suit must be deemed to be instituted on the date of re-instatement. A. I. R. 1926 P. C. 88=31 C. W. N. 174=(1926) M. W. N. 592=96 Ind. Cas. 887. A defendant given up but not struck off by amending plaint must be deemed to be party to the suit. A. I. R. 1927 Mad. 253=98 Ind. Cas. 726.

The Secretary of State is not a proper or necessary party to every suit in which a statute is sought to be declared *ultra vires*. A. I. R. 1926 Mad. 836=51 M. L. J. 148=24 L. W. 738=95 Ind. Cas. 214. If a matter has been referred to arbitration under s. 19 of the Arbitration Act, it is found that the name of the plaintiff is wrong, and application is made to the Court for correcting the mistake, the correction of that name does not make it a new suit so as to deprive the arbitrators of their jurisdiction upon original reference. A. I. R. 1926 Cal. 722=43 C. L. J. 297=94 Ind. Cas. 182. In case of addition of parties, capacity in which, as also party at whose instance party is to be added are material considerations. A. I. R. 1925 Mad. 836=50 M. 34=51 M. L. J. 148=24 L. W. 738=95 Ind. Cas. 214. In a mortgage suit, the lessee of the mortgaged property need not be added after the preliminary decree. A. I. R. 1927 Nag. 299=103 Ind. Cas. 306. Addition of parties to a final decree without any formal application under Order 1, rule 10 (2) for joining them does not amount to an order under Order 1, rule 10 and no decree can be granted against such parties. A. I. R. 1927 All. 465=49 A. 664=25 A. L. J. 365=101 Ind. Cas. 868. In a suit under s. 92 by co-trustees, other co-trustees can be joined as co-defendants. A. I. R. 1927 Rang. 180=5 Rang. 263=103 Ind. Cas. 261. A plaintiff on the record cannot be given a good cause of action by the addition subsequently of a person as plaintiff who has a good cause of action. A. I. R. 1927 Bom. 424=29 Bom. L. R. 418=103 Ind. Cas. 225. Application to bring on record legal representative, wrongly impleaded, as such can be made under Order 1, rule 10, though rejected under Order XXII, rule 4. 32 Ind. Cas. 320. No new plaintiff was added where a person sued in his own name but after expiry of limitation period was allowed to amend the plaint suing in company's name. 30 M. L. J. 57=33 Ind. Cas. 557. A son of a hereditary trustee is a proper party in a suit against him for his removal. 38 L. W. 9=(1917) M. W. N. 550=38 Ind. Cas. 133. The question of addition of a party does not arise in a suit against a dead man which is a nullity. 6 L. W. 359=1917 M. W. N. 643=33 M. L. J. 413=22 M. L. T. 333=42 Ind. Cas. 530; see also 47 Ind. Cas. 894=6 O. L. J. 546. Proper procedure in a case instituted by a next friend on behalf of a major who is wrongly assumed as a minor is to return the plaint for necessary amendment. 50 M. 743=41 Ind. Cas. 510.

A person who could not have been originally joined, cannot be made a co-plaintiff either under r. 10 or r. 8 of Order 1. 57 Ind. Cas. 784. Person promising indemnity against plaintiff to the defendant may be made a party at the instance of the defendant unless plaintiff objects and serious harm is likely to be caused thereby to him. 46 C. 48=50 Ind. Cas. 51. Person originally a defendant can be made a plaintiff to claim his share in an administration suit. (1918) M. W. N. 929=9 L. W. 79=26 M. L. T. 147=49 Ind. Cas. 139. In a redemption suit by some of the heirs of the mortgagor, Court can make other heirs as defendants. 45 B. 1007=23 Bom. L. R. 405=61 Ind. Cas. 590. It is not possible in a suit to make an opposing and contesting claimant a plaintiff nor is a decree possible in favour of contesting defendant against his co-defendant. A. I. R. 1921 All. 184=19 A. L. J. 833=63 Ind. Cas. 773. Receiver being a representative of all the parties to the suit, must be made a party in all the proceedings affecting property, but is not a party within this rule. A. I. R. 1923 Mad. 144=43 M. L. J. 211=16 L. W. 322=71 Ind. Cas. 293. In a suit against the widow in which the adoption by her is in question, the reversioners are the proper parties though not necessary parties. A. I. R. 1923 Mad. 521=17 L. W. 329=44 M. L. J. 322=72 Ind. Cas. 156. Change of period of limitation due to amendment of the Limitation Act

is a good ground for addition of parties after the period of limitation. A. I. R. 1925 Mad. 347=78 Ind. Cas. 168. Persons whose case conflicts with the case of plaintiffs on record cannot be added as co-plaintiffs at the instance of the plaintiffs. A. I. R. 1922 Cal. 459=36 C. L. J. 92=76 Ind. Cas. 915. The expression "proper party" means the party interested in the result of and having a right to seek the assistance of the Court in coming to a decision on the point in issue. A. I. R. 1925 Gal. 1257=89 Ind. Cas. 57. Where necessary, Court may add a person interested in the equity of redemption as a party even after preliminary decree, and re-open the proceedings so far as the added party is concerned. A. I. R. 1924 Mad. 648=46 M. L. J. 368=34 M. L. T. 114=(1924) M. W. N. 364=84 Ind. Cas. 122

In a suit under s. 77 of the Registration Act, a person claiming to have purchased the property at a prior sale from the executant is not a proper party, the title question not being strictly within the scope of s. 76. A. I. R. 1925 Cal. 1257=89 Ind. Cas. 56. Ordinarily the plaintiff has the choice of his opponent and a party can not be added as defendant at his will. A. I. R. 1925 Nag. 373=87 Ind. Cas. 988. Fresh parties can not be added after compromise of the suit by the original parties and during proceedings under Order 23, rule 3. A. I. R. 1926 Mad. 341=50 M. L. J. 59=98 Ind. Cas. 311. An attaching creditor of the mortgagor's interest in the mortgagee's property applying to be made a party to mortgagee's suit, should not be added as a party if his sole aim in being so added is to challenge the validity of the mortgage. A. I. R. 1926 Nag. 67=89 Ind. Cas. 446. A suit for rent against only some of the heirs of the deceased tenant is maintainable. A. I. R. 1925 Cal. 1056 (F. B.)=29 C. W. N. 400=42 C. L. J. 232=53 C. 197=90 Ind. Cas. 211. A Court can add parties after the suit has been remanded to it by the Court of Appeal but the Court of Appeal cannot do so after passing the order. A. I. R. 1926 Rang. 9=3 Rang. 474=92 Ind. Cas. 125. Where a partner in a business refuses to be joined as a plaintiff, he should be made a defendant in the suit, but the suit should not be dismissed on that ground. A. I. R. 1925 Lah. 501=7 Lah. L. J. 280=26 P. L. R. 699=92 Ind. Cas. 569.

**Striking out party.**—An order striking off the name of a party is appropriate to cases of actual misjoinder. A. I. R. 1934 Lah. 737. Party against whom no cause of action is mentioned no relief claimed may be struck off from the suit. A. I. R. 1931 Mad. 284=33 L. W. 681; A. I. R. 1930 Mad. 817=59 M. L. J. 932=32 L. W. 836=54 M. 81=127 Ind. Cas. 805; 42 M. 219=49 Ind. Cas. 835. An order striking off the name of a party from the record can be done at any stage of the proceeding. In the old sections the words used were "on or before the first hearing." So the rulings in 18A. 53, 20 M. 360 (362), 9 P. R. 1906; 71 P. R. 1907 are no longer good law as they are made obsolete by the change. Where an appellate Court has joined a party as defendant the lower Court cannot strike off, the same under Order 1, r. 10 (2), on case being remanded. A. I. R. 1930 All. 303=126 Ind. Cas. 225. An order discharging a defendant who is not a proper party and against whom no relief is claimed amounts to striking out his name from the record. A. I. R. 1926 Lah. 202=27 P. L. R. 194=93 Ind. Cas. 921. The Court may strike out the name of a deceased defendant who died before the institution of the suit. A. I. R. 1926 Lah. 153=89 Ind. Cas. 661. The order striking off name of a party is a decree. 53 A. 466=131 Ind. Cas. 548=1931 A. L. J. 181=A. I. R. 1931 All. 333. A defendant adjudged bankrupt in England is not proper party to a suit relating to property in which he had interest before bankruptcy and he can rightly be removed from record. A. I. R. 1930 Cal. 388=34 C. W. N. 53=125 Ind. Cas. 851. Name of a deceased defendant, who was dead at the time of the institution of the suit, should be expunged from the record. A. I. R. 1928 Lah. 359=9 Lah. 529=29 P. L. R. 626=110 Ind. Cas. 281.

**Substitution of parties.**—In a fit case for the ends of justice Court can order substitution of parties. 33 Bom. L. R. 546=A. I. R. 1931 Bom. 388=133 Ind. Cas. 823; 15 L. D. 204=12 L. R. 63 (Rev). If the name of a dead person appears on the petition of appeal instead of his legal representative through a *bona fide* error, petition of appeal can be amended. A. I. R. 1930 All. 131=123 Ind. Cas. 824. A substitute must enforce a single right pleaded in suit and not to bolster up a suit by pleading his own individual right. A. I. R. 1930 Sind 73=120 Ind. Cas. 517. Where the respondent whose name is entered in the appeal as presented, is found to have died before the presentation, legal representative of the deceased cannot be substituted, proper procedure is to file another appeal. A. I. R. 1924 Mad. 56=45 M. L. J. 231=18 L. W. 54=75 Ind. Cas. 739; see also A. I. R. 1924 Mad. 56=18 L. W. 54=45 M. L. J. 231=75 Ind. Cas. 739. The Court can grant substitution

of parties by virtue of inherent power as well. 1933 A. L. J. 1512. The ultimate reversioners are recognized by Courts of law, as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by a widow or other owner for life. Where therefore the preliminary decree passed in favour of the original plaintiff (a widow) clearly touches the corpus of the estate, the order substituting the reversionary heirs (some of the defendants) in the place of the original plaintiff is in accordance with the rule but a co-widow of the plaintiff cannot be transposed from the position of the defendant to that of plaintiff without her consent. A. I. R. 1934 Cal. 136. A suit can be continued by substitution of right plaintiff provided the suit was instituted by a wrong person as plaintiff. 66 Ind. Cas. 823=16 S. L. R. 71; see also 64 Ind. Cas. 413=A. I. R. 1923 Mad. 180.

**Transposition of parties.**—Transposition of parties may be ordered by the Court in the interest of justice where the nature of the suit is not changed. A. I. R. 1922 Cal. 459=76 Ind. Cas. 915; see also 20 C. W. N. 752=34 Ind. Cas. 186; 45 B. 983=23 Bom. L. R. 391=61 Ind. Cas. 398. The Courts have always liberally interpreted the provisions of law under Order 1, r. 10 as regards the transposition of parties. 24 C. W. N. 110=30 C. L. J. 417=54 Ind. Cas. 636; see also 19 C. L. J. 327=25 Ind. Cas. 440. The Court has power at any stage of the proceedings to add the *proforma* defendants as co-plaintiffs. Such a course should be adopted when it is necessary for a complete adjudication upon the questions involved in the suit and to avoid multiplicity of proceedings. A. I. R. 1931 P. C. 162=1931 A. L. J. 566=33 Bom. L. R. 1273=35 C. W. N. 870=54 C. L. J. 137=61 M. L. J. 632=132 Ind. Cas. 610 (P. C.); see also 36 Bom. L. R. 807=A. I. R. 1934 Bom. 356; A. I. R. 1936 Pat. 107=160 Ind. Cas. 149. But transposition should not be allowed where the character of the suit would be changed. 76 Ind. Cas. 915=36 C. L. J. 92=A. I. R. 1922 Cal. 459. A party so transposed is not a new party and as such s. 22 of the Limitation Act has no application. 14 C. 400; 22 B. 672; 34 B. 91; 19 C. W. N. 1269; 20 C. W. N. 49; A. I. R. 1927 Mad. 204=52 M. L. J. 33. When order for transposition has been ordered, necessary amendment of pleading may also be allowed. A. I. R. 1931 Cal. 561=129 Ind. Cas. 860=58 C. 561. An appellate Court has powers of transposition of parties similar to those exercised by original Court under Order 1, rule 10. A. I. R. 1930 All. 785=1930 A. L. J. 926. Court has power to transfer a plaintiff to the category of defendants. A. I. R. 1925 Cal. 328=82 Ind. Cas. 649. Such order can be made for a complete adjudication upon questions involved in the suit and to avoid multiplicity of suits. 58 I. A. 228=54 C. L. J. 137=35 C. W. N. 870=33 Bom. L. R. 1273=132 Ind. Cas. 610=1931 A. L. J. 566=A. I. R. 1931 P. C. 162=62 M. L. J. 632 (P. C.).

A transposition which would have the effect of defeating a valuable right acquired by a party under the statute since the institution of suit should not be allowed. A. I. R. 1928 Pat. 24=9 P. L. T. 238=104 Ind. Cas. 526. In a suit for partition or accounts transposition of parties are allowed even after a decree for partition. A. I. R. 1927 Nag. 32=97 Ind. Cas. 1023; see also 96 Ind. Cas. 67=A. I. R. 1926 All. 582=24 A. L. J. 694. Transposing a defendant to the category of plaintiff is entirely within the discretion of the trial Court and if not objected to during the trial, it cannot be interfered with in appeal. A. I. R. 1926 Nag. 393=95 Ind. Cas. 171. Merely because transposition of some defendants as plaintiffs would raise the valuation of the suit beyond the pecuniary jurisdiction of the Court is no reason for refusing the transfer. Plaintiff can be returned for presentation after such transfer. A. I. R. 1926 Pat. 28=90 Ind. Cas. 82. If refusal of an application for transposition of a party to a suit would lead to a separate suit by such party, the application should be allowed. A. I. R. 1925 Cal. 421=40 C. L. J. 535=85 Ind. Cas. 168. Transposition is allowed in limited cases. 15 N. L. R. 21=49 Ind. Cas. 34. It is no ground for refusing the transposition of *proforma* defendant into a plaintiff that the effect would be to assist the plaintiff. 14 Pat. L. T. 252=A. I. R. 1933 Pat. 239. The Court cannot transpose a defendant to the array of plaintiffs without the party's consent and in the absence of an application to that effect. 58 C. L. J. 240. Transposition of parties in a partition suit can be made even after the withdrawal of a part of a claim and the suit thus can be continued. 12 L. W. 563=60 Ind. Cas. 144.

**When parties may be added, etc.**—In some circumstances it may be right and proper that the Court should add such parties to the proceedings even at the appellate stage, persons who are not amongst the original parties to the suit. But the circumstances must be exception and must be such as renders

it really necessary in the interest of the original parties to the suit, that some other persons should be added to the proceedings, so that the matters originally in dispute may be properly adjudicated upon and finally determined as between the original parties to the suit. 59 C. 329=138 Ind. Cas. 104=A. I. R. 1932 Cal. 448. Under this rule the Court can add a party at any stage of the proceedings and it is competent for the Court to add a party after the case has been remanded to it on appeal. 33 Bom. L. R. 608=A. I. R. 1931 Bom. 408 ; see also 61 Ind. Cas. 378 ; 59 Ind. Cas. 233=12 L. W. 25=30 M. L. T. 31 ; 2 U. P. L. R. 96. Court has jurisdiction after the passing of the preliminary decree in a mortgage suit and before the final decree has been passed, to implead as defendants to the suit persons who were not originally impleaded as defendants and were not parties to the preliminary decree. A. I. R. 1927 All. 455=49 A. 664=25 A. L. J. 369=101 Ind. Cas. 868 ; see also 40 C. W. N. 1173. Under Order 1, r 10, any party may be joined to the suit at any stage means he should be so joined before the passing of decree which includes preliminary decree and an existing decree. 13 N. L. R. 69=89 Ind. Cas. 849. Court cannot add a plaintiff to the suit after passing of the decree. A. I. R. 1923 Mad. 472=44 M. L. J. 282=17 L. W. 422=72 Ind. Cas. 284. Though unusual plaintiffs may be added to a suit after decree especially in representative suits, so that persons interested might enforce in execution the direction in the scheme. A. I. R. 1923 Mad. 472=44 M. L. J. 282=17 L. W. 422=32 L. T. 212=72 Ind. Cas. 284. A Court can order joinder of a new party even after a preliminary decree is passed. A. I. R. 1926 Sind 26=89 Ind. Cas. 609. When a suit was wrongly brought in firm's name but objection was not raised till the time of argument, amendment of plaint can be allowed by the appellate Court. A. I. R. 1935 Rang. 240=159 Ind. Cas. 138.

**Appeal.**—An order under r. 10 striking out or adding a party is not appealable. 1930 M. W. N. 971=32 L. W. 766=60 M. L. J. 237=A. I. R. 1930 Mad. 987=129 Ind. Cas. 44 ; 47 Ind. Cas. 725 ; 69 Ind. Cas. 961=45 M. 199 ; 36 Ind. Cas. 919 ; 76 Ind. Cas. 207=45 M. L. J. 703 ; 85 Ind. Cas. 90=6 P. L. T. 581 ; 14 L. W. 642=(1921) M. W. N. 799 ; but see 53 A. 466=131 Ind. Cas. 548=1931 A. L. J. 181=A. I. R. 1931 All. 333. Where it has been held that order striking off name of a party is in substance although not in form of a decree and the proper remedy for the party aggrieved by the order is to file an appeal from it and not an application in revision under s. 115. Revision does not lie against an order refusing to add a party as plaintiff. A. I. R. 1926 Pat. 207=93 Ind. Cas. 932=1 P. L. T. 499 ; see also 50 A. 276=25 A. L. J. 991=108 Ind. Cas. 735=A. I. R. 1928 All. 97 ; but see A. I. R. 1929 Mad. 443=1929 M. W. N. 67=118 Ind. Cas. 780. Revision lies against an order refusing to make a person as defendant. A. I. R. 1929 Oudh 148=6 O. W. N. 118=116 Ind. Cas. 58. Whether persons should or should not be impleaded as co-defendants in a pending suit, is a question of pure discretion. An improper exercise of discretion would not amount to illegality or material irregularity, so as to subject to revision under s. 115. 111 Ind. Cas. 141 ; see also A. I. R. 1934 Pat. 425=15 Pat. L. T. 602=148 Ind. Cas. 347. Erroneous exercise of discretion under Order 1, rule 10, is no ground for interference under section 115 (c), unless such exercise of discretion results in misjoinder of parties and misjoinder of causes of action. A. I. R. 1925 Mad. 135=90 Ind. Cas. 721. An order under Order 1, rule 10(2), discharging a defendant from a suit does not operate as a decree and as such is not appealable. A. I. R. 1926 Nag. 75=89 Ind. Cas. 331. Proper exercise of discretion is not interfered in revision. A. I. R. 1934 Pat. 370=152 Ind. Cas. 778. Where an application is made under Order 1, rule 10, but is dealt with by the Court also under Order 22, rule 10, an appeal lies against the order. A. I. R. 1937 Mad. 200. No appeal lies from an order awarding costs under Order 1, rule 10(2). A. I. R. 1937 Lah. 67.

**Sub-rule (3).**—No person should be added as a plaintiff without his consent. 13 O. C. 109. When he refuses to be made a plaintiff he can be made a defendant. 7 C. 242=9 C. L. R. 13 ; 11 C. 618 ; 17 C. 160 ; 7 A. 326 ; 46 P. R. 1911.

**Sub-rule (4).**—Such amendment is only allowed as is necessary for the addition of the defendant. But no amendment would be allowed which would change the character of the suit. 24 A. 553 ; see also 25 Ind. Cas. 607 ; 14 C. L. J. 627=10 Ind. Cas. 503.

**Sub-clause (5).**—The provisions of s. 22 (1) of the Limitation Act are made inapplicable to a case of transposition of parties by this sub-clause. 11 Pat. 616=140 Ind. Cas. 572=A. I. R. 1932 Pat. 346. Whether a Court acts *suo motu* or upon the

application of a party a Court acting under rule 10 is bound by s. 22 of the Limitation Act. A. I. R. 1930 Lah. 647=11 Lah. 688=126 Ind. Cas. 78. "When parties are added by the Court after the institution of a suit under Order 1, rule 10 (2), section 22 of the Limitation Act provides that the date when they are added is deemed to be the date of the institution of the suit so far as they are concerned for the purposes of limitation and the rights which they may have acquired under the Limitation Act are therefore sufficiently safeguarded," *Per Sir John Wallis* in A. I. R. 1927 P. C. 252=26 A. L. J. 371=30 Bom. L. R. 220=32 C. W. N. 281=47 C. L. J. 136=54 M. L. J. 88=6 Rang. 29=107 Ind. Cas. 237 ; see also A. I. R. 1929 Cal. 501 ; 35 C. 519 (F. B.) ; 50 M. 372=52 M. L. J. 199=A. I. R. 1927 Mad. 468 ; A. I. R. 1928 Lah. 33=100 Ind. Cas. 859. Addition of more representatives out of time does not bar a suit to enforce rights of trust by interested persons. 9 L. W. 377=50 Ind. Cas. 353. Even where the Court of its own motion adds a necessary party, the suit will be deemed to be instituted when the party is added. A. I. R. 1925 Sind 181=17 S. L. R. 324=79 Ind. Cas. 914.

11. [S. 32, sixth para.] The Court may give the conduct of the suit to such person as it deems proper.

**Scope.**—The general rule is that the conduct of a suit will rest with the plaintiff. 21 Ch. D. 647. The word "person" in this rule means a person who is a party to the suit and not a stranger to it. A. I. R. 1926 Cal. 143=46 C. L. J. 530=106 Ind. Cas. 854. So suit cannot be conducted by a third party on behalf of absent party without special authorization under Order 1, rule 11. *Ibid.* Suit by trustee impleading co-trustee as a party defendant, can be continued by co-trustee after plaintiff's death. 62 Ind. Cas. 360=40 M. L. J. 208=13 L. W. 148=(1921) M. W. N. 108.

12. [S. 35.] (1) Where there are more plaintiffs than one, any one or more of them may be authorized by any other plaintiffs or defendants for appearance of one of several of them to appear, plead or act for such other plaintiffs or defendants for in any proceeding ; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party giving it and shall be filed in Court.

Sub-section (2).—*Vide* 2 B. H. C. R. 103.

13. [S. 34.] All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

**Scope.**—Objection as to non-joinder or misjoinder of parties should be taken at the earliest possible opportunity. 70 Ind. Cas. 645=A. I. R. 1922 Mad. 317=15 L. W. 283=(1922) M. W. N. 106=42 M. L. J. 133 ; A. I. R. 1925 Oudh 369=12 O. L. J. 66=2 O. W. N. 114=87 Ind. Cas. 17 ; see also 17 C. 580 (P. C.) ; 7 C. 594 ; 39 Ind. Cas. 160 ; 62 Ind. Cas. 386=44 M. 344=40 M. L. J. 282. At any rate such objection should be taken before the settlement of issues. 41 Ind. Cas. 527 ; see also 6 A. L. J. 541 ; 25 Ind. Cas. 125 ; A. I. R. 1934 Lah. 459=35 P. L. R. 616. Where a defendant is permitted to file an additional written statement and he therein raises an objection as to non-joinder, which is later on made the subject-matter of a fresh issue the provisions of Order 1, rule 13, are not infringed. 137 Ind. Cas. 274=1932 M. W. N. 494=35 L. W. 279=A. I. R. 1932 Mad. 583=62 M. L. J. 154. Where a suit is brought by a person describing himself in the plaint as the proprietor of a firm without making the widow of the other partner a party to the suit and the defendants raise no objection as to non-joinder and the issues between the parties are settled, the objection as to non-joinder cannot be allowed to be raised subsequently. A. I. R. 1934 Lah. 459 ; see also 156 P. R. 1889. Where such objections have not been taken in time, it must be deemed to have been waived. 14 M. 498 ; 26 B. 301 ; 69 P. R. 1903 ; 7 Ind. Cas. 102 ; 13 Bom. L. R. 1061 ; 64

P. R. 1881 ; 58 P. R. 1882 ; 55 Ind. Cas. 261=23 C. W. N. 876 ; 23 Ind. Cas. 862. But such objection can be allowed even after the settlement of issues where the reason of the objection has come into existence subsequently. 5 B. 609. Any irregularity in the initial procedure cannot be questioned at a later stage when parties without objection join issue and go to trial upon merits. 23 C. W. N. 876=57 Ind. Cas. 261. Such objection cannot be taken for the first time in appeal. 16 B. 119 ; 14 M. 498 ; 16 C. W. N. 639=13 Ind. Cas. 277 ; 26 B. 301 ; 44 M. 301 ; 18 A. 109 ; A. I. R. 1929 Rang. 295 ; 2 N. L. R. 45 ; 55 Ind. Cas. 261=23 C. W. N. 876. Objection as to non-joinder of parties not taken in first appeal cannot be raised in second appeal. A. I. R. 1921 Mad. 243=44 M. 344=62 Ind. Cas. 386 ; see also 38 Ind. Cas. 715=(1917) M. W. N. 333 ; 9 C. L. J. 623 ; 5 C. L. J. 95 ; A. I. R. 1933 Pat. 270=145 Ind. Cas. 335. Objection as to non-joinder taken for the first time before the High Court in revision cannot be allowed. 41 Ind. Cas. 527. Where the objection as to non-joinder of parties is taken after the framing of the issues, the objection cannot be entertained. A. I. R. 1933 Oudh 128=1 O. W. N. 48=141 Ind. Cas. 838. Where the objection as regards non-joinder was taken at the outset and the plaintiff does not remedy the defect, the suit must be dismissed. 145 Ind. Cas. 178=A. I. R. 1933 Lah. 93. Where a person impleaded as defendant does not appear or take objection to his being impleaded as such, he is held to have waived his objection. A. I. R. 1937 All. 251.

## ORDER II.

### *Frame of Suit.*

1. [S. 42.] Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

**Scope.**—Though a suit should include whole of the claim, it is not necessary to join all the causes of action. 59 Ind. Cas. 51. Suppressed fact essential for the final decision of the case, cannot be made a ground for second suit. It is barred by the rule. A. I. R. 1931 Bom. 114=32 Bom. L. R. 1473=129 Ind. Cas. 787 ; 10 L. W. 170=52 Ind. Cas. 735. The expression "subject in dispute" also includes the right of one party against the other. A. I. R. 1925 Mad. 192=6 Mad. 234=49 M. L. J. 701=23 L. W. 13=91 Ind. Cas. 660 ; see also 26 M. 760=13 M. L. J. 448. In the suit for declaration of the title possession of the properties need not be asked where the possession is not with the defendants. A. I. R. 1925 Mad. 427=20 L. W. 754=80 Ind. Cas. 929. This rule requires that all the disputes between the parties to the litigation should be disposed of in one suit. 25 C. 371=2 C. W. N. 201 ; see also 27 C. 724 (761). Suit for declaration of a right of residence and maintenance should be so framed as to enable the defendant the ascertainment of actual extent of right. A. I. R. 1926 Sind 18=96 Ind. Cas. 997. Mortgagor cannot in a mortgage suit claim account of the agency from the mortgagee acting as managing agent of mortgagor's business. A. I. R. 1930 Cal. 85=124 Ind. Cas. 520. Where in a suit by an adopted son against the widow and her alienees to recover the property of the adoptive father, the plaintiff fails to claim to recover from a particular defendant certain property of the adoptive father which was in that defendant's possession to plaintiff's knowledge, it cannot possibly be held that the suit was so framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them. 32 Bom. L. R. 1473=A. I. R. 1931 Bom. 114=129 Ind. Cas. 737. This rule should not be confined in its incidence to the manner in which the pleadings ought to be drafted. It should be the effort no less of the Court to attain a final decision upon the subjects, in dispute and prevent further litigation concerned. 34 Bom. L. R. 125=139 Ind. Cas. 678=A. I. R. 1932 Bom. 175.

2. [S. 43.] (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action ; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs ; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

*Explanation.*—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

*Illustration.*

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908, only for the rent due for 1906. A shall not afterwards sue B for the rent due for 1905 or 1907.

*Principle.*—The real principle underlying cases under this rule is that if the several items which make up the claim are of the same nature and form part of the same course of dealing, so as to pass under the same description and form part of one transaction, they must be considered as one cause of action and must be joined in one suit, though they may have arisen out of several contracts. But claims which are diverse in character, which do not answer the same description and which would require a different class of evidence to support them, may be made subject of different suits, though they may arise out of the same transaction. 12 C. 339. This rule is directed against two evils, viz., the splitting of claims and the splitting of remedies in respect of one cause of action, and is founded upon the maxim that no one shall be vexed twice for one and the same cause. In order that this section may apply, not merely must both suits arise out of the same cause of action, but they must be between the same parties under whom they or any of them claim. 6. Ind. Cas. 226=7 A. L. J. 627 ; see also 19A. 329 (F. B.) ; A. I. R. 1926 Lah. 539=8 Lah. L. J. 381=22 P. L. R. 630=97 Ind. Cas. 396 ; 56 Ind. Cas. 966=2 U. P. L. R. 108. The rule is intended to deal with the vice of splitting a cause of action. The object is doubtless to prevent the multiplicity of suits. 1931 A. L. J. 797=A. I. R. (1931) P. C. 229=35 C. W. N. 977=54 C. L. J. 274=34 L. W. 444=61 M. L. J. 294=134 Ind. Cas. 654 (P. C.).

*Scope of the Section.*—This section is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action, different causes of action, even though they arise from the same transaction. The first part of the clause makes it incumbent on the plaintiff to include the whole of his claim in the action. The second portion makes it incumbent on him to ask for the whole of his remedies. The final paragraph is not intended to be an illustration of the foregoing provisions, but a substantive enactment making what otherwise would be independent cause of action, one cause of action for the purpose of the section. 18 C. W. N. 617 P. C.=26 I. A. 228 ; see also 6 M. 49. This rule covers only cases where plaintiff can claim several reliefs as to one cause of action and does not cover case where several causes of action can be joined in one suit. A. I. R. 1928 Mad. 840=1928 M. W. N. 336=56 M. L. J. 52=110 Ind. Cas. 554 ; see also A. I. R. 1927 Rang. 237=6 Bur. L. J. 85=104 Ind. Cas. 370 ; A. I. R. 1926 Cal. 1022=30 C. W. N. 873=97 Ind. Cas. 73 ; 33 Ind. Cas. 950=18 Bom. L. R. 45=40 B. 351 ; 109 Ind. Cas. 65. In order to make the provisions of Order 2, rule 2, applicable it is necessary that the causes of action should be clearly the same. 145 Ind. Cas. 1010=34 P. L. R. 905=A. I. R. 1933 Lah. 542. Where the cause of action in the former suit and the cause of action in the present suit are different this section has no application. A. I. R. 1933 Lah. 1017 ; see also A. I. R. 1934 Pat. 515=15 Pat. L. T. 747, A. I. R. 1934 Mad. 46=39 L. W. 65. This rule only purports to bar suits for claim omitted from former suits and arising from the transaction under which the claim was made in the former suit and splitting up of the reliefs in respect of the same cause of action. It does not require that where several causes of action arise from one transaction, the plaintiff

should sue for all of them in one suit. The rule is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action, different causes of action, even though they arise from the same transaction. A. I. R. 1936 Rang. 167=161 Ind. Cas. 820 ; see also A. I. R. 1936 Nag. 263 ; A. I. R. 1935 All. 174=153 Ind. Cas. 73 ; A. I. R. 1935 Lah. 842 ; A. I. R. 1935 All. 790=1935 A. L. J. 948 ; 59 B. 454=157 Ind. Cas. 634=37 Bom. L. R. 336=A. I. R. 1935 Bom. 306 ; A. I. R. 1935 Rang. 365=159 Ind. Cas. 720. Where a wife brings a suit for maintenance against her husband it is open to her to bring for a relief getting her maintenance allowance charged on the property of her husband, and where she does not ask for such a relief, a subsequent suit by the wife for getting her husband is barred by Order 2, rule 2. A. I. R. 1937 All. 56. A certain property was misdescribed in a sale-deed and the vendee brought a suit for possession of the purchased property without any prayer for relief of rectification of the sale-deed and the Court dismissed the suit as no cause of action had accrued to the vendee for possession and subsequently he brought a suit for rectification and possession and it was contended that the second suit was barred under Order 2, rule 2 : *Held* that the cause of action for the two reliefs arose no doubt from the same transaction but were distinct and separate and the suit therefore was not barred A. I. R. 1937 All. 401. This section is applicable to the plaintiffs and not applicable to the defendants. A. I. R. 1933 Lah. 569 ; see also A. I. R. 1926 Lah. 494=7 Lah. 297=27 P. L. R. 463=96 Ind. Cas. 630 ; A. I. R. 1921 Cal. 357=57 Ind. Cas. 348=2 U. P. L. R. Lah. 130 ; 50 Ind. Cas. 909. The provisions of this rule do not apply to proceedings in which relief by way of restitution is claimed 3 P. L. R. 367=47 Ind. Cas. 47 ; see also 53 Ind. Cas. 552=13 S. L. R. 158. This rule only applies where the second suit is brought by the creditor who was plaintiff in the former suit and it cannot apply to a debtor's suit for a declaration that the previous suit by the creditor has extinguished his claim. A. I. R. 1925 Mad. 1120=49 M. L. J. 474=22 L. W. 17=48 M. 703=91 Ind. Cas. 403. This rule has no application to execution proceeding. If an application for partial execution has been allowed and has been successful, a subsequent application for executing the balance of the decretal amount will not be barred. 28 N. L. R. 77=130 Ind. Cas. 120=A. I. R. 1932 Nag. 89. The defendant who claims a set-off is in the position of a plaintiff and his subsequent suit may be subject to the rule. 32 C. 654=1 C. L. J. 364. The cause of action referred to in the rule is the cause of action which gives occasion to, and forms foundation of the suit, and if that cause enables a man to seek for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover balance by independent proceedings. A. I. R. 1922 P. C. 23=42 M. L. J. 248=20 A. L. J. 17=26 C. W. N. 297=15 L. W. 377=44 A. 121=24 Bom. L. R. 341=3 Pat. L. J. 279=49 I. A. 9=35 C. L. J. 126=65 Ind. Cas. 79. Under this rule every suit must include the whole of the claim arising from one and the same cause of action and it is not necessary that every suit shall include every claim or every cause of action which the plaintiff might have against the defendant. A. I. R. 1923 Cal. 371=37 C. L. J. 545=27 C. W. N. 673 ; A. I. R. 1923 Mad. 857=(1922) M. W. N. 845=46 M. 135=72 Ind. Cas. 207. Cause of action for the redemption suit and the subsequent suit for contribution against owner of a part of the equity of redemption are different. A. I. R. 1929 All. 696=(1929) A. L. J. 1462=126 Ind. Cas. 354. Cause of action arising subsequent to the dismissal of the claim under s. 58 need not be joined in a suit under Order XXI, r. 66. A. I. R. 1928 Mad. 840=56 M. L. J. 52=110 Ind. Cas. 554=(1928) M. W. N. 336. Suit by order of Magistrate to establish a right to certain stolen ornaments does not bar a subsequent suit for conversion. A. I. R. 1929 Bom. 460=31 Bom. L. R. 1123=122 Ind. Cas. 428. Where previous suit was for the wrongful conversion of goods it does not bar subsequent suit to obtain payment of legacies without any claim in respect of any of the goods to which the previous suit related. A. I. R. 1925 P. C. 105=29 C. W. N. 989=52 Ind. Cas. 214=48 M. L. J. 627=48 M. 312=27 Bom. L. R. 823=87 Ind. Cas. 324 (P. C.). A prior suit for possession does not bar a subsequent suit for compensation for holding over. A. I. R. 1928 Lah. 50=110 Ind. Cas. 491. Suit for possession does not bar subsequent suit for redemption. A. I. R. 1927 Nag. 322=103 Ind. Cas. 888. A person is not bound to sue on an alternative cause of action. A. I. R. 1927 Nag. 322=103 Ind. Cas. 888. Plaintiff cannot get a decree upon a cause of action arising subsequent to decree and totally different from that pleaded. A. I. R. 1927 Cal. 56=44 C. L. J. 263=98 Ind. Cas. 845. Claim to recover part of the property as owner and not by pre-emption rests on two causes of action. A. I. R. 1926 All. 710=49 A. 219=25 A. L. J. 48=97 Ind. Cas.



176. A claim for money due based on the original loan or dealings can be combined with a claim for the same money as due under a pronote. A. I. R. 1924 Mad. 520=44 M. L. J. 361=17 M. L. W. 374=72 Ind. Cas. 325. This rule when it operates as a bar merely deprives the claimant of his remedy by suit founded on the same cause of action. It cannot have the effect of vesting as right in any of the defendants. 144 Ind. Cas. 152=A. I. R. 1933 All. 228 ; see also 14 Pat. L. T. 663=A. I. R. 1933 Pat. 715. There is no reference in this rule to the jurisdiction of the Court trying the claims. 14 P. L. T. 663=A. I. R. 1933 Pat. 715. Where in a former suit by an adopted son against the widow and her alienees for recovery of the adoptive father's property the plaintiff claimed to recover a particular property from the widow and not from her alienee who was a party to the suit and who, plaintiff knew held the property under a void deed of gift from the widow, a subsequent suit by him to recover the property from the alienee would be barred by the provisions of Order 2, rule 2. 32 Bom. L. R. 1473=A. I. R. 1931 Bom. 114=129 Ind. Cas. 737. A claim for the rents and profits resting on the same foundation of facts and law as the right to have the purchases of the decree and of the properties declared to be purchases for the mortgagors ought to be joined in the same suit. Claim for rents and profits not asked for in the prior declaratory suit cannot be asked for in a subsequent suit. (1931) A. L. J. 797=A. I. R. (1931) P. C. 229=35 C. W. N. 977=54 C. L. J. 274=34 L. W. 444=61 M. L. J. 294=134 Ind. Cas. 654 (P. C.). This rule hardly applies to a case of claim made by a defendant in the suit who is not suing in respect of a claim omitted for the former suit. A. I. R. 1931 Sind 143.

There is nothing in the rule which limits its operation to cases where two reliefs open to plaintiff on the same cause of action are both cognizable by the same Court. It is operative even where the relief taken separately and alone would be cognizable in different jurisdiction. 1931 M. W. N. 893=A. I. R. 1931 Mad. 705. Where the wife brought a suit against the husband in the *Ellore* Munssiff's Court for maintenance and then brought another suit in the *Gudibada* Munssiff's Court for having the amount of the decree awarded to her made a charge upon certain property of the husband in the *Gudibada* jurisdiction, as the husband had no property in the *Ellore* jurisdiction, held that the second suit was incompetent by reason of Order 2, rule 2. 1931 M. W. N. 893=A. I. R. 1931 Mad. 705. First suit as manager for rendition of account against heirs of deceased brother does not bar a second suit for contribution towards the expenses and costs of litigation relating to an agreement of sale under which he and his deceased brother were joint promisees. 152 Ind. Cas. 199. To constitute an omission to sue by the plaintiff under this rule, it is necessary that the plaintiff must have actual knowledge of the item. 71 M. L. J. 264=A. I. R. 1936 Mad. 693. The bar which the Code provides in this rule and s. 11, Explanation 4 in regard to suits does not apply to the case of an application for restitution under s. 144, C. P. Code. 153 Ind. Cas. 572=A. I. R. 1935 All. 195. Where the Court rejected the plaint in a former suit, a second suit is not barred. A. I. R. 1935 Cal. 764. Where the plaintiff in a suit for possession on the basis of a lease, omits to include a relief for demolition of the building standing on a portion of the property, and obtains a decree for possession, he cannot afterwards bring a separate suit for that purpose. 155 Ind. Cas. 268=A. I. R. 1935 Pat. 222.

**Cause of action.**—The cause of action for a suit means the fact or facts which the plaintiffs alleges to entitle him to a decree. A. I. R. 1931 Oudh 57=7 O. W. N. 1156=130 Ind. Cas. 79. "Cause of action" should be interpreted not on the basis of English decisions nor on the basis of its meaning in the limitation statutes, but on the basis of rules or on sections of previous Code. A. I. R. 1924 Rang. 145=1 Rang. 694=2 Bur. L. J. 169=79 Ind. Cas. 755. "Cause of action" means every fact which it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court, and refers entirely to the grounds set forth in the plaint as the cause of action, or in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour. A. I. R. 1921 Pat. 143=60 Ind. Cas. 495. "Cause of action" for a suit is sum total of facts and circumstances which the plaintiff has to prove to entitle him to relief. 38 A. 217=14 A. L. J. 257=33 Ind. Cas. 124. A cause of action has no relation to the defence set up by the defendant nor does it depend on the character of the relief prayed for by the plaintiff, but refers entirely to the grounds set forth in the plaint as the cause of action. 52 Ind. Cas. 929 ; A. I. R. 1922 All. 510=70 Ind. Cas. 817. The words "cause of action" must be interpreted with reference to those facts which the plaintiff sets out as grounds for relief he claims. A. I. R. 1933 Bom.

440=25 Bom. L. R. 491=73 Ind. Cas. 424 ; see also A. I. R. 1924 Bom. 141=25 Bom. L. R. 1172=81 Ind. Cas. 776. The cause of action for a suit means the fact or facts which the plaintiff alleges to entitle him to a decree. A. I. R. 1931 Mad. 313=132 Ind. Cas. 196.

**Whole claim in respect of the same cause of action.**—This rule only prohibits the splitting up of claims arising out of the same cause of action. 2 L. W. 890=29 M. L. J. 474=18 M. L. T. 377=31 Ind. Cas. 59 ; see also A. I. R. 1937 Cal. 57. Whether the causes of action are different or same in two suits can be ascertained by whether the same evidence will maintain both actions. 40 B. 351=18 Bom. L. R. 45=33 Ind. Cas. 950. This rule has no application where the causes of action for a prior and a subsequent suit in respect of the same property are different. 4 O. L. J. 354=41 Ind. Cas. 80 ; 114 Ind. Cas. 871 ; 34 C. L. J. 465=66 Ind. Cas. 923 ; 77 Ind. Cas. 500 ; 130 Ind. Cas. 79=7 O. W. N. 1156=A. I. R. 1931 Oudh 57 ; 33 Bom. L. R. 1563 ; A. I. R. 1934 Mad. 46. Plaintiff need not combine in one suit all the causes of action which he may have in respect of the subject-matter of the suit. A. I. R. 1935 Mad. 264=127 Ind. Cas. 139. This rule does not require that every suit shall include every claim or every cause of action arising out of the same transaction. A. I. R. 1929 Pat. 241=120 Ind. Cas. 479. Where a mortgage bond contains default clause causes of action on mortgage and that for money are same and indistinguishable. A. I. R. 1929 Mad. 371=29 L. W. 400=56 M. L. J. 530=(1929) M. W. N. 280=120 Ind. Cas. 853. Where it is unnecessary to prove the same facts in both the suits and the evidence which would suffice the plaintiff to obtain a decree is not the same in both suits, the causes of action in both suits cannot be said to be the same. A. I. R. 1930 All. 116=121 Ind. Cas. 827. Where the former suit is one for pure declaration and the second suit is for possession, it must be taken that the two causes of action are different. A. I. R. 1929 All. 306=1929 A. L. J. 492=119 Ind. Cas. 552. Cause of action in suit based on dispossession is entirely different from cause of action in reversioner's suit for possession and the former does not preclude latter. A. I. R. 1922 Cal. 83=48 C. L. J. 368=114 Ind. Cas. 139.

A plaintiff cannot be compelled to join several causes of action though in certain case he can do so. A. I. R. 1929 Oudh 162=6 O. W. N. 142=117 Ind. Cas. 412. A suit by daughter to establish her title to her father's estate as heiress in reversion her mother's death does not bar a subsequent suit to recover possession of a specific property not included in the previous suit, but upon the footing that it formed a part of the estate and that the defendant was in wrongful possession of it. A. I. R. 1929 P. C. 166=51 A. 439=(1928) A. L. J. 716=33 C. W. N. 809=30 L. W. 60=56 I. A. 267=31 Bom. L. R. 891=57 M. L. J. 160=50 C. L. J. 52=10 P. L. T. 517=117 Ind. Cas. 498. The dismissal of a suit for ejectment does not in any way bar the plaintiff in a subsequent suit to enforce his right to redeem as mortgagor. 63 Ind. Cas. 684. The mere fact that the title to the property in dispute in both suits is the same and the property is the same does not necessarily show that the cause of action is the same. 59 Ind. Cas. 517. Suit for *mesne* profits up to delivery of symbolical possession does not bar a second suit for *mesne* profits after delivery of symbolical possession, causes of action being different. 27 C. W. N. 673=37 C. L. J. 515=70 Ind. Cas. 187. A suit either on a non-existent cause of action or upon a false cause of action will not disable a plaintiff from filing a fresh suit on the true cause of action. 7 L. W. 557=(1918) M. W. N. 427=24 M. L. T. 311=45 Ind. Cas. 969. Suit for a portion of claim in village Court bars the suit for balance. A. I. R. 1934 Mad. 99.

**Relinquishment of claim.**—Under this rule a plaintiff can relinquish any portion of his claim based upon the same cause of action in order to bring it within the jurisdiction of a particular Court. A. I. R. 1921 Mad. 696=16 L. W. 155=(1922) M. W. N. 83=66 Ind. Cas. 837. Where two reliefs on the same cause of action are open to plaintiff and he chooses only to ask for one he cannot bring a fresh suit for the other relief. A. I. R. 1924 All. 849=22 A. L. J. 745=83 Ind. Cas. 969. Provisions of this rule only require that a suit shall include whole of the claim in respect to one and the same cause of action and not that every suit shall include every cause of action which the plaintiff may have against the defendant at the time. A. I. R. 1928 Lah. 238=9 Lah. 451=29 P. L. R. 548=108 Ind. Cas. 613. Appellant can relinquish a part of his demand and can claim the rest, paying Court-fee stamp on the Memorandum of Appeal on the claim as reduced on appeal. A. I. R. 1927 Lah. 543=9 Lah. L. J. 293=29 P. L. R. 64=102 Ind. Cas. 705. Where several properties are mortgaged by one deed, a suit for declaration respecting one, as being inalien-

able bars a similar suit regarding other. A. I. R. 1927 Oudh 77=1 Luck. 1=3 O. W. N. 40=91 Ind. Cas. 976. Relief available in the previous suit or in execution of the decree in the previous suit is barred in subsequent suit. A. I. R. 1925 Cal. 305=80 Ind. Cas. 917 ; see also A. I. R. 1925 All. 795=88 Ind. Cas. 530 ; A. I. R. 1931 Bom. 114=32 Bom. L. R. 1473=129 Ind. Cas. 737 ; A. I. R. 1923 Bom. 63=24 Bom. L. R. 1157=73 Ind. Cas. 862 ; A. I. R. 1923 Bom. 201=25 Bom. L. R. 203=72 Ind. Cas. 290 ; A. I. R. 1922 All. 379=44 A. 663=20 A. L. J. 590=68 Ind. Cas. 970 ; 65 Ind. Cas. 194=A. I. R. 1922 Nag. 129=21 N. L. R. 124 ; 58 Ind. Cas. 636=46 C. 640. Omission to claim the possession of a right without knowledge of it cannot be intentionally relinquished under Order II, rule 2. 94 P. R. 1916=37 Ind. Cas. 119 ; but see 43 C. 95=20 C. W. N. 47=36 Ind. Cas. 179. The relinquishment by a plaintiff of a portion of the claim under Order 2, r. 2 (1) applies preliminarily to relinquishment before institution of the suit and the rule has no application to any part of dismissed claim abandoned in appeal. 54 Ind. Cas. 655. Where there are two remedies open to a party, the effect of pursuing one of them, is to relinquish the other. 33 Bom. L. R. 946=A. I. R. 1933 Bom. 437. An omission to sue in respect of a claim on which no decree could have been passed in the absence of a Succession Certificate, will not bar a subsequent suit in respect of such claim after the Succession Certificate was obtained. A. I. R. 1931 Mad. 313=132 Ind. Cas. 196.

**Omission to claim.**—Order 2, rule 2, requires plaintiff in a suit to include the whole of his claim he is entitled to make in respect of particular cause of action, constituting the basis, but does not compel him to include all claims arising out of different causes of action. 87 P. R. 1915=181 P. W. R. 1915=31 Ind. Cas. 463. This rule refers to a case where there has been a suit in which there has been an omission to sue in respect of a portion of a claim and a decree has been made in that suit. 45 C. 305=22 C. W. N. 611. This rule does not apply to the amendment of plaint by the addition of the claim which had been omitted. 45 C. 305=22 C. W. N. 611=47 Ind. Cas. 129. "Omits to sue" means intentionally "omits". 38 A. 217=14 A. L. J. 257=33 Ind. Cas. 124. Where the plaintiff is not aware of or informed of cause of action prior to suit, there is no omission. 23 L. W. 415=(1926) M. W. N. 94=93 Ind. Cas. 1 ; see also 21 O. C. 307=49 Ind. Cas. 54 ; 47 Ind. Cas. 881. This rule does not bar a plaintiff from including in his claim certain additional profits omitted in a previous suit under a misapprehension. A. I. R. 1923 All. 230=65 Ind. Cas. 585. Where a claim is made but rejected by Court as not claimable subsequent suit for same is not barred. It is only when there is an omission or intentional relinquishment that a second suit is barred. A. I. R. 1925 Rang. 313=4 Bur. L. J. 113=94 Ind. Cas. 611 ; see also A. I. R. 1927 Rang. 237=6 Bur. L. J. 85=104 Ind. Cas. 370. Casual omission for some property given in the Schedule to plaint, does not mean abandonment of claim, with respect to those items. 50 Ind. Cas. 381. In a suit by heirs for the property of the deceased, omission to sue for an item bars a subsequent suit in respect of the same. A. I. R. 1922 Nag. 246=18 N. L. R. 136=65 Ind. Cas. 338 ; see also A. I. R. 1924 All. 902=46 A. 822=22 A. L. J. 753=80 Ind. Cas. 31. Purchase in execution of a decree cannot maintain suit for possession after his suit for possession of part is dismissed. 20 C. W. N. 163=33 Ind. Cas. 139. Competence of a Court giving leave to plaintiff to omit to sue for relief is not affected by the pecuniary value of reliefs ought to be omitted. 9 Bur. L. T. 93=33 Ind. Cas. 135. Where possession is not prayed in a suit to set aside sale, a fresh suit for possession is not barred. 57 Bom. 456=35 Bom. L. R. 630=A. I. R. 1933 Bom. 398. A claim for rent against a tenant and a claim for possession on the expiry of notice are two distinct causes of action. A. I. R. 1933 Rang. 107=144 Ind. Cas. 751. This section is not applicable where the causes of action are distinct. A. I. R. 1933 Lah. 1017 ; see also A. I. R. 1933 All. 852.

**Same parties.**—Order 2, rule 2, is not applicable where parties to suit are different. A. I. R. 1929 Mad. 96=(1928) M. W. N. 654=116 Ind. Cas. 116 ; see also A. I. R. 1925 Oudh 53=81 Ind. Cas. 562.

**Withdrawal of suit.**—An order for withdrawal with leave under Order 23, rule 1 (2), does not preclude plaintiff from including portions of his claim in the new suit omitted in the first suit. A. I. R. 1925 Rang. 118=3 Bur. L. J. 189=84 Ind. Cas. 483. Leave may be given either expressly or by implication. 14 L. R. 134 (Rev.)=17 R. D. 176. Apprehension on the part of the plaintiff that the second suit would be barred under Order 2, rule 2, is good ground for allowing withdrawal. A. I. R. 1924 Rang. 349=2 Rang. 66.

**Execution proceedings.**—This rule has no application to proceedings in execution of decree. A. I. R. 1921 Sind 13=15 S. L. R. 11=62 Ind. Cas. 507; 96 Ind. Cas. 562=A. I. R. 1926 Cal. 1019=53 C. 582=43 C. L. J. 596; 38 Ind. Cas. 806=40 M. 780=5 L. W. 267; 28 N. L. R. 77=130 Ind. Cas. 120=A. I. R. 1932 Nag. 89.

**Dismissal of prior suit.**—Dismissal of an earlier suit on the ground of formal defect in the plaint, with permission to file fresh suit does not bar subsequent suit on the same cause of action. A. I. R. 1930 Lah. 634=130 Ind. Cas. 572. Dismissal of prior suit for mere declaration does not bar subsequent suit for possession of same subject matter. A. I. R. 1926 Rang. 123=5 Bur. L. J. 64=95 Ind. Cas. 892; see also A. I. R. 1930 Sind 87=120 Ind. Cas. 509; A. I. R. 1926 P. C. 118=30 C. W. N. 1009=24 L. W. 328=100 Ind. Cas. 345. Dismissal of a suit on the ground of misdescription of property in suit does not bar a subsequent suit on the same cause of action. A. I. R. 1925 Lah. 193=78 Ind. Cas. 579. Suit for recovery of purchase money from the vendor in case he has no title to the property is not barred by suit for possession. A. I. R. 1924 Cal. 558=39 C. L. J. 90=28 C. W. N. 1033=80 Ind. Cas. 357; see also A. I. R. 1925 Lah. 459=7 Lah. L. J. 236=6 Lah. 384=26 P. L. R. 280=87 Ind. Cas. 994; A. I. R. 1927 Mad. 273. Suit for mere declaration that property in suit was not attachable does not bar subsequent suit to recover damages for wrongful attachment of the same. A. I. R. 1927 Oudh 48=95 Ind. Cas. 299. A subsequent suit for the recovery of possession is not barred when the plaintiff was not in possession at the time of the dismissal of declaratory suit. 9 L. B. R. 37=10 Bur. L. T. 189=37 Ind. Cas. 15; see also 52 Ind. Cas. 434.

**Suits on contracts.**—Where a contract contains two covenants a breach of both of them constitutes one cause of action. 10 L. B. R. 111=12 Bur. L. T. 251=56 Ind. Cas. 653. When one instrument contains two separate contracts and the performance of each is secured in a different manner each gives rise to a separate cause of action, although they may be joined in the same suit. 16 N. L. R. 136=58 Ind. Cas. 18. *prima facie* each order and delivery of goods is a separate transaction and a separate cause of action; if not they are successive claims which arise under the same obligation within the explanation at the end of the rule, and the question whether they are really so or not depends upon the contract between the parties. 79 Ind. Cas. 755=A. I. R. 1924 Rang. 145=2 Bur. L. J. 169; see also 81 Ind. Cas. 465=A. I. R. 1924 Rang. 249.

**Mesne profits.**—A suit for possession and past *mesne* profits and suit for future *mesne* profits must arise out of different cause of action. A. I. R. 1931 Oudh 131=7 O. W. N. 831=128 Ind. Cas. 751; 12 Lah. L. J. 152=31 P. L. R. 745; see also A. I. R. 1927 All. 772=101 Ind. Cas. 816; A. I. R. 1926 Mad. 1015=51 M. L. J. 252=24 N. L. R. 290=(1926) M. W. N. 814=97 Ind. Cas. 389; A. I. R. 1931 Oudh 131=128 Ind. Cas. 751; A. I. R. 1925 Pat. 145=6 P. L. T. 78=80 Ind. Cas. 710; 32 Ind. Cas. 696=9 Bur. L. T. 92; 40 A. 292=16 A. L. J. 182=44 Ind. Cas. 88; A. I. R. 1924 Cal. 442=71 Ind. Cas. 972. A suit for partition does not bar subsequent suit for *mesne* profits on fresh cause of action. A. I. R. 1928 Nag. 65=105 Ind. Cas. 771. A claim for *mesne* profits need not be made in application for reinstatement of possession. A. I. R. 1921 Nag. 112=17 N. L. R. 62; see also 60 Ind. Cas. 65; A. I. R. 1924 Bom. 368=26 Bom. L. R. 288=80 Ind. Cas. 259; 35 Ind. Cas. 799=3 O. L. J. 271=19 O. C. 161; 57 Ind. Cas. 900; A. I. R. 1926 Rang. 137=5 Bur. L. J. 17=95 Ind. Cas. 380. The failure of the plaintiff to make a claim in the suit for *mesne* profits up to the date of possession will bar a subsequent suit for *mesne* profits from the date of decree to the date of possession. A. I. R. 1927 All. 716=49 A. 597=25 A. L. J. 409=104 Ind. Cas. 406; see also A. I. R. 1924 All. 909=78 Ind. Cas. 326; 54 A. 65=A. I. R. 1932 All. 510; but see 56 B. 292=34 Bom. L. R. 447=138 Ind. Cas. 578=A. I. R. 1932 Bom. 222. A suit for *mesne* profits is maintainable even though the plaintiff does not claim ejectment of the defendants from the lands in dispute as claims for *mesne* profits and for ejectments are distinct relief and may or may not arise from the same transaction. 12 P. L. T. 547=A. I. R. (1931) Pat. 233=133 Ind. Cas. 766. Plaintiff brought a suit for possession and *mesne* profits till the institution of the suit. After obtaining possession he brings the suit for *mesne* profits from the date of the prior suit: *Held* that Order 2, rule 2 is no bar. 1931 A. L. J. 673 (S. B.)=A. I. R. 1931 All. 673=133 Ind. Cas. 298; see also A. I. R. 1931 Oudh 131=128 Ind. Cas. 751=6 Luck. 243. Where a person sues for possession and *mesne* profits but the Court does not adjudicate on his claim to *mesne* profits it is

open to him to bring a fresh suit for *mesne* profits. 1931 A. L. J. 606=A. I. R. (1932) All. 45.

**Mortgage-suit.**—Where a mortgagor makes himself liable personally for unpaid interest, suit on personal covenant for interest does not bar the subsequent suit for enforcement of the mortgage. A. I. R. 1930 All. 286=(1929) A. L. J. 1045=51 A. 974=119 Ind. Cas. 90. In suit by usufructuary mortgagee for possession relief under the Transfer of Property Act, s. 68 (c) for money decree in the alternative should be prayed for. A. I. R. 1926 Pat. 87=7 P. L. T. 150=90 Ind. Cas. 622. A *puisne* mortgagee's suit for redemption does not bar subsequent suit for pre-emption. A. I. R. 1928 Lah. 63=103 Ind. Cas. 348. A mortgagee holding a separate money bond against a mortgagor is under no obligation to enforce the money bond along with the mortgagee, or even to refer to its existence in his plaint seeking to enforce the mortgage. A. I. R. 1925 Mad. 991=86 Ind. Cas. 481; see also 26 A. L. J. 57=107 Ind. Cas. 591; A. I. R. 1927 All. 713=25 A. L. J. 791=103 Ind. Cas. 289; A. I. R. 1926 Lah. 559=8 Lah. L. J. 381=27 P. L. R. 620=97 Ind. Cas. 396. Where a mortgage-deed provides for independent personal covenant for interest, a suit for interest brought on the covenant does not bar subsequent suit for mortgage money. A. I. R. 1925 Mad. 120=49 M. L. J. 474=91 Ind. Cas. 403; see also A. I. R. 1935 Lah. 673=37 P. L. R. 816=16 Lah. 640 (F. B.); see also 152 Ind. Cas. 494=A. I. R. 1934 Rang. 159. Where two successive mortgages are created on the same property by the same debtor, in favour of the same creditor each can be sued upon separately. 33 C. L. J. 232=25 C. W. N. 129=60 Ind. Cas. 809; see also A. I. R. 1925 Oudh 379=12 O. L. J. 127=86 Ind. Cas. 748; but see 53 Ind. Cas. 753=6 O. L. J. 482. Where lease and mortgage although executed on the same day are separate transaction, a suit for rent alone does not bar a suit for principal money. A. I. R. 1924 Lah. 190=69 Ind. Cas. 54; see also A. I. R. 1922 Lah. 111=8 P. W. R. 1922=3 Lah. 1=65 Ind. Cas. 102. But not so where it is one transaction. 3 Lah. L. J. 390=63 Ind. Cas. 928. Dismissal of a prior suit by a mortgagee for possession of the mortgaged land bars subsequent suit for recovery of mortgage debt. A. I. R. 1921 Lah. 300=4 Lah. L. J. 502; see also A. I. R. 1932 Lah. 523=138 Ind. Cas. 270; 34 Bom L. R. 1615; 140 Ind. Cas. 181; A. I. R. 1936 Pesh. 86; A. I. R. 1926 Pat. 87; A. I. R. 1925 Oudh 524.

Where the first suit was by the usufructuary mortgagee for arrears of rent the second suit for sale under a provision in the mortgage-deed and for arrears of rent which had accrued subsequently is not barred. 137 Ind. Cas. 651=1932 M. W. N. 337=35 L. W. 631=A. I. R. 1932 Mad. 466=63 M. L. J. 672.

**Suit for partition.**—The cause of action in a partition suit in a joint-family property must be regarded as exhaustive of the whole property available for division, so far as its existence is known at the date of the plaint. The position of suit properties in two jurisdictions make no difference in the application of the principle involved in Order II, rule 2. A. I. R. 1923 Mad. 584=44 M. L. J. 652=72 Ind. Cas. 430; see also 1927 Mad. 213=38 M. L. T. 82=98 Ind. Cas. 538; but see 38 A. 217=14 A. L. J. 257=33 Ind. Cas. 124 (where the properties are situate in two different districts). A suit for partition of all joint properties is not barred under Order II, rule 2, though a suit for partial partition is dismissed. 87 P. R. 1915=181 P. W. R. 1915=31 Ind. Cas. 463. Suit for partition of items not included in previous suit for partition is not barred if plaintiff was not aware of existence of these items and the information about them was withheld from him either by mistake or fraud of defendant. A. I. R. 1931 Sind 27=130 Ind. Cas. 552. Where brothers inherit property from their father and also from their maternal grand-father and the properties become mixed up, the properties do not get consolidated into one whole so as to give one cause of action for partition. A. I. R. 1930 All. 371=122 Ind. Cas. 403. Section 16 and 17 do not override the principles of the provisions of Order 2, rule 2. A. I. R. 1923 Mad. 584=44 M. L. J. 652=72 Ind. Cas. 430. First suit for partition of joint-family property bars subsequent suit for share of rent for a prior period. 137 Ind. Cas. 775=33 P. L. R. 570=A. I. R. 1932 Lah. 448. A claim for *mesne* profits for the period covered by a prior partition suit is a claim based on a different cause of action is not barred by the provisions of Order 2, rule 2, C. P. Code. 3 A. W. R. 735. This section is not applicable in a partition suit where the Court or the Commissioner has omitted to give the income of the

property to one of the parties in a final decree. A. I. R. 1935 Nag. 137=31 N. L. R. 304.

**Partnership.**—Accounts of a partnership can only be taken and must be taken once for all in a suit to which all the partners and their representatives are parties. 67 M. L. J. 413=A. I. R. 1934 Mad. 665=1934 M. W. N. 539; A. I. R. 1935 Lah. 321=158 Ind. Cas. 378.

**Principal and interest.**—If the mortgage provides for an independent obligation to pay the principal and the interest then a suit brought to obtain a personal judgment in respect of the interest alone, would not prevent a subsequent claim for payment of the principal. But if the non-payment of the interest causes the principal money to become due, Order 2, rule 2, applies. A. I. R. 1922 P. C. 412=50 I. A. 115=27 C. W. N. 802=38 C. L. J. 126=25 Bom. L. R. 220=32 M. L. T. 41 (P. C.)=72 Ind. Cas. 187; see also A. I. R. 1922 P. C. 23=44 A. 121=20 A. L. J. 17=26 C. W. N. 297=35 C. L. J. 126=42 M. L. J. 248=65 Ind. Cas. 79; 39 A. 506=15 A. L. J. 557=41 Ind. Cas. 233; 63 Ind. Cas. 928=A. I. R. 1921 Lah. 225=3 Lah. L. J. 390; 127 Ind. Cas. 246=A. I. R. 1930 Oudh 41=6 O. W. N. 960; but see 34 P. L. R. 520=A. I. R. 1933 Lah. 463. Where plaintiff obtained decree for interest only when he could have sued for principal also subsequent suit for principal and interest is barred. 102 P. L. R. 1918=88 P. L. R. 1918=167 P. W. R. 1918=47 Ind. Cas. 937; but see A. I. R. 1935 All. 461=158 Ind. Cas. 53; 157 Ind. Cas. 643. If a mortgage-deed provides for the payment of principal and interest as independent obligation a prior personal decree for interest one does not bar subsequent suit for principal. 110 Ind. Cas. 206; see also A. I. R. 1928 Lah. 732=112 Ind. Cas. 15; A. I. R. 1929 Rang. 96=117 Ind. Cas. 61; 109 Ind. Cas. 613=A. I. R. 1928 Lah. 269; A. I. R. 1926 Lah. 661=97 Ind. Cas. 285; 4 U. B. R. (1921) 62=64 Ind. Cas. 953.

**Rent suit.**—Second suit for rent for period covered by first suit is barred under this rule. A. I. R. 1929 Bom. 152=46 B. 229=23 Bom. L. R. 1086=64 Ind. Cas. 919. Suit for ejectment of a tenant does not bar subsequent suit for arrears of rent. A. I. R. 1922 Lah. 118=4 Lah. L. J. 17=63 Ind. Cas. 978. Suit for rent does not bar a second suit for cesses where cesses are agreed to be paid in the collectorate. A. I. R. 1923 Cal. 615=27 C. W. N. 521=77 Ind. Cas. 364. If in a suit for rent the plaintiffs stated that they reserved the right for settlement of rent for the excess quantity of land and no order however, allowing such reservation is made by the Court the plaintiffs are not entitled to claim for excess, are for the period of the prior suit. A. I. R. 1925 Cal. 463=40 C. L. J. 538=85 Ind. Cas. 162. A decree obtained under old rent, pending proceedings for enhancement under s. 105 does not bar suit for difference after the termination of proceedings under s. 105. A. I. R. 1928 Cal. 681=32 C. W. N. 870=110 Ind. Cas. 395. Where the rent for certain premises is payable monthly and is in arrears for a number of months the cause of action remains the same in respect of each of the monthly rents. But the effect of the institution of separate suits for recovery of rent for different periods so as to bring each portion within the pecuniary jurisdiction of Small Causes Court is not the dismissal of all of them. But the moment one of them is decreed the other suit must fail in as much as separate suits are not maintainable for the several instalments. 37 C. W. M. 730=A. I. R. 1933 Cal. 821=146 Ind. Cas. 351. But a prior suit for premium does not bar a subsequent suit for rent. 135 Ind. Cas. 801=33 Bom. L. R. 1563=A. I. R. 1932 Bom. 86.

**Suit for possession.**—Suit for cancellation of a deed in which possession is not prayed bars a suit for possession. 9 Bur. L. T. 93=33 Ind. Cas. 135; see also 77 Ind. Cas. 544=47 M. 150=45 M. L. J. 431. Plaintiff should join all the persons in possession of the property which he claims, for a suit against some bars subsequent suit against rest. A. I. R. 1923 Lah. 556=85 Ind. Cas. 202; see also A. I. R. 1923 Lah. 556=85 Ind. Cas. 203. A previous application for restoration of possession does not bar a subsequent claim for *mesne* profits by way of restitution. 38 C. W. N. 1197.

**Suit for specific performance.**—Dismissal of a suit for specific performance does not bar a subsequent suit for earnest money. A. I. R. 1923 All. 321=21 A. L. J. 378=45 A. 378=72 Ind. Cas. 85. In a suit for specific performance of a contract for sale of land it is open to the plaintiff to join a claim for delivery of possession unless the contract expressly disentitles him to such relief, and if the plaintiff in such a suit omitted to ask for delivery of possession a subsequent suit to obtain delivery

of possession might be barred under Order II, rule 2. 5 P. L. J. 314=1 P. L. T. 325=56 Ind. Cas. 322; see also 77 Ind. Cas. 542=A. I. R. 1924 Mad. 360=45 M. L. J. 431=(1923) M. W. N. 726. But a decree in suit for specific performance of agreement to lease does not bar a fresh suit for possession. 14 N. L. R. 176=48 Ind. Cas. 188.

8. [S. 45. Cf. R. S. C. O. 18, r. 1.] (1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants, jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

**Scope.**—Order I, rule 1, lays down rules as regards joinder of plaintiffs and order 1, rule 3 that of defendants. This rule lays down rules as regards joinder of causes of action. This rule is to be read subject to rules 4 and 5 of the order. This rule applies to cases where there are only one plaintiff, and one defendant and several causes of action, and also to cases where the plaintiffs and defendants, though consisting of two or more individuals, may be considered as a unit with reference to all the different causes of action. 2 C. L. J. 602. In *Umabai v. Bhan Balwant*, 34 B. 358 at p. 367, *Davoor J.* observed: "In *Narshing Das v. Mangal Dubey*, 5 A. 163, a full Bench of that Court held that a plaint had been properly rejected because the suit was open to the objection that different causes of action against different defendants separately had been joined in the same suit. In the course of the judgment it is said at p. 171: 'The plaintiff has united different causes of action in one suit against different defendants, who are not jointly liable in respect of each and all of such causes of action—a mode of procedure that the law does not sanction. This statement of the law by the Full Bench of the Allahabad High Court is important having regard to the fact that the language of section 45 of the old Code and that of rule 3, Order II of the present Code which deal with the joinder of causes of action against several defendants is the same. As I read the judgment it lays down that the meaning of the word 'jointly' in the old section, and therefore in this rule, is that all the defendants in a suit must be jointly liable in respect of "each and all" of the cause of action which the plaintiff unites against the defendants in the same suit. (See also 6 A. 106; 23 C. 821; *Burstall v. Beyfus*). The result of the authorities seems to me to be that the plaintiff may in one action unite several causes of action against several defendants, provided that all such defendants are 'jointly liable in respect of each and all of such causes of action' and that the condition precedent to the plaintiff being allowed to join several causes of action against several defendants, is that such defendants must all have a joint interest in the main question raised by the litigation and that cause of action joined in one suit against several defendants must be causes of action in which the defendants are all jointly interested." Under these rules read together different causes of action against different defendants also can be joined. A. I. R. 1926 Sind 66=19 S. L. R. 395=90 Ind. Cas. 970. When the suit is framed under s. 92 of the C. P. Code, the plaintiff cannot claim against stranger to the trust either a declaration of title or possession or any other relief. 10 Rang. 342=140 Ind. Cas. 317=A. I. R. 1932 Rang. 132. The cause of action for a personal decree upon a promissory-note is incompatible with, and could not be joined to a cause of action upon the mortgage; for the relief in respect of the claim based on a promissory-note is a personal decree against the promissors, whereas the decree in a mortgage suit does not impose any personal obligation upon the mortgagor to pay the mortgage debt. A. I. R. 1935 Rang. 315. The mere fact of misjoinder of parties or causes of action is not sufficient to entitle the defendant to have the proceedings set aside or action dismissed. When the merits of the case have been satisfactorily disposed of in spite of the complication of the proceedings, no effect can be given to the objection of misjoinder. When a multiplicity of parties or causes of action have been joined, there is no absolute right to have them struck out; it is discretionary with the Court to do so if it thinks right. The Court may refuse to permit the joinder of numerous parties and numerous causes of action in one suit even when such joinder does not strictly offend against the rules. 41 C. W. N. 418 (P. C.).

**Illustrative cases.**—Claims on three pro-notes can be joined together in one suit. 100 P. R. 1915=189 P. W. R. 1915=32 Ind. Cas. 40. All alienees form one person though on different occasions may be made co-defendants in a suit to set aside the alienations. 40 B. 351=18 Bom. L. R. 45=33 Ind. Cas. 950. Claims against different estates can be joined in one suit against the same person, if they are affected by the same instrument. 11 Bur. L. T. 222=50 Ind. Cas. 528. Where a landlord sued to eject, it is highly irregular to join in ejectment suit as defendants several tenants in possession of different parcels of land. 43 M. 567=47 I. A. 76=27 M. L. T. 102=38 M. L. J. 476=22 Bom. L. R. 578=25 C. W. N. 485 (P. C.)=22 Bom. L. R. 578=56 Ind. Cas. 117. In a suit for partnership accounts, relief regarding a certain item can be claimed against only one of the defendants. A. I. R. 1924 Pat. 65=1923 Pat. 276=76 Ind. Cas. 950. Plaintiff's suit involving his one capacity of *shebait* for one property and another personal capacity for other properties should be treated as two suitors which should be tried separately. A. I. R. 1928 Cal. 199=55 C. 164=32 C. W. N. 885=109 Ind. Cas. 755. Court should allow persons seeking individual reliefs to join in same suit for identical investigation as the policy of the rule is to avoid needless expense where it can be done without injustice to any one. A. I. R. 1928 Cal. 92=103 Ind. Cas. 811. But where several persons who has each separately contracted to supply cotton are jointly suing to recover the price from the same defendant, it cannot be said that they are jointly interested within the meaning of the rule. A. I. R. 1925 Bom. 342=27 L. R. 472=87 Ind. Cas. 435. A pre-emptor can bring a single suit against the vendee in respect of all the sales taken by the latter, impleading the various vendors as *pro forma* defendants. A. I. R. 1924 Lah. 156=6 Lah. L. J. 349=82 Ind. Cas. 605.

Only certain claims to be joined for recovery of immovable property. 4. [S. 44.] No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property except—

(a) claims for *mesne* profits or arrears of rent in respect of the property claimed or any part thereof ;

(b) claims for damages for breach of any contract under which the property or any part thereof is held ; and

(c) claims in which the relief sought is based on the same cause of action :

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property.

**Scope.**—This section is intended for the benefit of the defendant and as such waived by him is competent. 8 C. L. J. 196. "Section" 44 (=this rule) of the Code of Civil Procedure forbids the joinder with a suit for the recovery of immovable property, or obtain a declaration of title to such property of any claim other than the claims specified in the section." 24 A. 553 (555). A suit for sale or foreclosure in respect of a mortgage is not a suit for the recovery of immovable property. 25 A. 229=A. W. N. 1900, 19. There is nothing irregular in seeking to recover in one suit immovable and movable property if the cause of action is the same in respect of both. 31 C. 262 (P. C.)=31 I. A. 10=8 C. W. N. 146=14 M. L. J. 6. But the observation of the Privy Council in 31 I. A. 10, must be limited to cases where a party sets up the title to movable and immovable properties. 17 M. L. J. 135. A mortgagee who purchases in part of the mortgaged property in execution of his decree is entitled in a suit for partition and separate possession of his share to claim also rendition of accounts regarding that share from those in possession. 159 Ind. Cas. 463=A. I. R. 1935 Pesh. 161. Where in a suit for possession of immovable property and for *mesne* profits of different claims have been made, in consequence of separate orders having been passed in respect of different parcels of the same property but all those claims are based on the same cause of action, namely, the assertion of the adverse title by the defendant all these claims fall within the purview of clause (c), rule 4, and the suit is therefore clearly a suit which is permissible under rule 4 without leave of the Court. A. I. R. 1935 Sind 129=156 Ind. Cas. 702.

**Leave of the Court.**—A plaintiff may with the leave of the Court join causes of action with a suit for recovery of immovable property. But he is nowhere



compelled to do so. 6 A. 358=1 A. W. N. 115 ; see also 20 M. 48 (F. B.) ; 19 M. 90. Where objection to the joinder of certain causes of action is disallowed in the Court of first instance and the suit is decreed, the proceedings of the Court imply and indicate that leave was given to the joinder. A. W. N. 1882, 207. The leave must be obtained previously. 30 C. 369=7 C. W. N. 553. A leave of the Court may not be expressed but may be inferred from its acquiescence. A. I. R. 1924 Pat. 613=3 Pat. 244=5 P. L. T. 573=78 Ind. Cas. 885.

**Cases.**—This rule does not bar joinder in an administration suit claim in respect of the partnership with that for recovery of immovable property based on the same cause of action. A. I. R. 1927 Bom. 470=51 B. 800=29 Bom. L. R. 937=104 Ind. Cas. 764. It is generally convenient in mortgage suit to decide question of paramount title of persons in possession and likely to resist possession of a successful plaintiff in a mortgage suit. A. I. R. 1924 Pat. 613=3 Pat. 244=5 P. L. T. 575=78 Ind. Cas. 885.

5. [S. 44.] No claim by or against an executor, administrator or heir, as Claims by or against ex- such, shall be joined with claims by or against  
cutor, administrator or heir. him personally, unless the last mentioned claims  
are alleged to arise with reference to the estate in  
respect of which the plaintiff or defendant sues or is sued as executor,  
administrator or heir, or are such as he was entitled to, or liable for, jointly  
with the deceased person whom he represents.

**Scope.**—Where the executor or administrator has been dealing with assets or making contracts in the course of the administration properly and fairly in his character of executor or administrator and then it becomes a question whether, the contracts being personally entered into by him, he should be sued in his character of legal personal representative or in his personal character. *Padnick v. Scoll*, (1876) 2 Ch. D. 736, 743. The estate means the estate in its physical sense whether rightly or improperly held by executors. 21 C. W. N. 939=41 C. 615. Suit asked for dissolution of partnership and its account and for another account between plaintiff's father and defendants to which former was entitled as administrator does not contravene this rule. A. I. R. 1922 Mad. 436=16 L. W. 175=43 M. L. J. 218=69 Ind. Cas. 966. Money in the hands of an executor who is also a legatee to whom the money is due cannot be attached in execution of a decree against him personally but legatee's interest can be attached, and executor restrained from dealing with it otherwise than in his representative capacity. 9 Bur. L. T. 226=38 Ind. Cas. 563. This rule prohibits joinder of essentially different causes of action and not when they arise out of common fact such as accounting as executors of will for money received thereunder and as trustees under scheme settled by District Judge. 36 Ind. Cas. 29 ; see also 51 B. 800=29 B. L. R. 937=104 Ind. Cas. 764=A. I. R. 1927 Bom. 470. Where a promissory-note has been executed in favour of a father, his only son cannot, on death of father, sue for the sum as the sole surviving co-parcener of a joint and undivided Hindu family of which he and his father were members, or in the alternative as the sole heir and legal representative of his father. The two claims cannot be joined together under the terms of this rule. 59 B. 573=37 Bom. L. R. 405=A. I. R. 1935 Bom. 343.

6. [S. 45.] Where it appears to the Court that any causes of action  
Power of Court to order joined in one suit cannot be conveniently tried  
separate trials. or disposed of together, the Court may order  
separate trials or make such other order as  
may be expedient.

**Scope.**—This rule is applicable where the joinder has been properly made and the suit is properly constituted but cannot be conveniently tried. 27 M. 80. In a fit case the Court may order a separate trial. 8 B. 617 ; 8 M. 175 ; 14 A. 531 ; 6 Ind. Cas. 577. Issues on cause of action misjoined but noticed at a last stage should not be struck out but tried separately, if embarrassing. A. I. R. 1928 Mad. 764=113 Ind. Cas. 865 ; see also 20 W. R. 482 ; 19 C. L. J. 316=25 Ind. Cas. 438. This rule does not apply to rent suits under the Agra Tenancy Act. A. I. R. 1924 All. 720=22 A. L. J. 156=79 Ind. Cas. 560. Appellate Court should not interfere with trial Court's discretion under this rule. A. I. R. 1924 Lah. 156=73 Ind. Cas. 892.

7. [New.] All objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.

N. B.—After this rule, rule 8 has been added in Punjab.—*Vide infra*.

**Principal.**—The principal of the exception to the rule against multifariousness has all along recognized and now embodied in this rule is that where a party has, without objection, gone to trial on issues on the merits, he will not be allowed to plead after failing on the merits that his was a paramount title and one that ought not to have been adjudicated in the mortgage suit. 10 Pat. 234=130 Ind. Cas. 257=11 Pat. L. T. 898=A. I. R. 1931 Pat. 64.

**Waiver.**—Objection when not taken at the early stage, it is deemed to have been waived. 63 Ind. Cas. 168=A. I. R. 1921 Cal. 361=33 C. L. J. 317; but see 6 Ind. Cas. 327=11 C. L. J. 513; 13 Bom. L. R. 1061; see also 9 S. L. R. 11=30 Ind. Cas. 24.

### ORDER III.

#### *Recognized Agents and Pleadors.*

1. [S. 36.] Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader [appearing, applying or acting, as the case may be]\* on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

**Notes.**—This rule is intended primarily for the mofussial Court. Order 3, rule 1, has not the effect of authorizing an attorney of the original side of the High Court to file an appearance for a limited purpose only. A. I. R. 1934 Bom. 450=36 Bom. L. R. 987. The language of Order 3, rule 1, C. P. Code means no more than a recognized agent can appear, make application and take such steps as may be necessary in the course of litigation for the purpose of the case of the principal being properly laid before the Court. It cannot justify his being allowed to argue and plead. 161 Ind. Cas. 351=A. I. R. 1936 Oudh 261=1936 O. W. N. 351. The only proof of a pleader's authority to act for a party that can be taken is a written instrument filed in Court as required by Order 3, rule 4 of the Civil Procedure Code. The omission of the words "duly appointed to act" in Order 3, rule 1, by the amending Act of 1926 does not make an oral authority free the client sufficient for a pleader to act. 39 C. W. N. 534=62 C. L. J. 277. Power not invalid even if name of pleader engaged does not appear in body of power. A. I. R. 1922 Nag. 281=6 N. L. J. 179=73 Ind. Cas. 251. Power by *pardanashin* lady must be explicit. A. I. R. 1930 Pat. 181=11 L. T. 21=127 Ind. Cas. 457. Omission of name and indorsement of acceptance by pleader is simply a mistake. A. I. R. 1930 All. 112=(1930) A. L. J. 394=121 Ind. Cas. 546; but see A. I. R. 1927 All. 816=102 Ind. Cas. 255. *Vakalatnama* must be signed like plaints. A. I. R. 1928 Mad. 175=51 M. 242=27 L. W. 237=(1927) M. W. N. 885=54 M. L. J. 65=107 Ind. Cas. 804. Absence of names and other particulars describing the parties on *vakalatnams* does not invalidate the power. A. I. R. 1927 Lah. 522=102 Ind. Cas. 476. Pleader can accept *vakalatnama* signed by party from his *gomasta*. A. I. R. 1923 Cal. 11=48 C. L. J. 357=114 Ind. Cas. 156. Power granted by agent is for principal and not for himself. A. I. R. 1922 P. C. 225=26 C. W. N. 376 (P. C.)=24 Bom. L. R. 606=48 I. A. 534=44 M. 736.

General authority of pleader does not authorise him to enter into compromise in collateral matter. A. I. R. 1927 Cal. 714=31 C. W. N. 953=55 O. 113

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\* The words within brackets have been substituted for the words "duly appointed to act" by Act 22 of 1926.

=104 Ind. Cas. 387. Consent decree without client's consent is invalid and unenforceable. A. I. R. 1930 Cal. 477=34 C. W. N. 210=126 Ind. Cas. 765; see also A. I. R. 1930 Oudh 112=7 O. W. N. 153=125 Ind. Cas. 171. A Counsel has authority to make admissions on matters of fact relevant to the issues. A. I. R. 1927 Mad. 852=26 L. W. 465=39 M. L. T. 247=50 M. 786=53 M. L. J. 606=105 Ind. Cas. 5. Presence by clerk is not appearance by pleader. A. I. R. 1928 Lah. 841=110 Ind. Cas. 177. Defects in filing and signing plaint is immaterial when filed by duly authorized agent and with knowledge of plaintiff. A. I. R. 1927 All. 514=101 Ind. Cas. 698. Presence without readiness to act is no presence. A. I. R. 1926 Mad. 971=51 M. L. J. 290=97 Ind. Cas. 517. Appearance for applying for adjournment only is appearance without instruction. A. I. R. 1927 Rang. 46=99 Ind. Cas. 717; A. I. R. 1925 Mad. 21=47 M. 819=47 M. L. J. 398=82 Ind. Cas. 102 (F. B.); see also 41 M. 256=41 Ind. Cas. 719. Appearance by pleader at delivery of judgment is sufficient appearance. 97 P. L. R. 1920=52 P. W. R. 1920=58 Ind. Cas. 143. For representation of plaintiff fresh power is not needed. A. I. R. 1922 Nag. 125=5 N. L. J. 265=67 Ind. Cas. 206. Memorandum of Appeal if not accompanied by *vakalatnama* is not bad when it can be filed later before limitation. A. I. R. 1926 Bom. 336=28 Bom. L. R. 538=95 Ind. Cas. 266; see also A. I. R. 1926 Lah. 223=27 P. L. R. 18=93 Ind. Cas. 966; 2 U. P. L. R. 88=55 Ind. Cas. 990; but see 55 Ind. Cas. 927. Pleader cannot consent to be bound by oath of opposite party. 34 C. W. N. 310=129 Ind. Cas. 408. Memorandum of Appeal presented by unauthorized person is no appeal. A. I. R. 1930 All. 112=(1930) A. L. J. 394=121 Ind. Cas. 545. Disobedience to an order of Court directing the defendant to appear for being examined as plaintiff's witness is not in terms an order made under Order 3, r. 1, C. P. Code. Disobedience to such an order will be merely disobedience to witness summons and would not justify the striking off defence. 38 L. W. 869=65 M. L. J. 734=A. I. R. 1933 Mad. 811=1933 M. W. N. 696. There is no rule of law which requires or authorises the plaintiff or his duly authorised agent to present the plaint. Presentation may be by a person who is orally authorised. (1931) A. L. J. 777 (F.B.)=A. I. R. 1931 All. 507 (F.B.)=134 Ind. Cas. 26.

## 2. [S. 37.] The recognized agents of parties by whom such appearances, applications and acts may be made or done are— Recognized agents.

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made, or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts.

*N. B.*—Rule 2 (a) has been amended in Bombay—*Vide infra*.

**Scope.**—This rule does not deal with the liability of the principal to be bound by the acceptance of service by the agent and if in the case of business where the business is carried on or in the name of the principal by somebody then whether that principal is or is not resident within the local jurisdiction the service upon the recognized agent is good service upon him. A. I. R. (1931), p. 282=133 Ind. Cas. 679=10 Pat. 441. Recognized agent as such has no right of audience. A. I. R. 1934 Cal. 563. It would appear that for an act, in Court to be valid, the act must either be performed by the party himself or by a party authorized by a power of attorney or by a pleader appearing on his behalf, that is to say authorized by a proper *vakalatnama*. A. I. R. 1934 Pat. 290=15 Pat. L. T. 233. Where a power of attorney authorizes the agent to "prosecute the claim" it confers an authority on him to file an appeal. 36 P. L. R. 135=A. I. R. 1934 Lah. 973. To plead is not make or do an appearance, or an application or an act, and is not within Order 3, rules 1 and 2. Therefore a director of a company holding a power-of-attorney authorizing him "to appear for and on behalf of the company, to conduct and represent the company in the proceeding, etc.," as such has no right of audience. A. I. R. 1934 Cal. 563=61 C. 324=151 Ind. Cas. 753. Where a *vakalatnama* is in two sheets of paper, and each sheet was signed by different parties, who were aware of the contents of the other sheet, the *vakalatnama* was validly executed by all the parties. A. I. R.

1934 Pat. 290=15 P. L. T. 233=149 Ind. Cas. 596. This rule is applicable to proceedings under the Madras Estates Land Act by reason of s. 192 (e) of the Estate Land Act. 1936 M. W. N. 1175=44 L.W. 567=71 M. L. J. 607. Act in Court must be done by party himself or by authorized agent or by pleader authorized by proper *vakalatnama*. A. I. R. 1934 Pat. 290.

Clause (a).—*Vide* 108 Ind. Cas. 513=A. I. R. 1928 Lah. 733 ; 32 P. L. R. 389=133 Ind. Cas. 877 ; A. I. R. 1931 All. 320=133 Ind. Cas. 606 ; 1931 A. L. J. 904.

Clause (b).—The expression "carrying on business" is used in a restricted sense, viz., as relating to commercial business. Hence a person who is merely looking after factory of another is not a recognised agent of such another within the meaning of Order 3, rule 2 (a) or (b), specially for purposes of presenting petitions in matters not relating to the factory. A. I. R. 1937 Mad. 293 ; see also 1936 M. W. N. 1175=44 L. W. 567=71 M. L. J. 607. Political agent is not recognized agent. 11 B. 53. A mere servant is also not an agent. 4 B. 416. A partner is a recognized agent. 11 B. L. R. App. 26. Person looking after *Zemindary* of a person is not his recognized agent under this section. 132 Ind. Cas. 808=1931 A. L. J. 404=A. I. R. 1931 A. 449. Plaintiff's clerk is not his recognized agent. 46 B. 150=A. I. R. 1922 Bom. 113=68 Ind. Cas. 217. The management of an estate is business and service of summons on such manager is sufficient. 12 Lah. L. J. 13.

8. [S. 38.] (1) Processes served on the recognised agent of a party shall

Service of process on recog- be as effectual as if the same had been served on  
nized agent. the party in person, unless the Court otherwise directs.

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent.

Scope.—This section does not bar service on party. 3 U. B. R. 94. A service upon attorney's clerk is not good service. 2 Hyde, 116. A person holding general power of attorney can accept or refuse service at his option. 8 C. 317.

\* "4. (1) No pleader shall act for any person in any Court, unless he

Appointment of pleader. has been appointed for the purpose by such  
person by a document in writing signed by such  
person or by his recognised agent or by some other person duly authorised by  
or under a power-of-attorney to make such appointment.

(2) Every such appointment shall be filed in Court and shall be deemed to be in force until determined with the leave of the Court by a writing signed by the client or the pleader, as the case may be, and filed in Court or until the client or the pleader dies, or until all proceedings in the suit are ended so far as regards the client.

(3) For the purposes of sub-rule (2) an application for review of judgment, an application under section 144 or section 152 of this Code, any appeal from any decree or order in the suit and any application or act for the purpose of obtaining copies of documents or return of documents produced or filed in the suit or of obtaining refund of monies paid into the Court in connection with the suit shall be deemed to be proceedings in the suit.

(4) The High Court may, by general order, direct that, where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order.

(5) No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating—

(a) the names of the parties to the suit,

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\* This new rule (4) has been substituted for the following old rule by Act 22 of 1926 :—

"4. (1) the appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorized by power-of-attorney to act in this behalf."

(b) the name of the party for whom he appears, and

(c) the name of the person by whom he is authorised to appear :

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party"

*N. B.—Vide* Bombay, Madras, Nagpur, Oudh, Patna and Sind. amendments—*Infra*.

**Sub rule (1).—*Vakalatnama*** must bear parties or authorized agent's signature. A. I. R. 1921 Nag. 27 ; A. I. R. 1927 Lah. 382=100 Ind. Cas. 838. Acceptance of power may be verbal. 43 C. 884=23 C. L. J. 297=20 C. W. N. 287=38 Ind. Cas. 395 ; A. I. R. 1926 Lah. 32 ; but see 20 C. W. N. 283=38 Ind. Cas. 831 ; A. I. R. 1923 Lah. 402=84 Ind. Cas. 518 ; 39 C. W. N. 938=61 C. L. J. 193=62 C. 642. Advocates' power may be verbal. A. I. R. 1926 Pat. 73=4 P. 766=7 P. L. T. 362=92 Ind. Cas. 179 ; 88 Ind. Cas. 91=A. I. R. 1925 Pat. 614=6 P. L. T. 380=1925 Pat. 233. If name appears it can be signed by another pleader even after it is filed. A. I. R. 1922 Pat. 504=3 P. L. T. 447=68 Ind. Cas. 659. A duly accepted *vakalatnama* without pleader's name in body is not invalid. 12 N. L. R. 189=37 Ind. Cas. 103 ; 55 Ind. Cas. 415 ; 12 Pat. L. T. 558=133 Ind. Cas. 171 ; 41 Ind. Cas. 685 ; A. I. R. 1923 Nag. 182=19 N. L. R. 36=6 N. L. J. 100=71 Ind. Cas. 436 ; A. I. R. 1921 All. 210=43 A. 392=19 A. L. J. 183=61 Ind. Cas. 410 ; but see A. I. R. 1931 All. 767=1931 A. L. J. 983. *Vakalatnama* can authorize a second grade pleader to appoint other pleader. A. I. R. 1929 Nag. 109=12 N. L. J. 54=118 Ind. Cas. 58. Where appeal was filed with powers-of-attorney, subsequent filing of the same does not save limitation. 33 P. L. R. 517. The presentation of an execution petition by a pleader who holds no *vakalatnama* from the decree-holder is a nullity. 1936 M. W. N. 957=44 L. W. 528=71 M. L. J. 604 ; but see 63 C. 733=40 C. W. N. 730. Where a plaint is filed by a pleader in whose favour a valid *vakalatnama* has not been executed the proper procedure is to return the plaint to the pleader who presented it. 132 Ind. Cas. 566=1931 A. L. J. 983=A. I. R. 1931 All. 767. A defective presentation of plaint on account of failure to comply with the provisions of Order 3, rule 4, is a mere irregularity and can be cured under s. 99, C. P. Code. 1931 A. L. J. 777 (F. B.). A pleader may be authorized by *vakalatnama* duly executed by a general agent of a party to appoint another pleader for filing an appeal. A. I. R. 1937 Nag. 65 ; A. I. R. 1936 Lah. 500=17 Lah. 610. The Court can extend time of appeal to rectify the error in the *vakalatnama*. 150 Ind. Cas. 731=A. I. R. 1934 Lah. 444=150 Ind. Cas. 731 ; 63 C. 733=40 C. W. N. 730.

**Sub-rule (2).—Power of pleader remains in force in all stages of the suit.** A. I. R. 1930 Cal. 721=34 C. W. N. 914=52 C. L. J. 87=129 Ind. Cas. 561=58 C. 374. A *vakalatnama* filed by a pleader engaged by an applicant for leave to sue as a pauper under Order 33, C. P. Code, is not a *vakalatnama* merely for the petition, but becomes a *vakalatnama* for the purpose of suit also, when the petition becomes converted into a suit by operation of law. 152 Ind. Cas. 132=1934 M. W. N. 1204=40 L. W. 585=A. I. R. 1934 Mad. 450=67 M. L. J. 594. The Court which is contemplated by sub-section 2 includes not only the Court in which the power is filed, but in view of provisions of s. 150, it includes Court to which a case is subsequently transferred. A. I. R. 1935 Pesh. 145=158 Ind. Cas. 922. Authority remains in force even in appeal. A. I. R. 1936 Lah. 583=165 Ind. Cas. 274. Appointment of pleader continues till the end of the case if sufficient grounds for Court's sanction to terminate the power is not shown. A. I. R. 1930 Pat. 403=9 Pat. 865=11 P. L. T. 371=128 Ind. Cas. 350. Termination of power without leave of Court cannot be recognized. A. I. R. 1930 Lah. 134. Mere dismissal of suit or passing of an *ex parte* decree does not terminate Counsel's power. A. I. R. 1929 Lah. 96=30 P. L. R. 628=114 Ind. Cas. 76. Prosecution of the conduct of the suit includes all proceedings till its final decision in the Court concerned. *Ibid.* Court's consent for withdrawal need not be formal ; it can be presumed from circumstances. A. I. R. 1925 Mad. 21 (F. B.)=1924 M. W. N. 689=35 M. L. T. 48=47 M. L. J. 398=47 M. 819=82 Ind. Cas. 102. There is no specified form for written withdrawal. *Ibid.* Pleader cannot withdraw from a case or delegate his power to another pleader without notice to client and consent of Court. A. I. R. 1922 Cal. 515=35 C. L. J. 356=26 C. W. N. 589=49 C. 732=71 Ind. Cas. 81. Pleader's power terminates on its being cancelled or suit having come to an end, and is enforceable for miscellaneous proceedings.

1 P. L. W. 483=2 Pat. L. J. 259=18 Cr. L. J. 808=41 Ind. Cas. 328. Authorizing conduct of one particular matter is special power. 41 B. 40=18 Bom. L. R. 821=36 Ind. Cas. 805; see also A.I.R. 1930 Bom. 511=32 Bom. L.R. 1178=128 Ind. Cas. 609. Power of pleader appointed guardian is not terminated by minor's attaining majority. (1917) M. W. N. 495=42 Ind. Cas. 421. Authority of pleader engaged in trial Court unless specifically revoked subsists up to appellate stage. 146 Ind. Cas. 363=A. I. R. 1933 Pesh. 67. But it is not so where the pleader is appointed only for the lower Court. 29 N. L. R. 295=A. I. R. 1933 Nag. 219=145 Ind. Cas. 760; see also A. I. R. 1933 Lah. 504=A. L. R. 1933 Lah. 245. A pleader not specifically empowered cannot refer the matter to arbitration. 135 Ind. Cas. 712=33 P. L. R. 388=A. I. R. 1932 Lah. 373. When an appellant dies his power-of-attorney in favour of his counsel ceases to be operative and the counsel cannot file an application on behalf of the legal representatives to bring them on record without a fresh power from such legal representatives. 32 P. L. R. 389. The practice of the Calcutta High Court has always been that no order for change of attorney is made.

(2) Every such appointment, when accepted by a pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client.

(3) No advocate of any High Court established under the Indian High Courts Act, 1861, or of any Chief Court, and no advocate of any other High Court who is a barrister, shall be required to present any document empowering him to act, unless provision is made for payment of the attorney except where the attorney has by own conduct or misconduct discharged himself. A. I. R. 1934 Cal. 58.

**Sub-rule (3).—**This sub-rule defines the term "until all the proceedings of the suit are ended." Defendant's attorney can appeal against order refusing to set aside *ex parte* decree. A. I. R. 1927 Lah. 134=99 Ind. Cas. 690. Advocate appointed in a case can present appeal also. A. I. R. 1930 Lah. 68=116 Ind. Cas. 184. Appeal includes second appeal also. A. I. R. 1928 Lah. 733=108 Ind. Cas. 513. No fresh power required for appeal if pleader appointed to prosecute all litigations or suit. A. I. R. 1926 Lah. 32=6 Lah. 461=20 P. L. R. 721=91 Ind. Cas. 30. Fresh *vakalatnama* is not required for representation of plaintiff. A. I. R. 1923 Nag. 182=6 N. L. J. 100=71 Ind. Cas. 436. *Vakalatnama* embodied in general terms does not include power to refer a suit to arbitration. A. I. R. 1924 Nag. 338=79 Ind. Cas. 48.

**Sub-rule (5).—**Sub-rule (5) is inconsistent with the rules of the Calcutta High Court framed under s. 37, Letters Patent of 1865, as such the rules framed under s. 37, Letters Patent are to prevail. A. I. R. 1932 Cal. 1=135 Ind. Cas. 789; 35 C. W. N. 1100. When a pleader appears to plead in a case he must also be considered to be appearing on behalf of his client and for the purpose of appearance on behalf of his client neither a power-of-attorney nor a memorandum of appearance is necessary. A. I. R. 1935 Pesh. 2=153 Ind. Cas. 937.

**5. [S. 40.]** Any process served on the pleader of any party or left at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person.

*N. B.—Vide* C. P. Madras, Nagpur, Oudh, Patna and Peshwar rules for amendment of this rule.

**Scope.**—Notice to duly appointed pleader is good notice to the client. A. I. R. 1928 Lah. 426=108 Ind. Cas. 62. Under rule 5 there is a presumption that notice which was served on the pleader is communicated to the client. The only method by which a pleader can avoid his duty of communicating notices served upon him is to file a document in writing under Order 3, rule 4. sub-clause (2) of the Code showing that his authority is determined. Else the irrebuttable presumption under s. 5 arises. A. I. R. 1934 Pat. 592=152 Ind. Cas. 589. He is bound to protect client's interest. A. I. R. 1922 Oudh 75=25 O. C. 40=9 O. L. J. 170=67 Ind. Cas. 554. Signing order sheet by pleader is sufficient notice. A. I. R. 1927 Pat. 135=1926 Pat. 161=7 P. L. T. 739=95 Ind. Cas. 321. Communication of

order of filing award to pleader is sufficient compliance with para 10, Schedule 2. A. I. R. 1927 Cal. 619=45 C. L. J. 458=103 Ind. Cas. 625.

6. [S. 41.] (1) Besides the recognized agents described in rule 2 any person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.

(2) Such appointment may be special or general and shall be made by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filled in Court

*N. B.*—*Vide* Sindh rules for amendment.

## ORDER IV.

### *Institution of Suits.*

1. [S. 48.] (1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

*N. B.*—For local amendments in Allahabad C. P. and Oudh Sind,—*Vide infra*.

**Scope.**—Presentation of plaint is the starting point of a case. A. I. R. 1929 Mad. 480=133 Ind. Cas. 550. It does not matter if it is imperfect at the time of institution. A. I. R. 1921 Sind 166=17 S. L. R. 223=85 Ind. Cas. 893; see also 62 C. 1115; A. I. R. 1935 Sind 225. Plaint substantially in accordance with Order VI and VII is valid even with certain defendants. A. I. R. 1921 Sind 166=17 S. L. R. 223=85 Ind. Cas. 893. Presentation is proper when it is presented to Head Ministerial Officer authorized to receive plaint. 40 Ind. Cas. 587=6 L. W. 16 (on appeal 40 M. L. J. 229=19 A. L. J. 161 P. C.). Plaint must be validly signed. 23 Bom. L. R. 911=68 Ind. Cas. 217; A. I. R. 1924 All. 54=45 A. 701=21 A. L. J. 678=77 Ind. Cas. 30. Plaint presented out of office hours is not good presentation. A. I. R. 1925 Mad. 201=20 L. W. 655=82 Ind. Cas. 928. But when accepted it is good presentation. A. I. R. 1924 Mad. 448=47 M. 312=46 M. L. J. 78=19 L. W. 468=79 Ind. Cas. 1017. Plaint presented at Judge's residence after usual hours is valid presentation. A. I. R. 1922 Nag. 167=65 Ind. Cas. 674. Where a blank plaint has been signed by the plaintiff it cannot be treated as a proper plaint. A. L. R. 1934 All. 39=2 A. W. R. 932. The absence of signature or verification or for the matter of that the absence of presentation on the part of some of the plaintiffs out of several does not affect the jurisdiction of the Court and the suit must be deemed to have been duly instituted on their behalf if it was filed with their knowledge and authority. 134 Ind. Cas. 26=1931 A. L. J. 777=A. I. R. 1931 All. 507 (S. B.). A plaint is presented when it is handed over to proper officer appointed in that behalf. A. I. R. 1934 Bom. 91.

2. [S. 58.] The Court shall cause the particulars of every suit to be entered in a book to be kept for the purpose and called the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

## ORDER V.

### *Issue and Service of Summons.*

#### *Issue of Summons.*

1. [S. 64.] (1) When a suit has been duly instituted a summons may be issued to the defendant to appear and answer the claim on a day to be therein specified:

Summons. Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plaintiff's claim.

(2) A defendant to whom a summons has been issued under sub-rule (1) may appear :—

- (a) in person, or
- (b) by a pleader duly instructed and able to answer all material questions relating to the suit, or
- (c) by a pleader accompanied by some person able to answer all such questions.

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

*N. B.*—For local amendment in Oudh.—*Vide infra*.

**Scope.**—Onus of proving service of summons is on the plaintiff. A. I. R. 1925 Cal. 801=52 C. 453=88 Ind. Cas. 929. Where there is allegation that summons was not served by fraud, the defendant must prove it. A. I. R. 1922 Pat. 291=3 P. L. T. 451=66 Ind. Cas. 137. Where no date is fixed, suit cannot be dismissed for default under Order IX, rule 3. A. I. R. 1921 Lah. 320=27 P. L. R. 1921=60 Ind. Cas. 475. Sub-rule is equally applicable in the case of a plaintiff. A. I. R. 1924 Mad. 842=17 M. L. J. 514=20 L. W. 795=82 Ind. Cas. 107. It is not sufficient appearance, when a pleader instructed only to apply for adjournment, does so. A. I. R. 1927 Rang. 46=4 Rang. 408=99 Ind. Cas. 717 ; see also 24 M. L. J. 235=18 Ind. Cas. 360 ; A. I. R. 1935 Rang. 123.

Copy or statement annexed to summons.

2. [S. 65.] Every summons shall be accompanied by a copy of the plaint or, if so permitted, by a concise statement.

*N. B.*—For local amendment in Allahabad and Oudh, *Vide infra*.

Court may order defendant or plaintiff to appear in person.

3. [S. 66.] (1) Where the Court sees reason to require the personal appearance of the defendant, the summons shall order him to appear in person in Court on the day therein specified.

specified.

(2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance.

**Scope.**—Where the Court finds a date for the personal appearance of a party he is not bound to appear on the adjourned date. The suit cannot be dismissed for default for his not appearing on the adjourned date. 39 A. 476=15 A. L. J. 522=39 Ind. Cas. 634. Where no sufficient attempt is made to serve summons personally and the person served is not shown to be authorized to receive summons appeal to set aside *ex parte* decree must succeed. A. I. R. 1922 Cal. 128=70 Ind. Cas. 292. The Court under this rule cannot compel the personal appearance of a *pardanashin* lady on the ground that at her examination in commission she was tutored. This rule is confined to those cases in which the Court before the issues are framed desires the personal attendance of a party. 55 A. 666=146 Ind. Cas. 885=1933 A. L. J. 1384=A. I. R. 1933 All. 551 ; 28 N. L. R. 146=140 Ind. Cas. 716=A. I. R. 1932 Nag. 135.

No party to be ordered to appear in person unless resident within certain limits.

4. [S. 67.] No party shall be ordered to appear in person unless he resides :—

(a) within the local limits of the Court's ordinary original jurisdiction, or

(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixth of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

*N. B.*—For new rule 4 A. in Allahabad.—*Vide infra*.



5. [S. 68.] The Court shall determine, at the time of issuing the Summons to be either to settle issues or for final disposal. summons, whether it shall be for the settlement of issues only, or for the final disposal of the suit; and the summons shall contain a direction accordingly:

Provided that, in every suit heard by a Court of Small Causes, the summons shall be for the final disposal of the suit.

*N. B.*—For local amendment in Calcutta and Madras.—*Vide infra*.

**Notes.**—In simple cases a summons for the final disposal of the suit should be issued. 38 B. 377 (379) = 16 Bom. L. R. 39 = 24 Ind. Cas. 665. In a mortgage suit a summons for the settlement of issues should be issued. *Ibid*.

6. [S. 69.] The day for the appearance of the defendant shall be fixed with reference to the current business of the Court, the place of residence of the defendant and the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable him to appear and answer on such day.

**Notes.**—*Vide* 3 M. H. C. R. 167; 7 B. H. C. R. 138; 5 W. R. (Act X) 39; 1 L. B. R. 226; 17 Ind. Cas. 351 = 8 S. L. R. 153.

7. [S. 70.] The summons to appear and answer shall order the defendant to produce all documents in his possession or power upon which he intends to rely in support of his case.

8. [S. 71.] Where the summons is for the final disposal of the suit, it shall also direct the defendant to produce, on the day fixed for his appearance, all witnesses upon whose evidence, he intends to rely in support of his case.

### *Service of Summons.*

9. [S. 72.] (1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct.

**Notes.**—Service by registered post if brought into question, very slight evidence is necessary to displace it. A. I. R. 1928 Pat. 568 = 113 Ind. Cas. 698; see also 46 B. 130 = 64 Ind. Cas. 130. As regards meaning of "reside" *vide* 38 C. 394 = 15 C. W. N. 399. Service of summons effected outside jurisdiction of the Court and without any order of the Court having jurisdiction is irregular. A. I. R. 1925 Rang. 325 = 3 Rang. 239 = 89 Ind. Cas. 870. The defendant can appear and defend a suit where plaintiff has given a wrong address of him. 60 C. 98 = 143 Ind. Cas. 710 = A. I. R. 1933 Cal. 274.

10. [S. 73.] Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this behalf, and sealed with the seal of the Court.

*N. B.*—For local amendment in Lahore and Patna.—*Vide infra*.

**Mode of service.**—Service not made by officer of Court is irregular. A. I. R. 1925 Rang. 325 = 3 Rang. 239 = 89 Ind. Cas. 870. Identifier need not be

supplied by party. He may be resident of the village knowing the defendant. A. I. R. 1923 Pat. 114=3 P. L. T. 498=65 Ind. Cas. 49. Where service is not personal rules of procedure must be strictly complied with. 46 Ind. Cas. 277. Summons was held to be duly served by affixture where without accepting copy tendered by process-server defendant shut himself up in house and the copy was affixed to the door of the house. 38 Ind. Cas. 545; see also A. I. R. 1932 Pat. 150=12 P. L. T. 911=135 Ind. Cas. 110.

**Case under Punjab Amendment.**—*Vide* A. I. R. 1926 Lah. 579=95 Ind. Cas. 874; 99 Ind. Cas. 909=A. I. R. 1927 Lah. 157=9 Lah. L. J. 96=99 Ind. Cas. 909; 101 Ind. Cas. 615=A. I. R. 1927 Lah. 376; A. I. R. 1929 Lah. 235=116 Ind. Cas. 670.

Service on several defendants.

11. [S. 74.] Save as otherwise prescribed, where there are more defendants than one, service of the summons shall be made on each

defendant.

12. [S. 75.] Wherever it is practicable, service shall be made on the defendant in person, unless he has an agent

Service to be on defendant in person when practicable or on his agent.

empowered to accept service, in which case service on such agent shall be sufficient.

**Scope.**—Effort should be made to serve the summons personally. 29 M. 324; 43 C. 447=23 C. L. J. 183=20 C. W. N. 173=34 Ind. Cas. 799; 23 Ind. Cas. 324. Service of summons on *chela* is not valid. 23 O. C. 104=57 Ind. Cas. 563. Service of summons on *pardanashin* lady not being practicable affixing copy of summons at her residence is sufficient. 57 Ind. Cas. 594; 72 Ind. Cas. 910=A. I. R. 1923 Pat. 433=4 P. L. T. 89. Service on guardian *ad litem* is sufficient. A. I. R. 1926 Cal. 1106=30 C. W. N. 919=97 Ind. Cas. 614. Where the defendant residing in British India at the time of the institution of suit, is outside British India at the time of service of summons, the service should be effected by affixing the summons to his last known place of residence and by registered post. 32 Ind. Cas. 820. Where no sufficient attempt is made to serve summons personally service on cousin is not proper. 70 Ind. Cas. 292=A. I. R. 1922 Cal. 128.

13. [S. 76.] (1) In a suit relating to any business or work against a person who does not reside within the local limits of

Service on agent by whom defendant carries on business.

the jurisdiction of the Court from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service.

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer.

**Scope.**—This rule does not apply where suits are brought against persons in their individual capacity. A. I. R. 1926 Pat. 376=(1922) Pat. 76=3 P. L. T. 29=62 Ind. Cas. 927. Service of summons on the Foreign Corporation can be made on its agent who carries on business in British India on its behalf. 43 C. L. J. 576=A. I. R. 1926 Cal. 1030=97 Ind. Cas. 286.

14. [S. 77.] Where in a suit to obtain relief respecting, or compensation for wrong to, immovable property, service cannot be made on the defendant in person, and the

Service on agent in charge in suits for immovable property.

defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property.

15. [S. 78.] Where in any suit the defendant cannot be found and has no

Where service may be on male member of defendant's family.

agent empowered to accept service of the summons on his behalf, service may be made on any adult male member of the family of the defendant who is residing with him.

**Explanation.**—A servant is not a member of the family within the meaning of this rule.

**N. B.**—For local amendments in Allahabad, Calcutta, C. P., Lahore, Madras, Oudh, Peshawar, Rangoon and Sind.—*Vide infra*.

**Notes.**—Attempt should be made to find out the defendant, by an enquiry from his neighbours and other persons. This rule must be strictly followed. A. I. R. 1921 Cal. 638 = 35 C. L. J. 203 = 26 C. W. N. 359 = 68 Ind. Cas. 991 ; see also A. I. R. 1934 Pat. 274. Service on son will bind the father, if he is adult. 26 C. W. N. 359 = 35 C. L. J. 203 = 68 Ind. Cas. 991 ; see also 37 C. L. J. 478 = A. I. R. 1923 Cal. 682 = 75 Ind. Cas. 105. Service of notice to *munim* is no notice to party or pleader. 45 Ind. Cas. 932 = 105 P. W. R. 1918. A servant is not a member of the family. A. I. R. 1927 Lah. 202 = 8 Lah. 54 = 102 Ind. Cas. 523. Service of summons on son is not service on father where the son is not living with father. 34 P. L. R. 963 = A. I. R. 1933 Lah. 797. Where in an ejectment suit there are defendants in different villages, service of process on one defendant is not service on all. 17 R. D. 608 = 14 L. R. 500 (Rev.). Where from evidence it did not appear that the service peon had used any diligence at all in serving a notice under Order 5, rule 17, and where also it appeared that the house on which a notice was struck up was not within Order 5, rule 17, the service was irregular. A. I. R. 1934 Pat. 274 = 15 Pat. L. T. 273 = 13 Pat. 467. Summons can be delivered to be tendered to a *pardanashin* lady, even though it may not be possible for a process-server to have access to her ; nor can a *pardanashin* lady be considered to be a person who cannot be personally served. It is the duty of the process-server to make an attempt to find ways and means of delivery or tendering the summons to the *pardanashin* lady for whom it is intended. He can very often find some one living with her or in the neighbourhood, male or female who can take the summons to her. If the *pardanashin* lady accepts service, it is personal service as contemplated by rr. 10 and 15. He should in ordinary cases obtain the attestation of the witness taking the summons to the *pardanashin* woman concerned which should also be done in case of refusal by her to accept the summons. If the process-server cannot find any one, male or female, who can take the summons to her, it may be a case referred to in rule 15, namely, that the defendant cannot be personally served. A. I. R. 1935 All. 660 = 155 Ind. Cas. 676.

16. [S. 79.] Where the serving officer delivers or tenders a copy of the summons to the defendant personally, or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons.

17. [S. 80.] Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

**N. B.**—For local amendments in Calcutta, C. P. and Peshawar.—*Vide infra*.

**Notes.**—Mere absence of the defendant does not entitle the peon to affix summons on the door of his house. He must make sufficient enquiry before taking the above procedure. A. I. R. 1930 Lah. 192 = 124 Ind. Cas. 673 ; see also 32 Ind. Cas. 744 ; 32 Ind. Cas. 826 ; 23 C. L. J. 83 = 43 C. 447 = 20 C. W. N. 178 = 34 Ind. Cas. 799 ; 39 Ind. Cas. 544 ; A. I. R. 1924 Cal. 1004 = 40 C. L. J. 154 = 82 Ind. Cas. 703. All available steps to effect personal service must be made before resort is had to

substituted summons. A. I. R. 1925 Cal. 627=52 C. 179=88 Ind. Cas. 508 ; see also A. I. R. 1925 Cal. 801=52 C. 453=88 Ind. Cas. 929 ; A. I. R. 1925 Bom. 231=27 Bom. L. R. 251=49 B. 368=91 Ind. Cas. 20 ; A. I. R. 1924 Oudh 237=10 O. L. J. 337=74 Ind. Cas. 792 ; A. I. R. 1924 Lah. 233=73 Ind. Cas. 34 ; but see 42 M. L. J. 422. Summons must be served where he ordinarily resides. 41 Ind. Cas. 181. If person to be served lives outside British India, service should be effected by affixing to the last known residence in British India and by registered post. 32 Ind. Cas. 320. Words "after using all due and reasonable diligence" are specially restricted to the case when there is no agent empowered to accept service on behalf of the defendant. A. I. R. 1922 Nag. 105=5 N. L. J. 41=65 Ind. Cas. 44. Court's order under Order V, rule 20, is essential to make substituted service effectual. 55 Ind. Cas. 824. Mere delivery to a person who refused to accept service is itself sufficient. 99 P. R. 1918=184 P. W. R. 1918=48 Ind. Cas. 28 ; but see 43 Ind. Cas. 718=41 P. L. R. 1918=31 P. W. R. 1918. Service by affixing summons during temporary absence on the outer-door of house where party's wife was living is sufficient service. A. I. R. 1922 Mad. 93=42 M. L. J. 422=(1922) M. W. N. 173=45 M. 875=70 Ind. Cas. 611. Where *pardanashin* lady has not got other member of family or agent to receive summons, service by affixture is valid. A. I. R. 1923 Pat. 433=4 P. L. T. 89=72 Ind. Cas. 910 ; see also A. I. R. 1922 Oudh 268=9 O. L. J. 489=69 Ind. Cas. 667. Where defendant by his conduct renders it impossible to have the copies affixed on his house, he cannot be permitted to plead that the omission to affix rendered service invalid. A. I. R. 1924 Pat. 446=3 Pat. 236=2 Pat. L. R. 58=5 Pat. L. T. 576=78 Ind. Cas. 889. Where defendant refuses to accept summons, it must be affixed on the door of the house in which he resides and not on the door of the house where he is found. A. I. R. 1925 Cal. 801=52 C. 453=88 Ind. Cas. 929. The service of notice under r. 19 of the B. T. Act is guided by the above rules. A. I. R. 1925 Pat. 441=7 P. L. T. 175=4 Pat. 135=91 Ind. Cas. 184. The duplicate summons must be affixed to the outer-door or to some other conspicuous part of the house in which the defendant resides. A. I. R. 1929 Bom. 257=31 Bom. L. R. 424=118 Ind. Cas. 792. When it is shown that the process-server went to the defendant's place five times and made every effort to effect service of summons on the defendant who was, however, evading service, it should be held that affixture was good service. 27 N. L. R. 50=A. I. R. 1931 Nag. 122 ; see also 27 N. L. R. 53=A. I. R. 1931 Nag. 119.

Report of a process-server not containing the name of any witness while there must have been persons present at the time of service cannot be deemed to have been framed in accordance with law and does not furnish *prima facie* proof of due service. A. I. R. 1928 Nag. 80=23 N. L. R. 116=107 Ind. Cas. 666. The service of summons is not made simply by delivery of a copy of summons to the defendant where the defendant refused to append his signature to the acknowledgment of service. On such refusal it is incumbent to effect service in the manner prescribed by Order 5, rule 17 of the C. P. Code. A. I. R. 1933 A. 165=144 Ind. Cas. 1019=1933 A. L. J. 165 ; see also 33 P. L. R. 5=A. I. R. 1932 Lah. 59.

18. [S. 81.] The serving officer shall, in all cases in which the summons has been served under rule 16, endorse or annex Endorsement of time and manner of service. or cause to be endorsed, or annexed, on or to the original summons, a return, stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

*N. B.*—For local amendments in Madras.—*Vide infra.*

Notes.—Identifier need not be supplied by party. A. I. R. 1923 Pat. 114=3 P. L. T. 498=65 Ind. Cas. 49. The report of the Nazir is enough. 3 W. R. Mis. 11 ; 4 W. R. Mis. 4 ; 12 W. R. 365 ; 18 W. R. 197.

19. [S. 82, first para.] Where a summons is returned under rule 17, the Court shall, if the return under that rule Examination of serving officer. has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer, on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in

the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.

*N. B.*—For local amendments and insertion in Calcutta and Madras.—*Vide infra.*

**Notes**—Court's omission to make order declaring proper service is essential. It is not a mere irregularity. A. I. R. 1927 Mad. 813=39 M. L. T. 34=26 L. W. 481=103 Ind. Cas. 825; see also A. I. R. 1922 Mad. 417=15 L. W. 17. In case of substituted service, the requirements of the rule must be fulfilled. 43 C. 447=23 C. L. J. 183=20 C. W. N. 173=34 Ind. Cas. 799. The Court must either declare the service to be sufficient or order such service as it thinks fit. 1933 M. W. N. 478=37 L. W. 622=A. I. R. 1933 Mad. 466=64 M. L. J. 329; see also A. I. R. 1933 Mad. 406=64 M. L. J. 637=1933 M. W. N. 257. Declaration of due service under this section may be implied or inferred. A. I. R. 1932 Oudh 326=9 O. W. N. 896. The provision of Order 5, r. 19, will apply to all cases in which return of summons is made under Order 5, rule 17, whether due to absence or refusal of person to be served. Even in the case of a refusal, unless there is a declaration by the Court that the service under Order 5, rule 17, is sufficient as required by the provisions of Order 5, r. 19, any order passed by the Court in the absence of judgment-debtor will not constitute *res judicata*. A. I. R. 1937 Mad. 84.

20. [S 82, second para, Ss. 83, 84.] (1) Where the Court is satisfied

Substituted service.

that there is reason to believe that the defendant is keeping out of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the Court thinks fit.

Effect of substituted service.

(2) Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

Where service substituted, time for appearance to be fixed.

(3) Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.

*N. B.*—For local amendments in Oudh and Rangoon.—*Vide infra.*

**Scope.**—Substituted service amounts to personal service. A. I. R. 1928 Mad. 1052=116 Ind. Cas. 363; A. I. R. 1928 Mad. 815=51 M. 860; A. I. R. 1927 Mad. 487=52 M. L. J. 512=101 Ind. Cas. 651. Even though substituted service may be considered as personal service on the defendants under the provisions of Order 5, rule 20 and clause (2), this does not preclude the defendants from afterwards showing that in fact there had been no service on him at all and that the order for substituted service was procured on misrepresentation of facts. A. I. R. 1934 Cal. 745=60 C. L. J. 106=38 C. W. N. 1066=152 Ind. Cas. 830; see also A. I. R. 1935 Pesh. 112. Substituted service should not be ordered unless defendant could not be served in the ordinary way or has refused to accept service. 120 Ind. Cas. 594; see also (1930) M. W. N. 1227; A. I. R. 1930 Lah. 397=129 Ind. Cas. 689; 107 Ind. Cas. 282; 94 Ind. Cas. 395; 69 Ind. Cas. 467; L. R. 2 A. 244 (Rev.). Where substituted service is ordered to be effected by means of newspaper reasonable time to allow newspaper to reach in addition to the time of the notice is sufficient. L. R. 2 A. 242 Rev.; see also A. I. R. 1928 Rang. 185=6 Rang. 218=111 Ind. Cas. 371; A. I. R. 1929 Lah. 235=116 Ind. Cas. 620. It is not correct to order substituted service on a person to show cause why he should not be appointed guardian. A. I. R. 1930 All. 609=(1930) A. L. J. 1020=124 Ind. Cas. 191. Affixation of summons without being accompanied by copy of plaint is not a sufficient compliance with the law. A. I. R. 1927 Lah. 376=28 P. L. R. 300=101 Ind. Cas. 615. Where plaintiff has failed to make enquires substituted service should not be ordered. A. I. R. 1924 Lah. 191=69 Ind. Cas. 467. Service by registered post is a poor substitute for personal service. A. I. R. 1922 Bom. 377=46 B. 130=23 Bom. L. R. 928=64 Ind. Cas. 386. Question of

effecting substituted service being primarily on discretion of trial Court, appellate Court has only to see that rules of law are observed. A. I. R. 1931 Lah. 118=31 P. L. R. 1006=131 Ind. Cas. 344 ; A. I. R. 1927 Mad. 587=52 M. L. J. 477=102 Ind. Cas. 243. Where the defendant is avoiding service of summons substituted service can be ordered. A. I. R. 1932 Mad. 472=138 Ind. Cas. 146=1932 M. W. N. 133.

The advisability of effecting service by substituted service is a matter primarily for the trial Court and if it is satisfied on the matters set out in Order 5, rule 20, it should order substituted service which is as effectual as if service was made personally. 131 Ind. Cas. 344=31 P. L. R. 1006=A. I. R. 1931 Lah. 118 ; see also 132 Ind. Cas. 778=14 O. L. J. 543=A. I. R. 1931 Oudh 369. But if for no fault of the defendant, a defendant was never put in a position to know that a suit has been instituted against him whatever steps might have been taken for serving the summons on him, these steps can never be taken as amounting to due service. 1931 A. L. J. 1049=A. I. R. 1931 All. 727 (F. B.) ; see also 134 Ind. Cas. 1202=A. I. R. 1931 Mad. 813=61 M. L. J. 920. The dismissal of the suit without affording the plaintiff an opportunity to apply for substituted service is illegal and should be set aside. 12 Pat. L. T. 644=A. I. R. 1931 Pat. 420 ; see also 1930 M. W. N. 1227. Fixing notice to the judgment-debtor's house which was occupied by the other members of his family is good substituted service. 1931 A. L. J. 62=130 Ind. Cas. 485=A. I. R. 1931 All. 159. Substituted service need not be ordered where the defendant refused to accept service. A. I. R. 1935 Lah. 171.

**21. [S. 85, first para.]** A summons may be sent by the Court by which it is issued, whether within or without the Province, either by one of its officers or by post to any Court (not being the High Court), having jurisdiction in the place where the defendant resides.

**Amendment in Burma.**—In rule 21 omit “whether within or without the Province”.—*Vide* G. B. Order of 1937.

**N. B.**—For insertion of new rule in Bombay, Oudh, Rangoon and Sind.—*Vide infra*.

**22. [S. 86.]** Where a summons issued by any Court established beyond the limits of the towns of Calcutta, Madras, and Bombay\* is to be served within any such limits, it shall be sent to the Court of Small Causes within whose jurisdiction it is to be served.

**Amendment in Burma.**—In rule 22 omit “Calcutta, Madras, and Bombay” and substitute for it “Rangoon”.—*Vide* G. B. Order of 1937.

**N. B.**—For local amendments in Bombay and Rangoon.—*Vide infra*.

**Notes.**—*Vide* A. I. R. 1922 Bom. 377=22 Bom. L. R. 908=46 B. 130=64 Ind. Cas. 386.

**23. [S. 85, second para.]** The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto.

**N. B.**—For insertion of new rule 23 A. in Rangoon—*Vide infra*. In that rule “for other Provinces” substitute “outside Burma”.—*Vide* G. B. Order of 1937.

**24. [Ss 87, 88.]** Where the defendant is confined in a prison, the summons shall be delivered or sent by post or otherwise to the officer-in-charge of the prison for service on the defendant.

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\* Substituted by G. I. order of 1937.

**25. [S 89.]** Where the defendant resides out of British India and has no

Service where defendant resides out of British India and has no agent.

agent in British India empowered to accept service, the summons shall be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate.

**Local amendment in Burma.**—For insertion of new rule 25 A.—*Vide infra*. In that rule "British India" shall stand unmodified and for "the Province of" substitute "British"—*Vide* G. B. Order of 1937.

*N. B.*—For local amendments and additions in Allahabad, C. P., Madras and Oudh.—*Vide infra*.

**Notes.**—Refusal of letter containing summons amounts to due service. A. I. R. 1930 Lah. 439=31 P. L. R. 26=121 Ind. Cas. 386.

Service in foreign territory through Political Agent of Court.

**26. [S. 90.]** Where—

(a) in the exercise of any foreign jurisdiction vested in His Majesty or in "the Central Government or the Crown Representative"\* a Political agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

†(b) "the Provincial Government"\* has, by notification in the "Official Gazette"\* declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons "issued under this Code by a Court of the Province"\* shall be deemed to be valid service,] the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed, such endorsement shall be deemed to be evidence of service.

**Local amendments in Burma.**—For the words "the Central Government or the Crown representative" and "the Provincial Government" respectively substitute the word "Governor" and for the words "issued under this Code by a Court of the Province" substitute the words "issued by a Court under this Code." Also substitute Gazette for "Official Gazette".—*Vide* G. B. Order of 1937.

*N. B.*—For Local amendments in Allahabad, C. P., Madras, Nagpur and Oudh.—*Vide infra*.

**Notes.**—A witness in a foreign State cannot be punished for non-appearance after service of summons. He should be examined on commission. 142 Ind. Cas. 201=1933 M. W. N. 677=A. I. R. 1933 Mad. 366=61 M. L. J. 334.

**27. [S 422.]** Where the defendant is a public officer (not belonging to

Service on civil public officer or on servant of railway company or local authority.

His Majesty's military "naval or air"‡ forces§ or is the servant of a railway company or local authority, the Court may, if it appears to it that the summons may be most conveniently so served send it for service on the defendant to the head of the office in which he is employed, together with a copy to be retained by the defendant,

*N. B.*—For local amendments in Allahabad, Madras and Oudh.—*Vide infra*.

\* Substituted by G. I. Order of 1937.

† Substituted by s. 2 and Sch. I of the Second Repealing and Amending Act, 1914 (17 of 1914).

‡ Added by Act X. of 1927.

§ Certain words after this having been repealed by Act 35 of 1934 have been omitted.

**Notes.**—This rule invest the Court with a discretion in the matter of effecting service of summons on public servant. 9 O. W. N. 896=A. I. R. 1932 Oudh 326.

28. [S. 468.] Where the defendant is a soldier, "sailor" \* "or airman" †, the Court shall send the summons for service to his Commanding Officer together with a copy to be retained by the defendant.

*N. B.*—For local amendments in Allahabad, Madras and Oudh.—*Vide infra*.

29. [Cf. Ss. 87, 88, 468.] (1) Where a summons is delivered or sent to any person for service under rule 24, rule 27 or rule 28, such person shall be bound to serve it, if possible, and to return it under his signature, with the written acknowledgment of the defendant, and such signature shall be deemed to be evidence of service.

(2) Where from any cause service is impossible, the summons shall be returned to the Court with a full statement of such cause and of the steps taken to procure service, and such statement shall be deemed to be evidence of non-service.

*N. B.*—For local amendments and insertion in Allahabad and Madras—*Vide infra*.

30. [Ss. 91, 92.] (1) The Court may, notwithstanding anything hereinbefore contained, substitute for a summons a letter signed by the Judge or such officer as he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration.

(2) A letter substituted under sub-rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub-rule (3), shall be treated in all respects as a summons.

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit; and, where the defendant has an agent empowered to accept service, the letter may be delivered or sent to such agent.

*N. B.*—For addition of new rules in Allahabad and Sind.—*Vide infra*.

## ORDER VI.

### *Pleadings generally.*

Pleading. 1. [New.]. "Pleading" shall mean plaint or written statement.

**Pleading.**—No definition of the pleading is given in the Act. But according to s. 100 of the Supreme Court of Judicature Act of 1873 pleading "shall include any petition or summons, and also shall include the statements in writing of the claim or demand of any plaintiff and of the defence of any defendant thereto; and of the reply of the plaintiff to any counter claim of a defendant." A writ of summons is not a pleading. *Murray v. Stephenson* (1887) 19 Q. B. D. 60; *Wallis v. Jackson*, (1883) 23 Ch. D. 204; but a special endorsement on the writ of summons may be considered a pleading for some purposes. *Anlaby v. Practorius*, (1888) 20 Q. B. D. 764 C. A. *Roberts v. Plants* (1895) 1 Q. B. 597. "The Committee have added a few rules relating to pleadings based upon the pleading introduced by the Judicature Acts in England, which is generally admitted to be the best form of pleading in civil suits". *Report of the Special Committee*. "The whole object of pleadings" says *Jessel M. R.* in *Thorp v. Holdsworth*, (1876) 3 Ch. D. 637, 639 "is to bring the parties to an issue, and the meaning of the rule (relating to pleadings) was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was, in fact, the whole meaning of the system is to narrow the parties

\* Inserted by Act 35 of 1935.

† Added by Act. X of 1937.



to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing." In a case (6 A. 406) under the old Act it has been held the pleadings in Indian Courts need not be construed with the same strictness as in English Court. But it seems that, that is no longer the law. Party must make all necessary assertions to carry the reliefs and prove them in an alternative case. A. I. R. 1931 Cal. 25=57 C. 795=129 Ind. Cas. 355. Documents satisfying substantially the requirements of Order VI and Order VII is a plaint. 17 S. L. R. 223=85 Ind. Cas. 893. It is for the Court to find and examine all pleas of law applicable to the facts of a particular case. A. I. R. 1928 Nag. 206=107 Ind. Cas. 513.

## 2. [R. S. C. O. 19, r. 4.] Every pleading shall contain and contain only,

Pleading to state material facts and not evidence.

a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved, and shall, when necessary, be divided into paragraphs, numbered consecutively. Dates, sums and numbers shall be expressed in figures.

**Scope.**—The law of pleadings may be tersely summarised in four words. "Plead facts not law." It is the duty of the parties to state only the facts on which they rely their claim. It is for the Court to declare the law arising out of those facts. 143 Ind. Cas. 713=A. I. R. 1933 Sind 103; see also 137 Ind. Cas. 33=A. I. R. 1932 Nag. 23=27 N. L. R. 327=A. L. R. 1932 Nag. 70; A. I. R. 1930 Bom. 511=32 Bom. L. R. 1178=128 Ind. Cas. 609. Plaint should state substantially the facts which make up the plaintiff's case and should be so framed as to enable the other party to know what case he has to meet. 22 C. L. J. 254=20 C. W. N. 310=31 Ind. Cas. 181. Under this rule besides pleas which should be definitely taken, facts constituting them should also be stated. A. I. R. 1925 Pat. 168=(1924) Pat. 297=6 P. L. T. 465=84 Ind. Cas. 386. The decision of a case should be based on pleading. In collision case, plaint should be so framed as to enable the adversary to know the case he has to meet, and to state the particular acts of negligence the result of which is collision. 25 C. W. N. 519=34 C. L. J. 178=66 Ind. Cas. 745. Assertion of non-performance of marriage ceremony also includes denial of the validity of marriage. 64 Ind. Cas. 150. Inconsistent pleas each destructive of the other, should not be permitted. A. I. R. 1931 Nag. 57=26 N. L. R. 367=130 Ind. Cas. 108. But where not so destructive may be permitted. A. I. R. 1925 Oudh 120=27 O. C. 175=11 O. L. J. 619=82 Ind. Cas. 333. The plaintiff need not set out the evidence whereby he proposes to prove the facts which give him the title. 20 C. W. N. 310 (312)=22 C. L. J. 254; see also 38 C. W. N. 908=152 Ind. Cas. 117. Under this rule facts and only material facts are to be stated in the plaint and not the evidence by which they are to be proved. A. I. R. 1925 Pat. 410=31 Pat. L. R. 36=86 Ind. Cas. 629.

## 3. [R. C. O. 19, r. 5.] The forms in Appendix A when applicable, and

Forms of pleading.

where they are not applicable forms of the like character, as nearly as may be, shall be used for all pleadings.

## 4. [R. S. C. O. 19, r. 6.] In all cases in which the party pleading

Particulars to be given where necessary.

relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

**Scope.**—The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense and avoid allowing parties to be taken by surprise. *Spedding v. Fitzpatrick*, 38 Ch. D. 413 C. A. Whenever either party imputes, fraud, negligence or misconduct to his opponent the facts must be stated with special particularity. *Vide Halsbury Vol. XXII*, p. 454. "Under the contract law of India, as well as by ordinary principles, coercion, undue influence, fraud and misrepresentation, are all separate and separable categories in law. It is true that they may overlap or may be combined. There is a well-known rule of pleading expressed in the frequently quoted language of *Lord Selborne* that—"With regard to fraud if there be any principle which is

perfectly well settled, is that general allegations, however strong may be the words in which they are stated are insufficient even to amount to an averment of fraud of which any Court ought to take notice.' The law of India is in no way different from this, and it has been decided over and over again *e.g.*, in *Ganga Narain Gupta v. Tilukram*, L. R. 15 I. A. 119; 19 C. W. N. 745 P. C. The Court has inherent jurisdiction to interfere and direct particulars of a petition or affidavit to be furnished if it considers that a litigant will be substantially embarrassed owing to a lack of precision therein. 40 C. W. N. 913=165 Ind. Cas. 24.

**Misrepresentation.**—Particulars of misrepresentation and fraud must be given at the instance of the auction purchaser in an auction to resist auction purchaser's title under s. 65. A. I. R. 1926 Bom. 33=27 Bom. L. R. 1318=91 Ind. Cas. 426.

**Fraud.**—In an action based on general allegations of fraud, breach of trust, specific particular constituting the fraud or the breach of trust must be given. Mere general allegations is insufficient. A. I. R. 1930 Mad. 78=57 M. L. J. 609=30 L. W. 914=123 Ind. Cas. 15; see A. I. R. 1921 Mad. 759=54 M. L. J. 644=28 L. W. 367=110 Ind. Cas. 763; 145 Ind. Cas. 118=A. I. R. 1933 Rang. 153; A. I. R. 1930 Cal. 621=34 C. W. N. 809=129 Ind. Cas. 401; A. I. R. 1928 Pat. 112=9 P. L. T. 476=104 Ind. Cas. 821; A. I. R. 1923 All. 566=21 A. L. J. 488=L. R. 4 A. 481 Civ.=74 Ind. Cas. 964; A. I. R. 1924 All. 17=21 A. L. J. 571=L. R. 4 A. 464=45 A. 624=74 Ind. Cas. 466; 11 O. W. N. 1323=152 Ind. Cas. 468. Where fraud is alleged particulars must be given in plaint, mere general allegation is not sufficient. A. I. R. 1921 Pat. 193=2 P. L. T. 528=6 P. L. J. 373=62 Ind. Cas. 962; A. I. R. 1921 Pat. 209=2 P. L. T. 528=62 Ind. Cas. 962; A. I. R. 1933 Rang. 169=146 Ind. Cas. 954; A. I. R. 1933 Rang. 123; 6 P. L. J. 373 (F. B.)=58 Ind. Cas. 317; 23 C. W. N. 1045=31 C. L. J. 3=54 Ind. Cas. 197; 46 Ind. Cas. 676; 46 Ind. Cas. 342=(1918) U. B. R. 69; 20 C. W. N. 819=35 Ind. Cas. 339; 20 C. W. N. 638=35 Ind. Cas. 284; 35 Ind. Cas. 252. In an action based on fraud it is necessary to prove that the representatives were either known to be false to the party making them or that they were made recklessly and were made for the purpose of being believed and acted upon and they were believed and acted upon and actual damage was caused for which the relief is claimed. A. I. R. 1924 All. 17=21 A. L. J. 571=74 Ind. Cas. 466; see also A. I. R. 1926 Lah. 96=6 Lah. 512=92 Ind. Cas. 322; A. I. R. 1930 Pat. 357=125 Ind. Cas. 145; A. I. R. 1930 Cal. 22=56 C. 868=121 Ind. Cas. 625; 108 Ind. Cas. 383 (Lah); A. I. R. 1930 All. 427=(1930) A. L. J. 469=123 Ind. Cas. 759; A. I. R. 1931 Oudh 5=7 O. W. N. 1015=129 Ind. Cas. 168; A. I. R. 1930 Sind. 298=24 S. L. R. 232=128 Ind. Cas. 682. If one kind of fraud is not proved another kind of fraud cannot be set up as a basis of the case. A. I. R. 1929 Bom. 1=53 B. 75=30 Bom. L. R. 1539=113 Ind. Cas. 229; A. I. R. 1928 Oudh. 330=5 O. W. N. 435=110 Ind. Cas. 91; A. I. R. 1921 Pat. 48=2 P. L. T. 111=(1921) Pat. 107=60 Ind. Cas. 282; A. I. R. 1922 Cal. 202=34 C. L. J. 529=26 C. W. N. 117=68 Ind. Cas. 577; 24 C. W. N. 662=30 C. L. J. 475=55 Ind. Cas. 689. Court is not entitled to go into the question of fraud if no such issue is raised. A. I. R. 1927 Mad. 538=50 M. 357=38 M. L. T. 197=101 Ind. Cas. 399. Where plea of fraud was not set up in pleadings party being unwary it cannot be raised as soon as party comes to know of it. 3 O. L. J. 501=19 O. C. 334=36 Ind. Cas. 746. Plaintiff seeking the benefit of s. 18, Limitation Act, must clearly allege the particular fraud and in detail by which he was kept in dark about his right to sue. A. I. R. 1927 All. 437=101 Ind. Cas. 322. Strong evidence must be produced by defendant to extricate himself where he wants to defeat plaintiff's claim on ground of fraud alleging that he was party to it. 21 C. W. N. 864=41 C. 302. If a defence by defendants points as to fraud or forgery it should be specifically pleaded in written statement. If not, defence should not be easily accepted. A. I. R. 1926 P. C. 109=(1926) M. W. N. 812=25 A. L. J. 20=38 M. L. T. 3 (P. C.)=97 Ind. Cas. 543. Burden of proof as regards allegations of fraud and collusion lies on those who assert them, which must be proved from established facts or from inference legitimately drawn from them as a whole. A. I. R. 1923 P. C. 73=45 M. L. J. 363=33 M. L. T. 325=28 C. W. N. 327=39 C. L. J. 165 (P. C.)=73 Ind. Cas. 391; see also A. I. R. 1921 Sind. 106=17 S. L. R. 9; A. I. R. 1935 Rang. 73=155 Ind. Cas. 890=13 Rang. 175. The fraud which has been pleaded should be proved. A party is not entitled to succeed on any other ground of fraud than that pleaded by it. A. I. R. 1935 Lah. 222.

**Undue Influence.**—In a case of an action based on fraud or undue influence, particulars as regards the fraud or undue influence must be given. A. I. R. 1928

**Oudh 330=5 O. W. N. 435=110 Ind. Cas. 91.** Undue influence is a fraud of a gravest nature, and where fraud is already alleged in plaint, undue influence need not be specifically alleged. A. I. R. 1922 Cal. 202=34 C. L. J. 529=26 C. W. N. 177=68 Ind. Cas. 577; 33 Ind. Cas. 576=18 Bom. L. R. 27. If the execution of mortgage is denied by defendant and particulars of alleged undue influence are not given that question should not be gone into. 47 Ind. Cas. 11; see also 2 P. L. J. 111=5 P. L. T. 744=(1921) P. 107; 33 C. 773 (P. C.)=3 A. L. J. 353; but see A. I. R. 1931 Nag. 63=132 Ind. Cas. 452=27 N. L. R. 19. If there are facts on record to justify the inference of undue influence, the Court has power to administer relief notwithstanding inartistic pleadings. 27 N. L. R. 19=A. I. R. 1931 Nag. 63.

**Custom.**—In an action based on custom, custom should be specifically pleaded and all the requisites to its validity must be proved. 34 C. L. J. 319 (F. B.)=66 Ind. Cas. 640. In a case it is not permissible to split up the custom set up by a party. It must be taken as a whole and not piece meal. A custom different from one set up by a party should not ordinarily be allowed to be proved. A. I. R. 1929 Oudh 204=114 Ind. Cas. 113.

**Estoppel**—Where there are allegations in the written statement which are such that the plea of estoppel might have been raised, it is not always proper, though not absolutely essential that the plea should be definitely raised and issue framed thereon. A. I. R. 1926 Mad. 1052=96 Ind. Cas. 915.

**Negligence.**—In an action based on negligence all particulars, which constitute negligence must be specifically stated in pleading. A. I. R. 1922 Pat. 17=3 P. L. T. 222=67 Ind. Cas. 664.

**Damage.**—That he was ready to perform his part of the contract is not necessary for the plaintiff to allege, in a suit for damages by purchaser for breach of contract unless defendants put him to its proof. A. I. R. 1930 Lah. 553=31 P. L. R. 110=121 Ind. Cas. 723.

**Illegal contract.**—In a suit for money advanced if defendant pleads illegality of contract, he must so clearly plead and give particulars and prove illegality. A. I. R. 1925 Rang. 275=3 Rang. 275=92 Ind. Cas. 270. A contract is not valid in absence of consideration, but if there is consideration contract exists, though it may be voidable for fraud. 39 P. L. R. 1919=14 P. W. R. 1919=51 Ind. Cas. 579.

**Forgery.**—Allegation of forgery may be inferred from the allegation that the document was not executed but that it was executed by fraud cannot be inferred therefrom. A. I. R. 1929 Cal. 77=111 Ind. Cas. 746.

**Easement.**—Where the action be brought against the servient owner or a stranger, a party cannot safely allege his right to an easement generally but should state specifically the manner in which he claims title to the easement, whether by grant (actual or lost), prescription at common law, or under the Act. 142 Ind. Cas. 458=A. I. R. 1933 Cal. 215.

**Settled Accounts.**—*Vide* 55 M. 704=137 Ind. Cas. 636=1932 M. W. N. 93=35 L. W. 302=A. I. R. 1932 Mad. 284=62 M. L. J. 226.

5. [R. S. C. O. 19, r. 7.] A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just.

**Scope and object.**—In some cases, where other circumstances are such that the party pleading, does not know the facts necessary to enable him to give the particulars, but his opponent knows or ought to know them, the giving of particulars may be postponed till after discovery, and the party applying for particulars may be ordered to give discovery before the party pleading is required to deliver particulars. *Waynes v. Radford*, (1896) 1 Ch. 29; *Maxim Nordenfellt v. Nordenfellt*, (1893) 3 Ch. 122 C.A.; *Yearly Practice*, 1921, p. 250. In *Miller v. Harper* (1888), 38 Ch. 110 C.A. *Bowen L. J.* said: "It is good practice and good sense that where defendant knows the facts and the plaintiffs do not, the defendant should give discovery before the plaintiffs deliver particulars." See also *Carr v. Anderson*, (1901) 18 T. L. R. 206; *Yorshire v. Gilbert*, (1895) 2 Q. B. 148. The particulars tend to narrow the issue and to limit the enquiry at the trial. *Thompson v. Birkley*, 31 W. R. Eng. 230. Defendant can ask for particulars of allegations not precisely given in plaint, failure

to do which operates as espoppel in second appeal. 1 P. L. T. 34=(1919) Pat. 451=52 Ind. Cas. 964. Where particulars ordered are not supplied by defendant in time Court can strike out his defence even where penalty is not specified in Court's order. A. I. R. 1930 Mad. 473=31 L. W. 387=59 M. L. J. 22=53 M. 645=126 Ind. Cas. 629; see also 45 A. 627=74 Ind. Cas. 466=A. I. R. 1924 All. 17=21 A. L. J. 571. Where in a suit under Bengal Tenancy Act, plaint did not give particulars in s. 148, the defendant should ask for them, but on failure amendment of plaint should be allowed, if cause of action is given. A. I. R. 1931 Pat. 135=11 P. L. T. 617=128 Ind. Cas. 785.

6. [R. S. C. O. 19, r. 14.] Any condition precedent, the performance or occurrence of which is intended to be tested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be; and, subject thereto, an averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

Scope.—The true principle appears to be that wherever a condition precedent goes to the root of the cause of action it is always proper and safer to allege it, and the performance of it, or the excuse for non-performance of it, in the pleading and this rule only deals with the general allegation of the performance of all conditions and with minor matters, such as the lapse of a reasonable time, etc. *Yearly Practice*, p. 266; *Bullen and Leakes P. C.* 6th. Ed. 157. Condition precedent and its non-performance must be specified by defendant in pleading otherwise performance will be presumed. Plaintiff need not plead it. Pleadings if silent imply allegation of performance. A. I. R. 1924 Pat. 205=72 Ind. Cas. 1.

In a suit for damages for breach of contract averment of the willingness of the plaintiffs to perform their part of the contract, must be implied and the defendants if they contest that fact must raise the matter expressly in their pleadings. A. I. R. 1926 Lah. 318=7 Lah. 442=94 Ind. Cas. 304. Where service of notice is the foundation of the defendant's liability, the plaint must prove such service of notice, although an averment as regards service of notice in the plaint can be implied. 60 C. 733=37 C. W. N. 504=146 Ind. Cas. 671.

7. [R. S. C. O. 19, r. 16.] No pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.

Departure. Object and scope.—The effect of the rule is to prevent a plaintiff from setting up in his reply a new claim which is inconsistent with the cause of action alleged in the statement of claim. *Yearly Practice*, p. 270 citing *Earp v. Henderson*, (1876) 3 Ch. D. 254.

8. [R. S. C. O. 19, r. 20.] Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract.

Denial of contract. Scope.—If the defendant disputes the legality or sufficiency in point of law of the contract set up by the plaintiff, he must state specifically the grounds of his objection, and it is not sufficient to merely traverse any allegations the plaintiff may have made by way of anticipation. *Clarke v. Callow*, (1876) 46 L. J. C. P. 53; *Yearly Practice*, p. 274. But when it is brought to the notice of a Court that the consideration for a contract which it is, asked to enforce is in whole or in part an unlawful consideration such Court is bound to give effect to the fact thus brought to its notice, notwithstanding that the contract may appear upon the face of it to be perfectly legal contract, and that the unlawfulness of the consideration therefore was never pleaded by the defendant. 27 A. 266. In *Scott v. Brown*, L. R. (1892) 2 Q. B. D. 724. *Lindley L. J.* said: "No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is only brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the

illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the Court ought not to assist him". See also *Gedge v. Royal Exchange*, (1900) 2 Q. B. 214. "It is on the grounds of public policy" said *Truro L. C.* "namely, that those who violate the law must not apply to the law for protection." *Benyon v. Nettlefold*, 3 Mac. N. & G. 94.

9. [R. S. C. O. 19, r. 21.] Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as stated. Effect of document to be possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material.

Notes.—Precise words of the document need not be set out. All that is required that the effect of the document should be stated. *Darbyshire v. Leigh*, (1896) 1 Q. B. at 554=65 L. J. Q. B. 360; see also *Phillips v. Phillips*, (1878) 4 Q. B. D. 127.

10. [R. S. C. O. 19, r. 22.] Wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out circumstances from which the same is to be inferred. Malice, knowledge, etc.

Object and Scope.—Rule 2 provides that the material facts must be pleaded, but not the evidence by which they are to be proved. So also in the case of malice, fraudulent intention, knowledge or other condition of the mind of any person, the circumstances from which the same inferred is not to be stated. Mistake and *bona fide* belief and good faith cannot be presumed but must be distinctly alleged in the pleadings. A. I. R. 1931 Mad. 110=33 L. W. 78=130 Ind. Cas. 506. In an action for malicious prosecution, malice must be alleged and proved. *Mitchell v. Jenkins*, (1833) 5 B. & Ad. 588; *Hick v. Faulkner*, (1881) 8 Q. B. D. 167. The rule is the same as regards fraud or fraudulent intention. *Davy v. Garret*, (1878) 7 Ch. D. 489. Facts constituting fraud must be given in detail. A. I. R. 1921. Pat. 181=2 P. L. T. 401=61 Ind. Cas. 823; see also *Re Rica Gold Washing Co.*, (1879) 11 Ch. D. 36; 43, 47 (C. A.); *Redgrave v. Hurd*, (1881) 20 Ch. D. 1. 12; *Smith v. Chadwick*, (1881) 20 Ch. D. 27; *Wallingford v. Mutual Society*, (1880) 5 App. Cas. 685, 701. Allegation of fraud cannot be allowed to be made at a later stage of the suit. It must be made in pleadings. (1916) 1 M. W. N. 180=34 Ind. Cas. 1. Where knowledge or abuse of it is material, it should be stated expressly. *Vide Griffiths v. London Docks*, (1884) 13 Q. B. D. 259; *Osborne v. Chocqual*, (1896) 2 Q. B. 109.

11. [R. S. C. O. 19, r. 23.] Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material. Notice.

Scope.—Where notice is a part of the cause of action, it should be pleaded specifically. To exercise the power of re-sale by vendor giving of notice is condition precedent. Plaintiff therefore pleads and proves notice. A. I. R. 1924 Nag. 162=28 Ind. Cas. 1026; see also s. 80 *supra*; where notice should also be proved before the suit is decreed.

12. [R. S. C. O. 19, r. 24.] Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations or otherwise Implied contract, or relation. from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

Notes.—*Vide Brogden v. Metropolitan Co.*, (1877) 2 App. Cas. 666,

**13. [R. S. C. O. 19, p. 25.]** Neither party need in any pleading allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies upon the other side unless the same has first been specifically denied (*e.g.*, consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim).

**14. [Ss. 51, 115.]** Every pleading shall be signed by the party and his pleader (if any): Provided that where a Pleadings to be signed. party pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

*N.B.*—For insertion of new rule in Calcutta.—*Vide infra.*

**Application to Company.**—Order 29, rule 1, C.P. Code, relating to the procedure of signing and verification of pleadings in suits by or against corporation is only permissive in its nature, and Order 6, rule 14 applies to the case of companies as well as to private persons. Therefore a plaint in a suit by a company is properly signed if it complies with the provisions of Order 6, rule 14. 32 P. L. R. 655; see also 134 Ind. Cas. 1170=A. I. R. 1931 Sind 178.

**Sign.**—The procedure for signing is the same for *vakalatnama* affidavits and pleading. A. I. R. 1928 Mad. 175=54 M. L. J. 65=(1927) M. W. N. 885=51 M. 242=107 Ind. Cas. 804. Person named as co-plaintiff is a plaintiff though he does not sign or verify plaint. A. I. R. 1924 Pat. 104=3 Pat. 67=3 Pat. L. R. 169=5 Pat. L. T. 591=79 Ind. Cas. 5. This rule does not apply to suit on behalf of a limited company in which case the plaint must be signed and verified either by the Secretary or by a Director or other principal officer of the company. A. I. R. 1927 Sind 263=100 Ind. Cas. 450; see also A. I. R. 1930 Bom. 566=32 Bom. L. R. 1305=128 Ind. Cas. 557. Persons not signing plaint can be impleaded on application and joinder takes effect from date of plaint. 14 R. D. 335. Persons having instructions of real and ostensible plaintiff to sign is a duly authorized person. A. I. R. 1925 Lah. 144=75 Ind. Cas. 880. Person in jail unable to sign may authorise another to sign for him and plaint so signed is valid. 16 A. L. J. 64=40 A. 147=44 Ind. Cas. 28. Before accepting pleadings of *pardanashin* ladies as satisfactory proof of contents there must be strict proof that they have been read out and explained to them. 38 A. 627=31 M. L. J. 607=14 A. L. J. 1248=18 Bom. L. R. 1037=21 C. W. N. 130=43 I. A. 212 (P. C.)=36 Ind. Cas. 104. Signing plaint is matter of procedure and defect therein can be cured at any stage of litigation even in appellate Court as it is not a defect affecting merits of case. A. I. R. 1928 Pat. 51=8 P. L. T. 820=104 Ind. Cas. 747; see also A. I. R. 1923 Rang. 206=74 Ind. Cas. 100; 69 Ind. Cas. 422; A. I. R. 1922 Bom. 113=46 B. 150=23 Bom. L. R. 911=68 Ind. Cas. 217; 44 A. 147=44 Ind. Cas. 28; 25 Ind. Cas. 140; 54 C. 380=31 C. W. N. 397; 34 Bom. L. R. 628=138 Ind. Cas. 797=A. I. R. 1932 Bom. 367=A. L. R. 1932 Bom. 457; A. I. R. 1931 All. 507 (F. B.)=1931 A. L. J. 777=134 Ind. Cas. 26.

“Party to suit” in the rule would include even a corporation. 26 S. L. R. 158=A. I. R. 1931 Sind 178=134 Ind. Cas. 1170=A. L. R. 1932 Sind 195. There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies a plaint. The object of the signature to this plaint is to prevent as far as possible disputes as to whether the suit was instituted with the plaintiff’s knowledge and authority. Such authority may be established by other means besides the signature. This rule which requires a pleading to be signed by a party is merely a matter of procedure and it is the business of the Court to see that this provision is carried out. 26 S. L. R. 167=139 Ind. Cas. 114=A. I. R. 1932 Sind 9.

**15. [Ss. 51, 52, 115.]** (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

**Scope.**—Verification by plaintiff is ordinarily required. 6 W. R. 213. One partner can verify. 12 B. L. R. 35. A plaintiff may be duly authorized agent if he is well acquainted with the facts of the case. 4 B. 468; 26 A. 154; 48 P. R. 1866=9 A. 188; 1 P. L. T. 647=59 Ind. Cas. 282; A. I. R. 1927 Cal. 773=105 Ind. Cas. 564. Where pleading is filed on behalf of corporation, affidavit that person signing it is duly authorised in that behalf is necessary. A. I. R. 1927 Cal. 780=31 C. W. N. 1030. Reply to objection must also be verified. A. I. R. 1924 Rang. 273=3 Bur. L. J. 68=82 Ind. Cas. 973. All facts relating to suit which are within plaintiff's knowledge must be placed before the Court and plaintiffs must vouch for truth of allegations in plaint. 4 O. L. J. 522=42 Ind. Cas. 416. Where the verification states that certain statements are true according to the information and belief, the mere omission to disclose the sources of such information may affect the weight that is to be attached to that verification; but so long as the verification is made in strict accordance with Order 6, rule 15, it cannot be said to be faulty in form. A. I. R. 1934 Cal. 632=38 C. W. N. 551=59 C. L. J. 391. Where in a suit by a company registered under the Indian Companies Act the plaint was signed and verified by the Secretary and the plaint stated that he was authorized by the Articles of Association of the company to do all acts in connection with suits, and it appeared that the Articles of Association empowered the Secretary to verify pleadings: *Held* that the requirements of Order 29, rule 1 of the C. P. Code were satisfied and no affidavit testifying to the fitness of the Secretary to verify was required. 40 C. W. N. 930. Verified plaint is not legal evidence of its contents though a false verification may be the basis of a prosecution under s. 195, C. P. Code. 20 C. W. N. 1192=43 C. 1001=34 Ind. Cas. 235. A plaint with defective verification can always be amended and the defect remedied as the defect is one of form. A. I. R. 1924 Lah. 28=5 Lah. L. J. 217=74 Ind. Cas. 688; see also 87 Ind. Cas. 938=46 A. 637; 30 L. W. 499=A. I. R. 1929 Mad. 790; 104 Ind. Cas. 747=A. I. R. 1928 Pat. 51; A. I. R. 1931 All. 507=134 Ind. Cas. 26. Signing and verification of pleadings is a mere matter of procedure and the omission cannot affect jurisdiction of Court. 35 Bom. L. R. 554=A. I. R. 1933 Bom. 317=145 Ind. Cas. 641; see also A. I. R. 1932 Lah. 28; 134 Ind. Cas. 626. It is not necessary for a plaintiff to verify the paragraphs in the plaint that raise law points. A. I. R. 1932 Lah. 328=138 Ind. Cas. 335. Cause title is not covered by the verification. 58 C. 418=A. I. R. 1931 Cal. 458.

16. [R. S. C. O. 19, r. 27.] The Court may at any stage of the proceedings

order to be struck out or amended any matter  
Striking out pleadings. in any pleading which may be unnecessary or  
scandalous or which may tend to prejudice, embarrass or delay the fair trial  
of the suit.

**Scope.**—Parties should stick up to the pleadings as regards the fact to be proved at the trial; inconsistent rights claimed alternatively should be permitted except when they are destructive of each other. 22 C. L. J. 254=20 C. W. N. 310=31 Ind. Cas. 181. If Court is not moved under this rule at trial that party cannot contest it in second appeal. A. I. R. 1930 Mad. 814=32 L. W. 61=127 Ind. Cas. 292. Where defendant fails to supply particulars of his defence after being ordered by the Court to do so he runs the risk of having his defence struck out. A. I. R. 1930 Mad. 743=59 M. L. J. 22=53 M. 645=31 L. W. 387=126 Ind. Cas. 629. Contradictory pleas cannot be refused. A. I. R. 1926 Nag. 265=93 Ind. Cas. 926; see also A. I. R. 1924 Pat. 280=5 P. L. T. 49=(1923) Pat. 357=75 Ind. Cas. 433; 24 C. W. N. 145=30 C. L. J. 428=54 Ind. Cas. 700; 40 Ind. Cas. 488=3 O. L. J. 230; (1916) 2 M. W. N. 115=4 L. W. 126=36 Ind. Cas. 365. The jurisdiction under Order VI, rule 6, should be exercised with care and caution. A. I. R. 1925 Cal. 860=29 C. W. N. 670=88 Ind. Cas. 435.

**Unnecessary.**—As rule a pleading allegation should not be struck out merely because it is unnecessary unless it is also scandalous or embarrassing. *Knowles v. Roberts*, (1888) 38 Ch. D. 263, 270 (C. A.); *Rock v. Prussell*, 84 L. T. Jo. 45; *Yearly Practice*, p. 278. Order of the High Court refusing to direct certain allegations in defendants' written statement to be struck out as being unnecessary and scandalous is not a judgment. A. I. R. 1926 Mad. 64=49 M. L. J. 632=(1925) M. W. N. 75=91 Ind. Cas. 666.

**Scandalous.**—Allegations made in a pleading for the mere purpose of abusing or prejudicing the opposite party and any indecent or offensive matters are scandalous. *Christie v. Christie*, L. R. 8 Ch. 499; *Coyle v. Cuming*, 40 L. T. 455; *Yearly Practice*, p. 278. "It is well settled as pointed out in a work of high authority (*Daniell on Chancery Practice*, Vol. I, p. 336) that scandalous matter should be avoided in pleadings and any proceedings before the Court may be objected to for scandal and the scandalous matter ordered to be expunged. The Court may take action on its own motion or upon the application of the aggrieved party. But the question still remains what is the test to be applied to determine whether a matter is scandalous. There can be no doubt that allegations of dishonesty are scandalous, but they cannot be treated as such if they are relevant to the issue, for in the words of *Lord Justice Cotton in Fisher v. Own*, (8 Ch. D. 645 at p. 653) 'nothing can be scandalous which is relevant', or as put by *Lord Justice Brett in Millington v. Loring* (6 Q. B. D. 196), the mere fact that these paragraphs stated a scandalous fact does not make them scandalous. The sole question is as *Lord Chancellor Selborne* stated in *Christie v. Christie*, (L. R. 8 Ch. App. 499), whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleadings, which is material with reference to relief prayed." 14 C. W. N. 153 (156)=10 C. L. J. 414.

**Tend to prejudice and embarrass, etc.**—"The rule that the Court is not to dictate to the parties how they should frame their case is one that ought always to be preserved sacred. But the rule is of course subject to the modification and limitation that the parties must not offend against the rules of pleading which have been laid down by the law, and if a party introduces a pleading which is unnecessary, and tends to prejudice, embarrass and delay the trial of the action, it becomes a pleading which is beyond his right." *Per Bowen L. J. in Knowles v. Roberts*, 38 Ch. D. 263 (269). It is for the Judge to decide whether a pleading is embarrassing. *Russell v. Shilbs*, (1913) 2 K. B. 230. Where a plaint is verbose, extremely long and involved, and impossible to understand and does not allege clearly any fact which would show that the Judge had jurisdiction to hear the case at all the whole document should be struck out. 114 Ind. Cas. 906=1939 A. L. J. 495. Matter in pleading embarrassing fair trial of suit can be struck out by Court at any stage of the proceeding. 20 O. C. 192=4 O. L. J. 499=41 Ind. Cas. 903. Suit should be dismissed for inconsistent and embarrassing allegations in course of suit and not when occurring in plaint only. 2 Pat. L. W. 226=42 Ind. Cas. 620.

17. [R. S. C. O. 28. r. 1.] The Court may at any stage of the proceedings, allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

**Principle.**—"It is a well established principle that the object of Courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their right. I know of no kind of error or mistake which if not fraudulent or intended to over-reach, a Court ought not to correct, if it can be done without injustice to the other party. The Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendments as a matter of favour or grace. It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in a case is a matter of right". *Per Bowen L. J. in Copper v. Smith*, (1884) 26 Ch. D. 700 (C. A.); see also *Shoe Machinery v. Cutlan*, (1896) 1 Ch. D. 108. A prayer for amendment should be allowed unless the Court is satisfied that the party applying is acting *mala fide* or that his blunder has done some injury to his opponent which cannot be compensated for by costs or otherwise. *Tildesley v. Harper*, 10 Ch. D. 393; *Steward v. North Metropolitan Tramways* 16 Q. B. D. 178 180; *Australian Steam Navigation v. Smith*, 14 App. Cas. 318, 320; *In Re Trufort*, 53 L. T. 498, 500. So the rule is that however negligent or careless the first omission may have been, and however late the proposed amendment, the amendment should be allowed, if it can be made without injustice to the other side. And there is no injustice if the other side can be compensated by costs.



*Clarapade v. Commercial Union*, (1883) 32 W. R. 262, 263. So amendment can be allowed at any stage of the proceedings provided it is necessary for determination of real question in issue and there is no question of prejudice, the object being to administer justice and not to punish for mistakes. A. I. R. 1931 Nag. 20=130 Ind. Cas. 105 ; 7 O. W. N. 1195=A. I. R. 1931 Oudh 54 ; A. I. R. 1921 Lah. 220=3 Lah. L. J. 227=60 Ind. Cas. 502. An amendment is not objectionable where it does not change the subject-matter of the suit or is not otherwise objectionable. A. I. R. 1937 P. C. 42. "Amendment" is a very wide term and include addition of claims and claims which are not time-barred, can always be added if otherwise permissible. 156 Ind. Cas. 479=A. I. R. 1935 Pat. 365.

Where amendment is only asked for out of abundant caution because of a conflict of decision on the point it should be allowed as it does not injure the defendant and prevents plaintiffs being formally driven to a fresh suit on the same matter. A. I. R. 1934 Mad. 267=39 L. W. 476=1934 M. W. N. 478=148 Ind. Cas. 869. When a previous application for amendment has been dismissed on merits a second application on the same facts cannot be allowed. A. I. R. 1934 Sind 193. Where no new case is made in the application for amendment and where all thing is done is to change the history of the transaction, the prayer for amendment can be granted. A. I. R. 1934 Lah. 974=36 P. L. R. 264. Where the plaintiff prayed for amendment of his prayer without amending the cause of action, for saving his suit from being barred by limitation, his prayer can be granted. A. I. R. 1934 Rang. 266=152 Ind. Cas. 125. Where the Court compels the plaintiff to amend the plaint, only the plaintiffs can complain. 66 M. L. J. 315=A. I. R. 1934 Mad. 220=39 L. W. 354=1934 M. W. N. 1154. Where in a suit by members of joint Hindu family, there occurred omission to state that the suit was on behalf of the family, amendment should be allowed to insert the same. 1935 A. M. L. J. 11. There is no objection to amendments which just develop the original cause of action so long as they do not vary it. A. I. R. 1935 Mad. 137=154 Ind. Cas. 720=41 L. W. 37. Court has no right to direct an amendment of a plaint when it has no jurisdiction over the subject-matter of the plaint. A. I. R. 1935 All. 842=1935 A. L. J. 981=158 Ind. Cas. 516. The main point in considering whether leave should be granted to any party to amend his pleading is whether in the words of Order 6, rule 17, the amendment is necessary for the purpose of determining the real controversy between the parties. In this respect two complementary propositions arise : firstly, that the determination of the real questions in controversy is the prime object of the frame and settlement of the pleadings ; and on the other hand, that leave to amend should not be granted if the amendment would convert the case set up into another of a different and inconsistent character. The Court will not allow an amendment that would involve a complete change of forms in the defence A. I. R. 1935 Pat. 463=157 Ind. Cas. 764.

Scope—Order 6, rule 17, is considerably wider than the corresponding section of the old Code and the Court is given very wide power of discretion to allow amendment especially to avoid multiplicity of suits. 155 Ind. Cas. 1016=41 L. W. 429=1935 M. W. N. 56=A. I. R. 1935 Mad. 286. Under this rule amendment can always be allowed unless suit is changed or great inconvenience is caused to the defendant. A. I. R. 1930 Lah. 221=30 P. L. R. 645=119 Ind. Cas. 330 ; see also A. I. R. 1931 Oudh 54=7 O. W. N. 1195=130 Ind. Cas. 347 ; 24 C. W. N. 749=58 Ind. Cas. 665 ; 73 Ind. Cas. 748 ; 71 Ind. Cas. 452=48 A. 220=A. I. R. 1923 All. 112. Amendment for the purpose of administration of justice, of saving time and money, should be freely allowed. A. I. R. 1925 Sind 260=92 Ind. Cas. 1019 ; see also A. I. R. 1934 Lah. 1009=36 P. L. R. 253. All amendments necessary to decide points in controversy should be allowed. A. I. R. 1925 Sind 26=78 Ind. Cas. 817. If necessary plaint must be ordered to be amended but in no case plaint can be returned for amendment. A. I. R. 1921 Sind 166=17 S. L. R. 223=85 Ind. Cas. 893. Both original and Appellate Courts have full powers of amendment to decide questions in issue properly. 20 C. W. N. 1276=1 Pat. L. J. 393=35 Ind. Cas. 370. Court cannot compel the parties to amend their pleadings. 111 Ind. Cas. 787. The three chief conditions on which an amendment should ordinarily be allowed are (1) that the application should be *bona fide* (2) that no injustice is done to the otherside thereby, and (3) that the nature of the case is not changed. A. I. R. 1922 Cal. 255=35 C. L. J. 25=25 C. W. N. 73=65 Ind. Cas. 39 ; 45 C. 305=22 C. W. N. 611=47 Ind. Cas. 129 ; 85 Ind. Cas. 900=A. I. R. 1925 Mad. 950=22 L. W. 26 ; A. I. R. 1931 Cal. 76=52 C. L. J. 357. Amendment necessary to determine real questions in controversy

should be allowed. A. I. R. 1931 Oudh 54 ; A. I. R. 1926 Oudh 508=94 Ind. Cas. 875 ; A. I. R. 1925 Sind 72=78 Ind. Cas. 817. Amendment if causes such injury to the defendant as cannot be compensated by costs cannot be allowed. 18 Bom. L. R. 1=40 B. 153=33 Ind. Cas. 264. Amendment has retrospective effect from the date of the application. A. I. R. 1927 Nag. 95=98 Ind. Cas. 658.

Suit against a dead person is a nullity and no question of amendment arises. 42 InJ. Cas. 539. The effect of abandonment of claim is as if the suit had never been commenced in respect of such claims. 12 Bur. L. T. 155=9 L. B. R. 275=51 Ind. Cas. 376. Right to object to an amendment is waived if not taken in the written statement. 20 C. W. N. 686=32 Ind. Cas. 752. Amendment raising title acquired after the date of the plaint cannot be disallowed if otherwise admissible. A. I. R. 1925 Mad. 1021=22 L. W. 120=91 Ind. Cas. 503 ; see also 90 Ind. Cas. 881=A. I. R. 1926 Mad. 6=49 M. L. J. 479=22 L. W. 287=(1925) M. W. N. 622 ; A. I. R. 1926 Mad 754=22 L. W. 618=95 Ind. Cas. 267 ; A. I. R. 1931 Nag. 10=26 N. L. R. 348=124 Ind. Cas. 244 ; A. I. R. 1921 Lah. 220=3 Lah. L. J. 227 ; 67 Ind. Cas. 894 ; 31 Ind. Cas. 7=9 S. L. R. 61. Amendment allowing the plaintiff to sue on a cause of action arising subsequent to the suit should not be allowed in second appeal. 65 Ind. Cas. 214.

Amendment setting up altogether a different case, cannot be allowed. A. I. R. 1923 P. C. 21=44 M. L. J. 476=2 Pat. 230=4 P. L. T. 219=50 I. A. 58=37 C. L. J. 369=27 C. W. N. 901=71 Ind. Cas. 769. When the amendment entails a new trial, it should be disallowed. 120 Ind. Cas. 163. Suit for rent based on lease cannot be changed into a suit for damages for use and occupation. A. I. R. 1927 Mad. 182=52 M. L. J. 399=99 Ind. Cas. 977.

The plaintiff's suit was one for recovery of a sum of Rs. 307 odd, said to be due on account of certain business transaction between the parties from 11-12-26 to 11-3-29 ; and after the original *ex parte* decree has been set aside and the suit restored the plaintiff made an application to amend his plaint in answer to the written statement. In the written statement it had been pleaded that some of the items named in the plaint were barred by limitation, and the plaintiff therefore applied to amend the plaint with reference to the acknowledgment said to have been made on 27-7-29 : *Held* that as the proposed amendment itself did not alter the nature of the suit, the amendment should be allowed. 55 A. 256=A. I. R. 1933 All. 374=145 Ind. Cas. 859=(1933) A. L. J. 768. So where fundamental character of the suit is not changed, amendment should be allowed. A. L. R. 1933 Rang. 247=A. I. R. 1933 Rang. 247. The powers of the Court under the C. P. Code to allow amendment are very wide and leave to amend should always be given unless the Court is satisfied that the party applying for leave is acting *mala fide*, or that by his blunder he has done some injury to the opponent which cannot be compensated for by costs or otherwise. Where therefore it is conceded that the proposed amendment would not change the character of the suit, nor would it cause irreparable injury to the defendant and all the facts necessary for the decision of the case on the proposed amendment are before the Court, the amendment of the plaint should be allowed. A. I. R. 1934 Lah. 245=33 P. L. R. 694=139 Ind. Cas. 441. The amendment of a plaint relates back to the date of institution of the suit with regard to a question of limitation. 143 Ind. Cas. 504=A. I. R. 1933 Mad. 153. Amendment relates back to the date of the suit but fresh claim does not. A. I. R. 1934 Lah. 412. Party receiving cost for amendment of plaint cannot challenge the order. A. I. R. 1934 Nag. 163. Amendment of plaint before trial has begun should ordinarily be allowed. A. I. R. 1934 Cal. 102. General power of allowing amendments may be applied to application to sue *in forma pauperis*. A. I. R. 1934 Lah. 231. Amendment of prayer by way of abundant caution due to conflict of opinion, when the defendant is not injured should be allowed. A. I. R. 1934 Mad. 267. Prayer for consequential relief in a declaratory suit should not be allowed at the appellate stage. A. I. R. 1934 Lah. 235.

Section 5 of the Provincial Insolvency Act makes the provisions of s. 6, rule 17, C. P. Code, applicable to proceedings in insolvency. 67 M. L. J. 924. In a suit on a promissory-note, claiming exemption from limitation on the ground of a part-payment, the Court has power under this rule to allow the plaint to be amended by addition of an acknowledgment of liability as a further ground of exemption. 67 M. L. J. 921.

**Granting Amendment is discretionary.**—Court has discretion to grant amendment at any stage. A. I. R. 1927 Lah. 103=8 Lah. 257=9 Lah. L. J. 25=28 P. L. R. 15=99 Ind. Cas. 770 ; 87 Ind. Cas. 950=A. I. R. 1925 Oudh 692 ; 79 Ind. Cas. 911=A. I. R. 1925 Nag. 62 ; 45 Ind. Cas. 649 ; 32 Ind. Cas. 624=(1916)

1 M. W. N. 171. But the discretion of the Court must be exercised judicially and not arbitrarily. A. I. R. 1930 Nag. 295=128 Ind. Cas. 407 ; 9 Bur. L. T. 150=8 L. B. R. 418=36 Ind. Cas. 5. No hard and fast rule can be laid down for granting amendments. It depends upon the circumstances of each case and with due regard to the interest of the other party and upon the fact that unnecessary litigation should be avoided. 9 S. L. R. 61=31 Ind. Cas. 7. Court may in its discretion allow an amendment seeking to change the nature of the suit. A. I. R. 1923 Nag. 385=24 Bom. L. R. 924=47 B. 104=69 Ind. Cas. 207. Amendment should always be allowed unless it be *mala fide* even if defendant is grossly careless. A. I. R. 1929 Rang. 33=117 Ind. Cas. 563 ; see also A. I. R. 1928 Nag. 203=109 Ind. Cas. 293. Order to pay costs of amendment in cash against pauper plaintiff is not proper. A. I. R. 1922 Bom. 385=24 Bom. L. R. 924=47 B. 104=69 Ind. Cas. 207. Amendment which does not change the nature of the suit and which does not cause any prejudice to the defendant should always be allowed. 84 P. R. 1919=6 P. L. R. 1919=52 Ind. Cas. 464. A Court can allow amendment on payment of Court-fee and cost to the defendant within a fixed time. But in such a case the succeeding Judge cannot extend the time for payment of Court-fee and cost. 140 Ind. Cas. 373=36 C. W. N. 869.

**At any stage of the proceedings.**—Under this rule amendment in a proper case may be allowed at any stage of the proceedings *i.e.*, before, at or trial or even after judgment or in appeal. After disposal of appeal, amendment of plaint was allowed by adding a new claim for *mesne profits*. 45 Ind. Cas. 649 Court may allow amendment of objection petition even after expiry of the time allowed for the same. A. I. R. 1926 Mad. 396=24 L. W. 213=92 Ind. Cas. 100. This rule gives very wide powers of amendment for the purpose of determining real question in controversy and this can be done at any stage of the proceedings. A. I. R. 1931 Nag. 20=26 N. L. R. 359=130 Ind. Cas. 105 ; see also A. I. R. 1930 Cal. 534=57 C. 398=127 Ind. Cas. 772 ; A. I. R. 1923 Oudh 291=27 O. C. 231=11 O. L. J. 613=79 Ind. Cas. 1033 ; A. I. R. 1924 Mad. 883=47 M. L. J. 540=82 Ind. Cas. 492 ; 29 C. L. J. 206=50 Ind. Cas. 49 ; 36 C. W. N. 112.

Amendment setting out an inconsistent case at the final stage cannot be allowed. 22 C. L. J. 309=31 Ind. Cas. 391 ; see also 36 Ind. Cas. 66=3 O. L. J. 227 ; A. I. R. 1930 Cal. 534=57 C. 398=127 Ind. Cas. 772 ; 45 Ind. Cas. 894 ; 47 Ind. Cas. 906 ; 51 Ind. Cas. 570=13 S. L. R. 1 ; A. I. R. 1921 Lah. 156=3 Lah. L. J. 437 ; see also 67 M. L. J. 918. In an action for damages amendment of plaint by enhancing claim is permissible at any stage before trial commences. 7 L. W. 415=23 M. L. T. 312=45 Ind. Cas. 566. Amendment seeking to change the nature of the suit altogether cannot be allowed at the judgment stage. A. I. R. 1921 Lah. 53=3 Lah. L. J. 184=69 Ind. Cas. 132 ; see also 5 Pat. L. J. 164=46 Ind. Cas. 929 ; A. I. R. 1929 Cal. 223=26 C. W. N. 499=69 Ind. Cas. 963 ; A. I. R. 1923 Mad. 245=31 M. L. T. 449=70 Ind. Cas. 335 ; A. I. R. 1923 Lah. 675=75 Ind. Cas. 740 ; A. I. R. 1925 Mad. 441=21 L. W. 224=86 Ind. Cas. 747. Alternative claim sought to be set up in the last stage, was disallowed by the Privy Council though it had power to do so. A. I. R. 1925 P. C. 169=49 M. L. J. 238=(1925) M. W. N. 532=41 C. L. J. 450=47 A. 459=27 Bom. L. R. 853 (P. C.)=87 Ind. Cas. 292. Amendment at a late stage entailing retrial cannot be allowed. A. I. R. 1928 Lah. 599=9 Lah. 289=29 P. L. R. 477 ; see also A. I. R. 1928 Lah. 375=9 Lah. 588=30 P. L. R. 41=110 Ind. Cas. 384. Amendment of plaint if not sought in earlier stages, cannot be allowed in second appeal. A. I. R. 1928 Lah. 32=9 Lah. L. J. 334=109 Ind. Cas. 320 ; see also 10 Lah. L. J. 169=113 Ind. Cas. 87 ; A. I. R. 1927 Bom. 521=51 B. 749=29 Bom. L. R. 1071=104 Ind. Cas. 685 ; A. I. R. 1925 All. 355=47 A. 450=23 A. L. J. 198=87 Ind. Cas. 55. Amendment in written statement will be disallowed after plaintiff has called all his evidence or issues of fact and has closed his case. But where a new defence of law has been necessary owing to the case of the plaintiff, it may be allowed even after the plaintiff has closed his case. A. I. R. 1930 Rang. 140=7 Rang. 800=121 Ind. Cas. 803. Amendment cannot be allowed by the lower Court after a decree has been passed. The proper course is to apply for review. But it is different with an Appellate Court. A. I. R. 1924 Bom. 166=25 Bom. L. R. 888=77 Ind. Cas. 171. Where a party was given an opportunity to amend but did not take advantage of it, he cannot be allowed afterwards to do so. 60 Ind. Cas. 376. An amendment during argument in High Court was disallowed. A. I. R. 1933 Lah. 712=34 P. L. R. 5=14 Lah. 306. A belated amendment can be allowed only on condition of payment of costs by the petitioners to the opposite party and the latter is

entitled to an opportunity to adduce evidence on the new case adopted for the petitioner. A. I. R. 1935 All. 273=1934 A. L. J. 1129=56A. 428. Party accepting the cost cannot challenge the order of amendment. A. I. R. 1934 Nag. 196=30 N. L. R. 347. Delay by itself is not an adequate reason for refusing permission to amend a pleading. The significance of delay lies not in the quantity of the time that has elapsed but in what has transpired during that time. A. I. R. 1935 Pat. 463=156 Ind. Cas. 764.

**Where Amendment is prejudicial to defendant.**—Amendment can be permitted at any stage provided no injustice, other than which can be compensated for by costs, is caused to the other side. 61 Ind. Cas. 328=3 U. P. L. R. (Lah) 44; A. I. R. 1921 Lah. 367=85 P. L. R. 1922=67 Ind. Cas. 335; A. I. R. 1925 Nag. 155=82 Ind. Cas. 177; 77 Ind. Cas. 471=A. I. R. 1923 Lah. 305; 75 Ind. Cas. 549=A. I. R. 1923 Sind 17; 64 Ind. Cas. 305 (Cal); A. I. R. 1928 Oudh 305=5 O. W. N. 459=111 Ind. Cas. 360. The object of this rule is to administer justice properly and hence amendment whenever necessary can be allowed even without formal application unless prejudice to the defendant is thereby caused. 116 Ind. Cas. 884. Amendment can be allowed where the defendant is not taken by surprise and opportunity is given to him to contest the fresh allegations. 113 Ind. Cas. 757. Where a legal right has accrued to the defendant, amendment seeking to take away that right cannot be allowed. But in special cases exception to this rule may also be made. A. I. R. 1925 Cal. 67=41 C. L. J. 49=28 C. W. N. 1009; 78 Ind. Cas. 905=19 S. L. R. 26=A. I. R. 1924 Sind 144; 78 Ind. Cas. 846=A. I. R. 1925 Sind 173; 35 Bom. L. R. 929=A. I. R. 1933 Bom. 450. New cause of action should not be allowed to be introduced if thereby the defendant is deprived of his plea of limitation. A. I. R. 1925 Rang. 264=4 Bur. L. J. 110=90 Ind. Cas. 639; see also A. I. R. 1926 Mad. 827=23 L. W. 771=(1926) M. W. N. 392=51 M. L. J. 414=96 Ind. Cas. 700; A. I. R. 1927 Cal. 733=46 C. L. J. 51=104 Ind. Cas. 151. Where there is no surprise on the part of the defendant, amendment may be allowed. 139 Ind. Cas. 441=39 P. L. R. 694.

**New case.**—Amendment should be disallowed where it altogether changes the nature of the relief claimed or purports to substitute one cause of action for another. A. I. R. 1929 Lah. 449=11 Lah. 306=120 Ind. Cas. 279; A. I. R. 1929 Rang. 179=7 Rang. 140=117 Ind. Cas. 577; (1927) M. W. N. 781=110 Ind. Cas. 775=A. I. R. 1928 Mad. 828. So amendment getting up a new and an inconsistent case is to be disallowed. A. I. R. 1930 Mad. 325=30 L. W. 557=120 Ind. Cas. 887; see also 130 Ind. Cas. 105=26 N. L. R. 359=A. I. R. 1931 Nag. 20; A. I. R. 1930 Lah. 278=11 Lah. L. J. 553=31 P. L. R. 340=120 Ind. Cas. 492; A. I. R. 1929 Lah. 710=119 Ind. Cas. 429; A. I. R. 1927 Mad. 839=103 Ind. Cas. 670; A. I. R. 1922 P. C. 249=24 Bom. L. R. 682=30 M. L. T. 28=48 I. A. 214=48 C. 832=63 Sind 914=4 U. B. R. 30=(1921) M. W. N. 316 (P. C.); 71 Ind. Cas. 270=(1921) M. W. N. 639=41 M. L. J. 525; (1919) 3 U. B. R. 171=52 Ind. Cas. 961; A. I. R. 1933 Ind. Cas. 279 (F. B.)=146 Ind. Cas. 77; A. I. R. 1934 Oudh 118=11 O. W. N. 118. Amendment introducing new cause of action necessitating a new trial should be disallowed. A. I. R. 1928 Bom. 516=53 B. 640=30 Bom. L. R. 1300=115 Ind. Cas. 400; A. I. R. 1931 Lah. 260. Where plaintiff had every opportunity to amend their pleadings before but failed to do so, amendment resulting in totally different case, specially at a late stage cannot be allowed. A. I. R. 1928 Lah. 933=10 Lah. L. J. 534=114 Ind. Cas. 441. Amendment can be allowed where there is no change in the cause of action. A. I. R. 1927 Mad. 504=1927 M. W. N. 175=38 M. L. T. 221. Original plea of inability to perform contract cannot be allowed to be changed into a plea of denial of contract. A. I. R. 1927 Mad. 973=(1927) M. W. N. 668=39 M. L. T. 613=105 Ind. Cas. 563. Amendment altering the claim to one for a refund of losses paid upon wagering contract cannot be allowed. A. I. R. 1922 Lah. 408=5 P. W. R. 1923=67 Ind. Cas. 959. Usufructuary mortgagee failing to prove the genuineness of deed cannot be allowed to put in appeal claim of subrogation (1917) M. W. N. 769=35 M. L. J. 315=43 Ind. Cas. 28. Amendment seeking to modify but not to change the original cause of action can be allowed. A. I. R. 1925 Mad. 188=80 Ind. Cas. 278. If in a redemption suit alleged mortgage is not proved, amendment seeking to prove different mortgage cannot be allowed. 96 Ind. Cas. 304. Conversion of suit for specific performance of contract into one for damages in respect of prior contract amounts to introducing a new case and hence cannot be allowed. A. I. R. 1922 P. C. 249=24 Bom. L. R. 682=30 M. L. T. 28=48 I. A. 214=48 C. 832=4 U. B. R. 30=63

Ind. Cas. 914 (P. C.). But suit on promissory-note can be allowed to be changed into one on original consideration, oral application being sufficient for the same. 52 Ind. Cas. 758 ; see also 35 Bom. L. R. 965=A. I. R. 1933 Bom. 476. Claim for share in ancestral property can be changed into one of maintenance in second appeal, A. I. R. 1923 Nag. 151=6 N. L. J. 81=19 N. L. R. 69=71 Ind. Cas. 566. Application for amendment will be refused in second appeal on the ground that if granted, plaintiff would start afresh on allegations inconsistent with original plaint. 46 C. 168=27 C. L. J. 299=45½ Ind. Cas. 241. Amendment involving claim for additional relief, addition of new parties, and changed in the nature of case, cannot in second appeal be allowed. A. I. R. 1923 Pat. 590=2 Pat. 925=(1923) Pat. 263=1 Pat. L. R. 363=5 P. L. T. 193=74 Ind. Cas. 758. Suit as principal contracting party cannot be changed into one as agent of defendants. A. I. R. 1925 Bom. 248=27 Bom. L. R. 277=87 Ind. Cas. 481. A suit for dissolution of partnership and rendition of accounts cannot be allowed to be converted into a suit for remuneration as an agent or servant of defendant. A. I. R. 1934 Lah. 38=148 Ind. Cas. 253. Where a suit for injunction is not maintainable for want of a prayer for a declaration and the plaintiff is willing to amend the plaint his prayer should be granted even at the appellate stage on payment of cost. 67 M. L. J. 245=A. I. R. 1934 Mad. 600=1934 M. W. N. 1024. Where if the plea had been raised earlier, defendant could not have objected to it, amendment should be allowed so as to include that plea. A. I. R. 1925 Sind 241=19 S. L. R. 12=86 Ind. Cas. 357. An amendment introducing a new or inconsistent case should not be allowed. 34 Ind. Cas. 541 ; A. I. R. 1927 Lah. 771=101 Ind. Cas. 280. Claim originally based on gift cannot be allowed to be changed into claim based on inheritance. A. I. R. 1923 Pat. 481=4 P. L. T. 397=71 Ind. Cas. 897. Amendment sought by the legal representative of the deceased plaintiff to be introduced, amounts to assertion of title hostile to that of the deceased cannot be allowed. A. I. R. 1922 Mad. 49=(1922) M. W. N. 42=42 M. L. J. 43=15 L. W. 72=68 Ind. Cas. 703. Where the effect of the amendment is to introduce new cause of action in appeal, leave should be refused. 14 Lah. 640=34 P. L. R. 767=A. I. R. 1933 Lah. 676=144 Ind. Cas. 390. The Court will refuse amendment as a rule if amendment introduces a totally new and inconsistent case which will require further evidence to be adduced by the party. 33 Bom. L. R. 1385=A. I. R. 1931 Bom. 590 ; see also 60 M. L. J. 713=A. I. R. 1931 Mad. 1=33 L. W. 213=132 Ind. Cas. 311 ; 32 P. L. R. 278=A. I. R. 1931 Lah. 595=133 Ind. Cas. 646 ; A. I. R. 1931 Lah. 260=134 Ind. Cas. 110. Suit for dissolution of partnership and rendition of accounts cannot be changed for remuneration of defendants. A. I. R. 1934 Lah. 38. Application for amendment at a late stage seeking to introduce new case should be rejected. A. I. R. 1934 Oudh 118.

**Alternative case.**—Merely because an amendment sets up an alternative case, is no ground for its refusal. A. I. R. 1927 Mad. 212=38 M. L. T. 83=98 Ind. Cas. 458 ; see also 33 Bom. L. R. 1385=A. I. R. 1931 Bom. 590. Amendment can be allowed where the change is only in the nature of the liability to pay the debts. A. I. R. 1931 Mad. 369=122 Ind. Cas. 174. In a suit for specific performance or in the alternative for damages, amendment can be allowed as to giving up of a claim for specific performance. A. I. R. 1922 Sind 36 ; see also 32 C. W. N. 953=A. I. R. 1928 P. C. 208=52 B. 597=53 I. A. 360=30 Bom. L. R. 292=41 Ind. Cas. 413=26 A. L. J. 1220. In a suit on unstamped *hundi* amendment as a suit on original consideration should be allowed. A. I. R. 1922 Lah. 394=10 P. W. R. 1922 ; see also A. I. R. 1927 Mad. 378=99 Ind. Cas. 625 ; A. I. R. 1933 Nag. 57 ; A. I. R. 1930 Lah. 559=125 Ind. Cas. 329 ; A. I. R. 1934 Cal. 554=38 C. W. N. 488=61 C. 433=150 Ind. Cas. 433 ; see also 1934 A. L. J. 989 ; 38 C. W. N. 1146=60 C. L. J. 91. In a suit for possession of certain plots and injunction in respect of the rest, amendment seeking to add the prayer as to the possession of latter plots also, should be granted. A. I. R. 1927 Oudh 513=4 O. W. N. 975=105 Ind. Cas. 784. In a suit on registered mortgage bond afterwards found to be not registered, amendment seeking personal decree should be allowed. A. I. R. 1927 Rang. 154=5 Rang. 115=6 Bur. L. J. 49=101 Ind. Cas. 628. Suit on mortgage bond can be allowed to be changed into a suit on running account. A. I. R. 1926 Mad. 424=(1927) M. W. N. 256=97 Ind. Cas. 936=24 L. W. 400. Suit for pre-emption based on custom should be decreed on the basis of contract not set up and amendment for the same should not be allowed in second appeal. A. I. R. 1922 All. 5=20 A. L. J. 15=65 Ind. Cas. 242 ; see also A. I. R. 1925 Oudh 523=12 O. L. J. 253=87 Ind. Cas. 356. Where the plaintiff brings a suit on a promissory-note, which he finds, is improperly stamped and so

inadmissible in evidence, he cannot be allowed at the trial of the suit to amend his plaint so as to entitle him to sue on the original cause of action, that being a cause of action quite distinct from that based upon the promissory-note. 138 Ind. Cas. 783=34 Bom. L. R. 643=A. I. R. 1932 Bom. 394; but see A. I. R. 1931 Oudh 54=7 O. W. N. 1195=130 Ind. Cas. 347; A. I. R. 1931 Mad. 533=1931 M. W. N. 390=131 Ind. Cas. 1; A. I. R. 1934 Cal. 554.

**Claim barred by limitation.**—Amendment seeking to introduce time-barred claims should be disallowed but exception may be made under special circumstances. 39 L. L. J. 195=28 M. L. T. 149=18 A. L. J. 1095=22 Bom. L. R. 1370=25 C. W. N. 289=47 I. A. 255=48 C. 110=2 U. P. L. R. (P. C.) 124=57 Ind. Cas. 606; 1932 M. W. N. 1116=140 Ind. Cas. 500=36 L. W. 716=63 M. L. J. 725; see also 50 C. 878=27 C. W. N. 1007=79 Ind. Cas. 287; 27 N. L. R. 291=A. I. R. 1931 Nag. 74; A. I. R. 1929 Bom. 51=30 Bom. L. R. 1588=114 Ind. Cas. 262; 31 M. L. J. 688=4 L. W. 456=(1916) 2 M. W. N. 362=38 Ind. Cas. 720. Amendment causing prejudice such as one which seeks to deprive defendant of right acquired by virtue of limitation cannot be allowed. A. I. R. 1921 Pat. 485=2 P. L. T. 679=64 Ind. Cas. 125; see also A. I. R. 1926 Cal. 189=87 Ind. Cas. 218; 10 Rang. 74=137 Ind. Cas. 39=A. I. R. 1932 Rang. 26; A. I. R. 1928 Mad. 828=(1927) M. W. N. 284=110 Ind. Cas. 75; A. I. R. 1925 Rang. 49=2 Rang. 414=84 Ind. Cas. 295; A. I. R. 1933 Lah. 774=144 Ind. Cas. 322; A. I. R. 1931 All. 160=(1931) A. L. J. 56=130 Ind. Cas. 702; A. I. R. 1931 Nag. 74=138 Ind. Cas. 417; 22 C. W. N. 104=27 C. L. J. 403=43 Ind. Cas. 893; 43 Ind. Cas. 122; 61 M. L. J. 316=A. I. R. 1931 Mad. 497; 137 Ind. Cas. 710=34 Bom. L. R. 35=A. I. R. 1932 Bom. 117; A. I. R. 1935 Pat. 86. Question of limitation does not arise where only misdescription of party is sought to be corrected. A. I. R. 1923 Nag. 96=71 Ind. Cas. 39. Ordinarily an application for amendment should not be granted where it deprives the opposite party of raising the plea of limitation but under special circumstances it can be allowed. A. I. R. 1934 Sind 33=148 Ind. Cas. 974; see also 38 C. W. N. 488=A. I. R. 1934 Cal. 554=61 C. 433=150 Ind. Cas. 982. Where on the date of the application for leave to amend the plaint, the claim in the suit was barred by limitation, the Court has power to make amendments in the plaint under the special circumstances of the case. 165 Ind. Cas. 503=44 L. W. 267=1936 M. W. N. 486=A. I. R. 1936 Mad. 632. Where original debt agreed to be paid by instalments is subsequently comprised in a promissory-note payable on demand even though the suit on promissory-note is barred by limitation, the plaint may be amended so as to base the claim on the basis of original debt because the original debt can be sued upon irrespective of promissory-note and need no new facts for its support. A. I. R. 1936 Mad. 785=165 Ind. Cas. 301=1936 M. W. N. 912=71 M. L. J. 250 (F. B.); see also A. I. R. 1936 Rang. 508=14 Rang. 383=165 Ind. Cas. 810; 158 Ind. Cas. 533=A. I. R. 1935 Rang. 282; 39 C. W. N. 1235; 165 Ind. Cas. 503=44 L. W. 267=1936 M. W. N. 486=A. I. R. 1936 Mad. 632=71 M. L. J. 166.

**Changing nature of suit.**—Amendment changing nature of suit cannot be allowed. 35 Ind. Cas. 91; see also 41 Ind. Cas. 749; 45 Ind. Cas. 173=11 S. L. R. 103; 92 Ind. Cas. 253=A. I. R. 1926 Rang. 49=3 R. 483; A. I. R. 1925 All. 705=89 Ind. Cas. 103; 88 Ind. Cas. 65=A. I. R. 1925 Mad. 794=22 L. W. 318=48 M. L. J. 489; A. I. R. 1921 Sind 159 (F. B.)=16 S. L. R. 207=83 Ind. Cas. 360; A. I. R. 1924 Mad. 292=42 M. 203=45 M. L. J. 667=(1923) M. W. N. 825=19 L. T. 37=33 M. L. T. 146=79 Ind. Cas. 510; 57 Ind. Cas. 426=22 Bom. L. R. 735=44 B. 515; 51 Ind. Cas. 435; 59 Ind. Cas. 63; A. I. R. 1926 Lah. 453=27 P. L. R. 168=93 Ind. Cas. 871; A. I. R. 1933 Pat. 443; A. I. R. 1931 Mad. 330=60 M. L. J. 315=130 Ind. Cas. 766=(1931) M. W. N. 497. Amendment seeking to alter the nature of the suit cannot at least be allowed in Privy Council. A. I. R. 1927 P. C. 18=6 Pat. 323=54 I. A. 55=25 A. L. J. 74=(1927) M. W. N. 69=8 P. L. T. 98=38 M. L. T. (P. C.) 74=31 C. W. N. 469=52 M. L. J. 402=45 C. L. J. 313=25 L. W. 635=29 Bom. L. R. 796 (P. C.)=100 Ind. Cas. 56. Amendment which does not seek for change of cause of action but in the date of the cause of action should be allowed. A. I. R. 1926 Mad. 128=(1925) M. W. N. 781=92 Ind. Cas. 330; see also A. I. R. 1924 Oudh 385=11 O. L. J. 297=81 Ind. Cas. 484. To try to disclose further details of facts which go to support the same cause of action is not introducing fresh cause of action and hence there is no question of prejudice of defendant on point of limitation. 78 Ind. Cas. 234. Where there is no change in the nature of the suit amendment may be allowed. A. I. R. 1932 Nag. 157=29 N. L. R. 115=A. I. R. 1932 Nag. 82; see also 17 R. D. 7.

**Amendment to avoid multiplicity of suits.**—Amendment to avoid multiplicity of suits may be allowed. A. I. R. 1925 Cal. 944=86 Ind. Cas. 615 ; 56 Ind. Cas. 115 ; A. I. R. 1922 Oudh 266=9 O. L. J. 359=68 Ind. Cas. 986 ; 71 Ind. Cas. 452=A. I. R. 1923 All. 112=45 A. 220 ; A. I. R. 1925 Rang. 282=4 Bur. L. J. 141=3 Rang. 183=89 Ind. Cas. 425 ; 87 Ind. Cas. 1055=A. I. R. 1925 Oudh 718=64 Ind. Cas. 99 ; 106 Ind. Cas. 838=39 M. L. T. 459=A. I. R. 1928 Mad. 2=53 M. L. J. 647 ; A. I. R. 1928 Mad. 828=(1927) M. W. N. 781=110 Ind. Cas. 775 ; 124 Ind. Cas. 244 ; A. I. R. 1930 Mad. 47=30 L. W. 507=124 Ind. Cas. 208. Amendment which has the effect of shortening the litigation should be allowed. A. I. R. 1925 Nag. 195=78 Ind. Cas. 570.

**Amendment to correct mistake.**—Mistake of name of a party can be corrected even in appeal. A. I. R. 1921 Sind 63=24 S. L. R. 478=131 Ind. Cas. 718. Amendment seeking to correct *bona fide* mistake made however negligently or carelessly can be allowed provided injustice is not done thereby to the other side. 67 Ind. Cas. 335 ; see also A. I. R. 1921 Mad. 664=70 Ind. Cas. 284 ; A. I. R. 1925 Nag. 9=78 Ind. Cas. 234 ; A. I. R. 1924 Rang. 249=2 Rang. 66=81 Ind. Cas. 465 ; A. I. R. 1928 Nag. 203=109 Ind. Cas. 293 ; 41 C. L. J. 511=A. I. R. 1925 Cal. 922=88 Ind. Cas. 1029. Where a mistake was discovered after the written statements were filed whereupon plaintiff applied to amend the plaint as to give cause of action and the facts of this clearly show that it was necessary for the determination of the suit, amendment was allowed. A. I. R. 1930 All. 474=126 Ind. Cas. 13. If in a passing off action if the omission to refer to fraud be through oversight, necessary amendment ought to be allowed. A. I. R. 1928 Mad. 759=28 L. W. 367=54 M. L. J. 644=110 Ind. Cas. 763. Amendment of a plea omitted by mistake should be allowed. A. I. R. 1927 Cal. 477=100 Ind. Cas. 469 ; A. I. R. 1926 Nag. 385=95 Ind. Cas. 294. Amendment taking away defendant's legal right, to plead bar of limitation should not be allowed unless there are special considerations. A. I. R. 1924 Sind 144=19 S. L. R. 262=78 Ind. Cas. 905. Suit upon pro-note can be changed into a suit on transaction referred to in the document, it being a mere technical error. 71 Ind. Cas. 968. In a redemption suit on one mortgage amendment which seeks relief on another mortgage cannot be allowed unless the mistake is caused due to the defendant. (1918) M. W. N. 139=7 L. W. 284=44 Ind. Cas. 447. Correction of dates in the plaint can be allowed on the ground of mistake. 144 Ind. Cas. 250=A. I. R. 1933 Sind 131.

**Wrong description.**—Plaint can be amended if the property in the suit is wrongly described. A. I. R. 1926 Nag. 313=93 Ind. Cas. 103 ; see also A. I. R. 1922 All. 81=20 A. L. J. 159=66 Ind. Cas. 208. So also where the plaint is only one of misdescription of party amendment should be allowed. A. I. R. 1925 Lah. 441=6 Lah. 252=7 Lah. L. J. 410=26 P. L. R. 437=89 Ind. Cas. 279 ; see also A. I. R. 1923 Bom. 453=47 B. 785=25 Bom. L. R. 513=73 Ind. Cas. 1027 ; 35 C. W. N. 432=134 Ind. Cas. 1200=A. I. R. 1931 Cal. 770 ; A. I. R. 1929 Nag. 261=117 Ind. Cas. 257 ; A. I. R. 1928 Bom. 191=30 Bom. L. R. 117=109 Ind. Cas. 99 ; 24 S. L. R. 478=131 Ind. Cas. 718=A. I. R. 1931 Sind 63 ; 34 Bom. L. R. 1410. Where minority of the plaintiff is discovered after an objection by the defendant, plaint should be allowed to be amended. A. I. R. 1924 Lah. 157=69 Ind. Cas. 401. Where a major sues as minor and on the mistake being pointed out prays for amendment of the plaint, the amendment can be allowed only if the party was under a *bona fide* mistake. 136 Ind. Cas. 710=33 P. L. R. 263=A. I. R. 1932 Lah. 322.

**Amendment in declaratory suit.**—Declaratory suit cannot be allowed to be changed into one for recovery of possession and injunction if substantial injustice will not be done by asking plaintiff to bring fresh suit or if the change would be unprecedented one. 2 Pat. L. J. 379=40 Ind. Cas. 174 ; see also A. I. R. 1934 Lah. 235=35 P. L. R. 136. In a declaratory suit falling under s. 7, Court-fees Act, amendment should not be made for consequential relief if a separate suit can lie for it. A. I. R. 1927 Lah. 499=8 Lah. 531=9 Lah. L. J. 400=102 Ind. Cas. 46. But where a second suit is barred by limitation amendment to include specific relief should be allowed. 1929 A. L. J. 487=116 Ind. Cas. 871. Such amendment is also allowed even in second appeal where the plaintiff was under a *bona fide* belief that consequential relief is not open to him. A. I. R. 1924 Pat. 310=2 Pat. 919=5 P. L. T. 314=76 Ind. Cas. 347 ; A. I. R. 1931 Bom. 218=33 Bom. L. R. 141 ; see also A. I. R. 1923 Mad. 553=44 M. L. J. 515=1923 M. W. N. 301=32 M. L. T. 107. Where possession was lost owing to decree of Revenue Court during the pendency of a declaratory

suit, plaint must be so allowed to be amended as to ask for possession as further relief. 56 Ind. Cas. 458. It is open to the appellate Court to allow an amendment of the plaint so as to convert a suit for declaration into one for possession. A. I. R. 1935 Lah. 91=157 Ind. Cas. 1024. Where objection was taken on the ground that no consequential relief was asked for and plaintiff opposed it, and did not amend the plaint, subsequent amendment for the same should not be allowed. A. I. R. 1928 Rang. 134=115 Ind. Cas. 911. Where a person brought a suit for declaration of his *Maharki vatan* but subsequently he has allowed by Court to amend the plaint by adding reliefs of possession and injunction: *Held* that as suit for possession on refusal of amendment would have been in time and as possession of field was consequential relief on title, allowing of amendment was not contrary to law. A. I. R. 1937 Nag. 84.

**Technical defect.**—Technical defect in the pleadings can always be corrected, only if a slight amendment of a plaint is necessary it should be allowed. A. I. R. 1926. Lah. 472=27 P. L. R. 317=97 Ind. Cas. 800. Amendment by way of signature necessary to the suit can be allowed. A. I. R. 1924 All. 804=82 Ind. Cas. 65. Mere error in the initials of the name of the defendant was allowed to be amended even two years after *ex parte* decree was passed. A. I. R. 1928 Mad. 367=110 Ind. Cas. 433. In a suit to recover possession, mistake as to date of dispossession can be corrected. 12 L. R. 107 (Rev.)=15 R. D. 293. Court can allow parties to make good the defective signing of the plaint. 138 Ind. Cas. 797=34 Bom. L. R. 628=A. I. R. 1932 Bom. 367. The want of verification of pleadings can be made good by amendment under this section. 133 Ind. Cas. 626.

**Additional Relief.**—In a suit for specific performance, amendment as to relief of possession may be allowed. A. I. R. 1926 Mad. 155=22 L. W. 579=92 Ind. Cas. 599=(1925) M. W. N. 802. Amendment should be allowed even if the original cause of action is modified to some extent or another is added. 122 Ind. Cas. 174; see also 33 C. W. N. 359=56 C. 622=A. I. R. 1929 Cal. 519=119 Ind. Cas. 814; 92 Ind. Cas. 772=A. I. R. 1926 all. 506=48 A. 292=24 A. L. J. 260; A. I. R. 1927 Lah. 723=104 Ind. Cas. 325; A. I. R. 1929 Mad. 273=113 Ind. Cas. 296; A. I. R. 1928 Mad. 402=107 Ind. Cas. 637; A. I. R. 1926 Pat. 427=5 Pat. 746=7 P. L. T. 719=95 Ind. Cas. 991. But addition of claim for additional lands is a new relief. 41 Ind. Cas. 728. Amendment to introduce new cause of action after limitation ought not to be allowed. 13 Bur. L. T. 201=64 Ind. Cas. 29. In a suit for possession of property against wife on the ground of adultery amendment adding prayer for divorce should be allowed even in second appeal. A. I. R. 1923 Rang. 160=2 Bur. L. J. 65=75 Ind. Cas. 6. A plaintiff with a good cause of action cannot be turned out merely because although he has stated the facts quite accurately he has asked for confirmation of possession instead of asking for recovery of possession. In such a case the Court can order an amendment. 35 C. W. N. 620.

**Addition of parties.**—New plaintiff may be added for really deciding plaintiff's claim. A. I. R. 1931 Cal. 765=2 C. L. J. 357=58 C. 561=129 Ind. Cas. 860. Opportunity should be given to parties to remove the defect of non-joinder. A. I. R. 1930 Rang. 295=129 Ind. Cas. 508; see also A. I. R. 1923 Bom. 305=25 Bom. L. R. 689=47 B. 809=83 Ind. Cas. 856. Amendment dates back the suit when no new party is added. A. I. R. 1926 Mad. 487=50 M. L. J. 412=93 Ind. Cas. 625. Amendment seeking to bring new plaintiff on record at a time when the suit would be time-barred, cannot be allowed. A. I. R. 1925 Mad. 917=85 Ind. Cas. 961. Whereby non-joinder of necessary parties as respondent the appeal would be incompetent, even in such case amendment cannot be allowed where omission was due to negligence. A. L. R. 1934 Lah. 41. Adding parties at the stage of execution is not permissible. 60 C. 801=A. I. R. 1930 Cal. 668. Where a suit has been instituted against dead person and others, legal representatives of the dead person can be added as parties to suit. 147 Ind. Cas. 782=A. I. R. 1934 All. 25=1934 A. L. J. 25.

**Amendment by Appellate Court.**—In a proper case amendment can even be permitted for the first time in second appeal. A. I. R. 1926 Mad. 1117=51 M. L. J. 418=98 Ind. Cas. 39; see also A. I. R. 1930 Sind 98=125 Ind. Cas. 828; 139 Ind. Cas. 678=34 Bom. L. R. 175; A. I. R. 1926 Mad. 989=49 M. 978=51 M. L. J. 328=24 L. W. 304=7 O. L. J. 1123=92 Ind. Cas. 643; 50 Ind. Cas. 180=6 O. L. J. 55; A. I. R. 1933 Lah. 395=144 Ind. Cas. 168; A. I. R. 1921 Lah. 157=2 Lah. 73=3 Lah. L. J. 75=68 P. L. R. 1921=61 Ind. Cas. 415; 63 Ind. Cas. 701; A. I. R. 1925 Pat. 168=1924 Pat. 297=6 P. L. T. 465=84 Ind. Cas. 386. But amendment



sought in second appeal by which defendant is likely to lose his plea of limitation should not be allowed. A. I. R. 1927 Mad. 650=25 L. W. 506=38 M. L. T. 345=101 Ind. Cas. 390. Amendment of plaint in second appeal should not also be allowed where such paryer could have been made at the earlier stage of the proceeding and the bringing of a fresh suit for obtaining relief sought is not barred. A. I. R. 1935 Rang. 88. In appeal amendment should not be allowed except on exceptional circumstances. A. I. R. 1936 Mad. 545 ; A. I. R. 1936 Pat. 191. Where plaintiff contended in the lower Court that the suit was properly framed, he can not be allowed to amend the plaint in second appeal. 39 Ind. Cas. 861 ; see also 46 Ind. Cas. 471=119 P. W. R. 918. Amendment which would cause trial *de novo* should not be allowed. A. I. R. 1921 Cal. 125=33 C. L. J. 380=25 C. W. N. 552=68 Ind. Cas. 514. Amendment in second appeal seeking to introduce a new case altogether should not be allowed. A. I. R. 1923 Lah. 530=77 Ind. Cas. 518. Whereby consent of parties in suit was limited to a particular cause of action amendment cannot be permitted in second appeal with a view to remand for retrial as it would mean starting retrial on causes voluntarily given up. 6 O. L. J. 322=52 Ind. Cas. 849. Grounds of appeal can be amended at any stage if they are not sufficiently clear. A. I. R. 1923 Lah. 115=3 Lah. 382=77 Ind. Cas. 207.

**Appeal and Revision.**—Amendment permitted by appellate Court is not subject to appeal. 42 Ind. Cas. 455. Amendment allowed with the consent of the pleader of the opposite party cannot be objected in second appeal. A. I. R. 1926 Oudh 98=1 Luck. 33=13 O. L. J. 115=3 O. W. N. 45=91 Ind. Cas. 927. Interference by the High Court with the discretion of the lower Court in allowing an amendment will not be proper unless it was exercised on entirely wrong principles. A. I. R. 1926 Cal. 1112=30 C. W. N. 928=98 Ind. Cas. 751 ; see also A. I. R. 1927 Lah. 847=9 Lah. L. J. 357=103 Ind. Cas. 701 ; A. I. R. 1929 Rang. 199=4 Bur. L. J. 12=86 Ind. Cas. 509. Revision lies against improper refusal of amendment. A. I. R. 1925 Mad. 585=(1925) M. W. N. 469=48 M. L. J. 349=21 L. W. 6'9=87 Ind. Cas. 90 ; see also A. I. R. 1926 Mad. 1124=(1927) M. W. N. 256=97 Ind. Cas. 936 ; A. I. R. 1925 Nag. 195=78 Ind. Cas. 510. But the discretion of the lower Court will not ordinarily be interfered with unless a strong case is made out for such interference. A. I. R. 1933 Lah. 867 ; see also 60 C. L. J. 91=38 C. W. N. 1146.

**18. [R. S. C. O. 28, r. 7.]** If a party who has obtained an order for Failure to amend after leave to amend does not amend accordingly within the time limited for that purpose by order. the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days, as the case may be, unless the time is extended by the Court.

**Scope.**—Order VI, rule 17 of the Civil Procedure Code only provides that the Court may allow an amendment, and if the party to whom the permission is given does not avail himself of it, the only consequence is that, under Order VI, rule 18, he cannot amend his pleading afterwards unless the time allowed for amendment is extended by the Court. Therefore where a plaintiff fails to amend his plaint when directed to do so, the Court has no power, merely on this account, to dismiss the suit. 60 Ind. Cas. 376 ; see also 19 Ind. Cas. 472=169 P. L. R. 1913=107 P. W. R. 1913. Time however may be extended by the Court even after the expiry of the time originally fixed. 16 B. 348. Refusal to amend seeking to introduce a certain cause of action is no bar to bring a fresh suit on the same cause of action. 99 Ind. Cas. 538=A. I. R. 1927 Lah. 83. Under Order 6, C. P. Code failure to amend merely involves loss of right to amend and therefore not to the determination of the suit as expressed in the original plaint. A. I. R. 1936 Pesh. 155=164 Ind. Cas. 181.

## ORDER VII.

### *Plaint.*

Particulars to be contained in plaint.

1. [S. 50, para 1.] The plaint shall contain the following particulars :—

(a) the name of the Court in which the suit is brought ;

- (b) the name, description and place of residence of the plaintiff ;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained ;
- (d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect ;
- (e) the facts constituting the cause of action and when it arose ;
- (f) the facts showing that the Court has jurisdiction ;
- (g) the relief which the plaintiff claims ;
- (h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished ; and
- (i) a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court-fees, so far as the case admits.

**Plaint.**—Plaint in law means nothing more than a private memorial tendered to a Court in which a person sets forth his cause of action ; the exhibition of an action in writing. Substantial compliance with Order VI, and Order VII makes a document a plaint. A. I. R. 1921 Sind 166=17 S. L. R. 223=85 Ind. Cas. 893 (22 M. 494 foll.) Formerly "plaint" meant in the Superior Court of England, the cause for which the plaintiff complained against the defendant and for which he obtained the King's writ—*Byrne's Law Dictionary*. It is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they will have to meet when the case comes on for trial. This the plaintiff is bound to do though he need not set out the evidence whereby he proposes to prove the facts which give him the title. *Williams v. Wilcox*, 8 A. & E 33 ; *Gantrel v. Egerton*, L. R. 2 C. P. 371 ; 20 C. W. N. 310 =22 C. L. J. 254. A plaintiff may in certain circumstances rely upon several different rights alternately though they may be inconsistent. 34 C. 51=11 C. W. N. 26=4 C. L. J. 437 ; 20 C. W. N. 310=22 C. L. J. 254 ; *Phillips v. Phillips*, 4 Q. B. D. 127 ; *Berdan v. Greenwood*, 3 E. X. D. 255 ; *Huwkesley v. Bradshaw*, 5 Q. B. D. 303 ; *In re Morgan*, 35 Ch. D. 496. The Court should look to the substance of the plaint rather than to their wordings, when they are prepared in mufassil Courts. 12 P. L. T. 636=131 Ind. Cas. 529=A. I. R. 1931 Pat. 179. Application under para 20 does not become suit to enforce award by mere fact of being brought under Order 7, rule 1. A. I. R. 1934 Mad. 68.

**Shall contain.**—The word "shall" was substituted for the word "must" which occurred in the old Code. The word "must" was held to be a strong imperative. 18 A. 403. The description of a suit in the heading of a plaint does not determine the nature of the suit. A. I. R. 1927 Sind 78=97 Ind. Cas. 257.

**Clause (b)**—A corporation should sue in its own name. 10 W. R. 366. An unregistered or unincorporated company must sue by the name of all its members. 8 W. R. 45. The description of the plaintiff as residing in Chitpur Road in the town of Calcutta is not a sufficient description of his place of abode. Where the defendant is described as "formerly of Calcutta" the description also is insufficient. 4 C. L. R. 366. The name of the street and the number of the premises should be inserted. 134 Ind. Cas. 538=58 C. 418=A. I. R. 1931 Cal. 458. The heading of the plaint filed by a corporation should also contain the name and description or place of residence of the person who represents such corporation. 26 S. L. R. 431=142 Ind. Cas. 361=A. I. R. 1933 Sind 102. Where plaintiff is not described in the cause title *shebail* of the idol it is certainly a misdescription, but may be cured by amendment without hardship to defendant. A. I. R. 1926 Cal. 417=42 C. L. J. 30=87 Ind. Cas. 159.

**Clause (c)**—The description contemplated by the Code includes all the titles by which a party is known. 18 W. R. 301=12 B. L. R. 443 (P. C.) (12 W. R. 450 disapproved). Father's name and age should also be given as they fall under the word "description". 7 M. L. J. 81. When a person is suing or is sued as executor of another person, it should be stated in the description of the party. 9 A. 188. A corporation should be sued in its corporate name. 15 W. R. 534 ; 9 W. R. 206. Dismissal is not justified for the omission of full description of the defendant in plaint or his capacity in title of plaint. 35 Ind. Cas. 792.

**Clause (d).—**For suits by or against minor *vide* Order XXXII. Where under a *bona fide* belief that the plaintiff is a minor and is represented by his mother as next friend, the suit is maintainable, notwithstanding the plaintiff is major. A. I. R. 1927 Cal. 477=100 Ind. Cas. 469.

**Clause (e).—**"Cause of action" means every fact necessary for the plaintiff to prove, if traversed to support his right to judgment of Court. It does not mean every piece of evidence necessary to prove each fact but every fact necessary to be proved. A. I. R. 1921 Sind 200=17 S. L. R. 41=80 Ind. Cas. 985. Under Order VII, aggregate of claim put forward in plaint is treated as one suit though there may be several causes of action. One plaint is only one suit. 40 M. 1=5 L. W. 580=32 M. L. J. 231=(1917) M. W. N. 367=39 Ind. Cas. 439. It is imperative under Order VII, rule 1 (e), that the plaint should contain in addition to other particulars "the facts constituting the cause of action and when it arose." 42 C. 85=28 Ind. Cas. 463; see also 39 Ind. Cas. 21=13 N. L. R. 16; 19 C. W. N. 18; 6 C. W. N. 585 (588); 11 W. R. 238. A plaintiff when he files his suit must allege the cause of action in the manner prescribed in this rule and must prove necessary allegations in so far as they are not admitted by the defendant. 4 Bom. L. R. 58=26 B. 360. It is doubtful whether a plaintiff can be allowed to take advantage of any express ground of exemption from the ordinary law of limitation which has not been pleaded in the plaint, having regard to the terms of this section. 30 C. 699=7 C. W. N. 651. No suit is maintainable when instituted by a person in his capacity as administrator of the estate of a deceased person unless and until letters of administration are issued to him to entitle him to sue in such representative capacity. 12 C. W. N. 738. When a plaintiff does satisfy the requirements of s 50, C. P. Code, by granting what in his opinion the ground upon which he intends to get over the bar of limitation, he ought not to be precluded from taking another and not inconsistent ground should be latter advised that the latter is the true ground. 10 Bom. L. R. 346. Estoppel being rule of evidence should not be set out in plaint which should confine itself to facts. 16 S. L. R. 207=83 Ind. Cas. 360. The Court can disregard the form of the plaint where in substance all the facts necessary to raise the point in controversy are mentioned in plaint. A. I. R. 1927 Cal. 806=46 C. L. J. 149=105 Ind. Cas. 22.

In a suit for defamation, plaint should allege specific time, place and words and also individuals to whom words are spoken. A. I. R. 1926 All. 672=96 Ind. Cas. 89.

Only facts entitling plaintiff to decree need be set out in plaint. A. I. R. 1923 Lah. 475=83 Ind. Cas. 807. Plaintiff must prove that he is in time as regards a suit of limitation. A. I. R. 1924 Cal. 420=38 C. L. J. 218. A Court must see whether a plaintiff has brought his suit within limitation. A. I. R. 1927 Cal. 30=97 Ind. Cas. 635. Where relied on as alternative ground adverse possession should be specifically pleaded. A. I. R. 1925 Mad. 1005=(1925) M. W. N. 232=88 Ind. Cas. 249. Facts not specifically pleaded in plaint but admitted by the defendant can be relied on by the plaintiff to establish his claim. A. I. R. 1921 Bom. 307=45 B. 535=58 Ind. Cas. 69. A person's authority to bring a suit is a question of principle, but the proper signing and verification of the plaint is a matter of practice, omission therein may be amended at any time. A. I. R. 1925 Sind 159=19 S. L. R. 286=80 Ind. Cas. 141; see also 105 Ind. Cas. 22=A. I. R. 1927 Cal. 806=46 C. L. J. 149. The plaintiff and not the defendant has to state and prove when his cause of action arose. A. I. R. 1930 Mad. 742=123 Ind. Cas. 197. The Court is entitled to determine the date when the cause of action arose from the facts alleged and proved and is not confined to plaint alone. A. I. R. 1928 Lah. 516=119 Ind. Cas. 258. The plaint should contain a distinct statement as to where the cause of action arose. If the narration of facts constituting the cause of action contains the date, no separate statement in a separate para as to when it arose is unnecessary. 35 C. W. N. 990; see also A. I. R. 1931 Cal. 458=58 C. 418. In a suit for redemption *prima facie* proof in support of the plaintiff's claim for redemption must be forthcoming. 132 Ind. Cas. 793=14 O. L. J. 452=8 O. W. N. 732=A. I. R. 1931 Oudh 378.

**Clause (f).—**The provisions of this clause is imperative. A. I. R. 1925 Nag. 183=82 Ind. Cas. 201. The jurisdiction of Court to try the suit must then depend on the amount or value of the subject-matter of the suit as fixed by the plaintiff. The plaint must contain a statement of the value of the subject-matter of the suit for the purpose

of jurisdiction and of Court-fees so far as the case admits. 39 Ind. Cas. 439=40 M. 1=33 M. L. J. 231=(1917) M. W. N. 367 (F. B.). If such jurisdiction is disputed, it is determined by the Court, and that determination which is preliminary to the adjudication of the suit, determines the Court which has jurisdiction to try the suit. *Ibid*; see also 2 C. L. J. 431; 2 Ind. Cas. 269=12 O. C. 90. If the plaintiff rely upon the defendants' residence or place of business giving jurisdiction, the facts showing this should be stated in the body of the plaint. A. I. R. 1931 Cal 458=58 C. 418.

**Clause (g).**—Substance and not form of plaint should be looked to. Prayer in particular form is not necessary when relief is substantially claimed in body of plaint. A. I. R. 1931 Mad. 94=(1930) M. W. N. 358=129 Ind. Cas. 824 If a plaintiff ask for "the following reliefs and such other relief as to the Court may seem just and proper to grant, namely", and follows this up with several prayers without any disjunctive adverb, the presumption is that they are intended to be cumulative and not alternative. 7 Ind. Cas. 505=86 P. W. R. 1910. On a prayer by plaintiff for such general relief as the Court might grant if prayer for possession is refused, the Court can grant the plaintiff a declaration of his title though he fails to obtain the specific relief prayed for. 4 Lah. L. J. 393.

**Clause (h).**—*Vide* A. W. N. (1906) 214.

**Clause (i).**—*Vide* notes under clause (f). Fanciful valuation should not be given. 92 Ind. Cas. 730=A. I. R. 1929 Mad. 591. Plaint may be returned for gross under valuation. 3 A. W. R. 405.

**Verification.**—The provisions regarding verification of plaints appears to be useless. 58 C. 418=134 Ind. Cas. 538=A. I. R. 1931 Cal. 458. Order 29, rule 1, only requires that a pleading filed by a corporation should be verified by its principal officer. 26 S. L. R. 431=142 Ind. Cas. 361=A. I. R. 1933 Sind 102.

**2. [S. 50, paras 2, 3.]** Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed.

But where the plaintiff sues for *mesne* profits or for an amount which will be found due to him on taking unsettled accounts between him and the defendant, the plaint shall state approximately the amount sued for.

*N. B.*—For local amendment in Lahore.—*Vide infra*.

**Scope.**—The power to reject a plaint arises only upon its being proved that the suit is under-valued. The correct valuation of the property in dispute is not necessary for admission of a plaint before the plaint is registered. A. I. R. 1930 Cal. 65=50 C. L. J. 164=33 C. W. N. 952=57 C. 587.

**Suit for money.**—In a money suit, precise amount claimed must be stated. 12 B. 625. Where the suit is on a promissory-note, all the facts giving rise to the alternative claim are fully stated in the plaint, the fact that the plaintiff has not formally asked for relief on the original consideration is no bar to the granting of the relief on that basis. 27 N. L. R. 327.

**Suits for mesne profits or for accounts.**—When *mesne* profits are claimed only from the date of institution of the suit, it is not possible to state even approximately the amount of *mesne* profits. A. I. R. 1923 Rang. 110=1 Bur. L. J. 267=4 U. B. R. 140=77 Ind. Cas. 53; see also 40 M. 1=32 M. L. J. 221; 29 Ind. Cas. 195=1915 M. W. N. 319; 10 Ind. Cas. 312; 18 C. W. N. 622; 15 B. 416. Where plaintiff claims *mesne* profits both for period antecedent to suit and period subsequent thereto, the valuation refers to both periods. If he sues for *mesne* profits in respect of only one of these two periods, the valuation refers to that period alone. 93 Ind. Cas. 939=A. I. R. 1926 Pat. 218 (F. B.)=5 Pat. 361=7 P. L. T. 313. Neither Order VII, rule 2 of the Code of Civil Procedure nor s. 7, cl. (IV) (f) of the Court Fees Act would apply to unascertained future *mesne* profits. *Per Jawla Prosad J.* in A. I. R. 1926 Pat. 218 (F. B.)=5 Pat. 361=7 P. L. T. 313=(1926) P. 49=93 Ind. Cas. 939; see also 15 B. 416. Approximate valuation need only be given to past *mesne* profits. 24 Ind. Cas. 232. This rule is also applicable in suits for accounts. 20 Ind. Cas. 928=9 N. L. R. 112; 18 B. 40; 40 M. 1. In suit for damages, the amount of damages claimed should also be given approximately. 17 M. L. J. 625.

**3. [New.]** Where the subject-matter of the suit is immovable property, the plaintiff shall contain a description of the property sufficient to identify it, and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, the plaintiff shall specify such boundaries or numbers.

Where the subject-matter of the suit is immovable property.

*N. B.*—For local amendment in Calcutta.—*Vide infra.*

**Soope.**—There is some apparent conflict of decisions on the point whether in a suit relating to immovable properties the boundaries should be given. In 26 C. 845=4 C. W. N. 162, a bench of the Calcutta High Court held that the plaintiff's suit would not necessarily fall upon the ground that there were no boundaries given in the plaint, when they merely seek for a declaratory decree in respect of their title. In 1 C.W.N. 574, *Mr. justice Rampini* went further and said in the course of his judgment at p. 576 : "I am not aware of there being any provision in the Civil Procedure Code authorising the dismissal of a suit" on the ground that the land in suit cannot be identified. But in the above case it is submitted the learned Judge's opinion is a mere *obiter dictum*. In 19 W. R. 81, the decree which was successfully objected to in special appeal was a decree for the portion only of the land in suit, such portion not being specified by boundaries in the decree which consequently was incapable of execution. See also 23 W. R. 285 ; 25 W. R. 39 ; 2 C. L. R. 134. But now it is clear from this rule that boundaries of the immovable property are not absolutely necessary but in all kinds of suits whether declaratory or not, if it relates to immovable property, the plaintiff shall contain a description of the property sufficient to identify it. See also 18 W. R. 461 ; 5 C. W. N. 121 ; 7 C. W. N. 121. Where there are two conflicting descriptions of the subject-matter of a grant or two conflicting parts of the same description, that which is more certain and stable, and the least likely to have been mistaken or to have inserted inadvertently, must prevail if it sufficiently identifies the subject-matter. 10 C. L. J. 570=37 C. 293. But where these two elements, the boundaries and the quantity, are equally certain and exactly defined, or the boundaries are as precise and definite as the quantity is specific and exact, and there is gross divergence between the quantity specified and the quantity found to be included within the defined boundaries, preference should be given to that element of the description of the subject-matter which is more consistent with the intention of the parties to be collected from the other parties of the deed, illuminated if necessary, by the surrounding circumstances and the subsequent conduct of the parties. *Ibid.* (on appeal 40 I. A. 223=41 C. 493=18 C. W. N. 66=19 C. L. J. 95) ; see also 13 C. W. N. 702. Where boundaries of property as given in the plaint are not correct the property within those boundaries cannot pass. A. I. R. 1929 Pat. 49=108 Ind. Cas. 814.

**4. [S. 50, para 4.]** Where the plaintiff sues in a representative character the plaintiff shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

When plaintiff sues as representative.

character the plaintiff shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.

**Soope**—Representative capacity need not be stated in cause-title. It is sufficient if it appears in the body of the plaint. 50 Ind. Cas. 525=46 C. 877 ; see also A. I. R. 1928 Nag. 319=109 Ind. Cas. 785 ; 19 C. W. N. 1193=28 Ind. Cas. 818 ; 34 C. 548. The plaint must contain a statement that the suit is brought in a representative capacity. A. I. R. 1925 Nag. 183=82 Ind. Cas. 201 ; see also 7 B. 467 ; 8 B. 309 ; 5 C. 144 ; 12 C. 437 ; 77 Ind. Cas. 1028. In a suit by the manager of an undivided family on a promissory-note passed in his name by the defendant the other members are not necessary parties and the suit is not bad for non-joinder. A. I. R. 1922 Bom. 283=46 B. 358=23 Bom. L. R. 1135=64 Ind. Cas. 966 ; see also 14 B. 597.

**Has taken steps.**—So long as the compliance with s. 187 of the Succession Act (of 1865) is prior to the decree, the fact that it is after the institution of the suit makes no difference and the Court is fully competent to deal with the suit. A. I. R. 1923 Cal. 1=50 C. 49=36 C. L. J. 35 ; see also 15 B. 105 ; 38 C. 327 ; 37 B. 158 ; 12 C. W. N. 738. But Mahomedan executors need not take out probate before suing. 14 C. 37.

**Suit by or against a club.**—In a suit by or against an unregistered club the names of all the members should be given.—*Vide* 14 M. 362 ; 20 A. 497.

5. [S. 50, para 5] The plaintiff shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff's demand.

**Scope.**—A plaintiff which does not show the cause of action is a defective plaintiff. The Court in such a case is bound to call upon the plaintiff to disclose his cause of action correctly against each defendant. A. I. R. 1924 Nag 191=79 Ind. Cas. 614 ; see also 25 Ind. Cas. 77=12 A. L. J. 339.

6. [S. 50, para 6.] Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed.

**Scope.**—This rule should be construed liberally and reasonably. Where exemption from limitation is not stated in the plaintiff the Court should allow the inclusion of that ground. Where that point is expressed in the plaintiff, r. 6 is satisfied but in such a case plaintiff may try to get over the bar of limitation by putting forth another ground if he believes the latter to be true. 3 Lah. L. J. 22=60 Ind. Cas. 772. Where suit is *prima facie* barred by limitation, plaintiff must state in plaintiff the ground on which the bar is saved. 52 Ind. Cas. 243=(1919) M. W. N. 429=9 L. W. 82 ; 51 Ind. Cas. 956=1 Lah. 21 ; 145 Ind. Cas. 343=34 P. L. R. 841=A. I. R. 1933 Lah. 491 ; A. I. R. 1936 Mad. 545=1936 M. W. N. 411=165 Ind. Cas. 737. A ground to save limitation which has not been taken in the plaintiff cannot be taken unless the plaintiff is amended. 1933 M. W. N. 931 (30 C. 699 ; 31 C. 195 ; 17 M. L. J. 281 ; 1919 M. W. N. 429 ; 1933 M. W. N. 595 Fol.) ; see also A. I. R. 1933 Mad. 395=64 M. L. J. 317=1933 M. W. N. 595. Where nothing is stated and no issue is framed, no evidence can be given to prove facts that limitation has been saved. 25 M. L. T. 295=1919 M. W. N. 429=9 L. W. 82=51 Ind. Cas. 956 ; A. I. R. 1922 Lah. 39=4 Lah. L. J. 190=3 Lah. 233=69 Ind. Cas. 419 ; 31 C. 106 ; 34 B. 540 ; 26 Ind. Cas. 441. Though an acknowledgment is not pleaded in plaintiff, yet it can be set up in reply to defence of the defendant. A. I. R. 1922 Oudh 135=25 O. C. 89=68 Ind. Cas. 196. But where plaintiff shows how plaintiff's claim is within limitation, plaintiff ought not to be debarred from taking another and even on inconsistent ground to get over the bar of limitation. A. I. R. 1921 Nag. 1=17 N. L. R. 209=65 Ind. Cas. 279 ; see also 12 C. W. N. 617=7 C. L. J. 560 ; 14 C. W. N. 128 ; 8 Ind. Cas. 81=13 C. L. J. 139 ; 65 Ind. Cas. 772=A. I. R. 1922 Lah. 230=2 Lah. 13=3 Lah. L. J. 22=63 P. L. R. 1921. Where the plaintiff is defective in this respect, the plaintiff should be allowed to amend his plaintiff. 116 P. W. R. 1918=102 P. R. 1918=120 P. L. R. 1918=46 Ind. Cas. 495. This section has no application in a case when *prima facie* the case is not time-barred. 25 Ind. Cas. 463=70 P. R. 1914=260 P. L. R. 1914 ; see also A. I. R. 1923 Lah. 591=82 Ind. Cas. 866. In a suit to redeem mortgage alleged to have executed within 60 years, it is not necessary for plaintiff to plead acknowledgment to save limitation. 51 Ind. Cas. 283=17 A. L. J. 330. An omission to show ground of exemption in respect of a suit filed on the day the Court reopened after its summer vacation would not entail the dismissal of the suit. The plaintiff should be allowed to be amended. 16 N. L. R. 198=56 Ind. Cas. 926. Where suit would be barred but for the alleged minority of plaintiffs *onus* is on the plaintiffs to prove that the suit is within time. 10 Lah. L. J. 309=30 P. L. R. 105=109 Ind. Cas. 331. An acknowledgment of liability sufficient under s. 19 of the Limitation Act to give a fresh period of limitation from the date thereof should be pleaded specifically. A. I. R. 1924 Pat. 806=5 P. L. T. 551=78 Ind. Cas. 919. The plaintiff having mentioned one ground of exemption in the plaintiff is not debarred from taking another inconsistent ground to get over the bar of limitation. But where no ground of exemption from the law of limitation is stated in the plaintiff, acknowledgment as a ground of exemption cannot be allowed to be set up in appeal. A. I. R. 1922 Lah. 39=3 Lah. 233=69 Ind. Cas. 419=4 Lah. L. J. 190. Special plea of limitation ought to be taken in the written statement ; though a plea of limitation can be raised at any stage of suit, even in appeal. A. I. R. 1924 Cal. 463=69 Ind. Cas. 194. Objection as regards omission to set out in plaintiff the ground of exemption from limitation cannot be allowed to be taken in revision. 4 L. W. 148=36 Ind. Cas. 593. Where a plaintiff is presented on the reopening date after Court holidays and the period of limitation has expired during the holidays, the fact that the

ground of exemption under s. 4, Limitation Act, was not specifically mentioned in the plaint will not entail the dismissal of the suit in as much as the Court is bound to take judicial notice of the holidays. A. I. R. 1937 Pesh. 41.

7. [R. S. O. 20, P. 6.] Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative, and it shall not be necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement.

**Scope**—The same cause of action can give rise to different reliefs. A plaintiff may claim them, separately, or collectively. It has always been the practice of the Court to confine the relief given under the power to grant general relief, the relief which is inconsistent with the case made out on the pleadings, and not to give relief inconsistent with it. *Cockerell v. Dickens*, Mont. D. & D. 45; *Mathers v. Green* (1865) 35 L. J. Ch. 1; *Hill v. G. N. Ry. Co.*, (1854) 5 De. G. M. & G. 66; *Hutton v. Hutton*, (1916) 1 K. B. 642, 656. The power of Court to grant general or other relief not specifically claimed, while undoubted is always subject to the condition that the relief so granted is not inconsistent with that specifically claimed and with the case raised by the pleadings. A. I. R. 1933 Lah. 267.

**General or other relief.**—The intent and purpose of Order 7, rule 7, is to take the place of practice previously followed by Courts. 13 Lah. L. T. 31. A prayer for a general relief is no longer necessary under the new Code. Where facts pleaded and found proved show that the plaintiff is entitled to a particular relief the Court can grant him such relief though it is not specifically pleaded. A. I. R. 1930 Nag. 92=26 N. L. R. 94=120 Ind. Cas. 321; see also A. I. R. 1930 Pat. 71=10 P. L. T. 630=127 Ind. Cas. 292; 118 Ind. Cas. 381=A. I. R. 1929 All. 555. So a prayer for general relief is unnecessary. All that is necessary is that the necessary foundation of facts must be laid in the plaint. A. I. R. (1923) Pat. 386=(1923) Pat. 153=5 P. L. T. 337=76 Ind. Cas. 940; A. I. R. 1921 Lah. 125=2 Lah. 256=107 P. L. R. 1921=64 Ind. Cas. 896; A. I. R. 1921 Pat. 14=6 Pat. L. J. 190=2 P. L. T. 325=60 Ind. Cas. 980; 54 Ind. Cas. 797. Court can give the plaintiff a decree for less than what he had demanded if the Court finds him entitled to less relief. A. I. R. 1923 Sind 5 (F. B.)=16 S. L. R. 112=71 Ind. Cas. 161; 44 Ind. Cas. 557; 33 M. L. J. 631=22 M. L. T. 391=(1918) M. W. N. 110=43 Ind. Cas. 760. Where the plaint sets out facts in issue that are material the plaintiff is entitled to relief which those facts will sustain under the general prayer but he cannot desert specific relief prayed and under the general prayer ask specific relief on another description unless the facts and circumstances mentioned in the plaint will, consistently with the rules of the Court maintain that relief. A. I. R. 1924 Lah. 324=69 Ind. Cas. 501; see also 43 C. 743=22 C. L. J. 419=20 C. W. N. 446=32 Ind. Cas. 437. Accounts can be directed to be taken although there is no prayer in the plaint to that effect but only a general prayer. 23 C. W. N. 500=29 C. L. J. 280=51 Ind. Cas. 597. Rights to which a person is found entitled cannot be refused on ground of an exaggerated claim. 140 P. W. R. 1918=13 P. R. 1919=46 Ind. Cas. 679. Court can in a proper case pass a decree for redemption of a mortgage, though the suit as framed was one in ejectment. 44 Ind. Cas. 921. Where in a suit for *khas* possession, plaintiff was found not entitled to possession till after expiry of term decree for declaration at the end of such term, can be granted. 1 P. L. W. 405=39 Ind. Cas. 596. In a suit for partition, decree for ejectment can be given, if that was asked for in effect and defendant was not taken by surprise. 13 S. L. R. 159=53 Ind. Cas. 722.

The discretion under Order VII, rule 7 and Order XLI, rule 33, covers the granting of a declaratory decree in a suit for possession, where alternative relief is claimed therein. A. I. R. 1923 Lah. 412=85 Ind. Cas. 95. Decree in a suit should conform with the rights of the parties as they were at the time of its institution. 44 C. 47=24 C. L. J. 140=20 C. W. N. 1099=34 Ind. Cas. 869. A suit for share of inheritance is an administration suit, though not brought in that form and decree should be passed on lines of model decrees in App. D. Forms 17 and 20, C. P. Code. 41 Ind. Cas. 579. Where written contract is inadmissible in evidence for want of stamp, oral evidence is admissible to prove the said terms. A suit should be brought within three years of the date of the transaction if it can be maintained on the original consideration. 29 C. L. J. 508=51 Ind. Cas. 945.

Where in a suit for possession by partition the estate is found impartible, a decree for joint possession should be given and the suit must not be dismissed although plaintiff may not have expressly asked for a declaratory decree. A. I. R. 1921 All. 106=43 A. 318=19 A. L. J. 61=65 Ind. Cas. 878 But where right of easement has been claimed but has not been established, the Court cannot give relief to plaintiff on basis of natural right not specifically claimed and created a new case. 57 Ind. Cas. 504. In a suit on a negotiable instrument, relief on the strength of the original consideration can be granted if prayed for in the alternative, 46 C. 663=29 C. L. J. 340=17 A. L. J. 405=25 M. L. T. 258=36 M. L. J. 429=21 Bom. L. R. 606=23 C. W. N. 937=50 Ind. Cas. 216 (P. C.). But in a suit for ejectment where property is found encumbered, prayer for redemption cannot be allowed. 4 O. L. J. 365=41 Ind. Cas. 171. In a suit to enforce transfer unenforceable under law, transferee cannot recover consideration money as damages. 4 O. L. J. 425=41 Ind. Cas. 435.

8. [R. S. C. O. 20. r. 7.] Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated as far as may be separately and distinctly.

Notes.—Where the plaintiff claims property by ownership as successor to a person in the mohant-ship of a temple and in his reply to the defendant's written statement pleads, that he is entitled, even if not to the ownership, to the management of the property, the first claim cannot include the second and plaintiff has two distinct claims, founded on separate and distinct grounds and the case falls under Order VII, rule 8. A. I. R. 1929 Nag. 347=120 Ind. Cas. 404.

9. [S. 58.] (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it; and, if the plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements.

(2) Where the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant sues or is sued.

(3) The plaintiff may, by leave of the Court, amend such statements so as to make them correspond with the plaint.

(4) The chief ministerial officer of the Court shall sign such list and copies of statements if, on examination, he finds them to be correct.

N. B.—For local amendments in Allahabad, Calcutta, C. P., Madras, Oudh. Rangoon and Sind.—*Vide infra*.

Suit instituted.—A suit is instituted when the plaint is filed and not when it is ordered to be registered. 34 C. L. J. 465=66 Ind. Cas. 923.

Documents.—There is distinction between documents sued upon and documents relied upon by the plaintiff. 24 C. W. N. 302=56 Ind. Cas. 457. There is no provision of law which necessitates or even empowers the Court to return a plaint on the ground that the plaintiff has not mentioned therein the list of the documents on which he relies. The only effect of a person not furnishing the list of documents on which he relies is that, unless the Court permits him to do so he is not entitled to produce them at a later stage. A. I. R. 1930 Lah. 480=122 Ind. Cas. 480.

\*10. [S. 57.] (1) The plaint shall, at any stage of the suit, be returned to be presented to the Court in which the suit should have been instituted.

\* This section has been applied to suits for the recovery of rent under the Chota Nagpur Tenancy Act, 1908 (Ben. Act VI of 1908).



(2) On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

Procedure on returning plaint.

**Scope**—"When a suit is instituted in a Court which has no jurisdiction to try it then the Court must return the plaint to the plaintiff for presentation to the Court having jurisdiction. The provisions are wide enough to cover all cases where the Court is unable to entertain the suit for want of jurisdiction, whatever may be the nature of the objection to the jurisdiction. I am unable to construe this provision to be limited to cases where the Court is incompetent to try the suit by reason of the nature of the subject-matter and not on account of the value thereof being beyond the jurisdiction or even the subject-matter thereof being beyond the territorial jurisdiction of the Court, as for instance, merely to a case where a suit which should have been instituted in a Revenue Court is instituted in a Civil Court or *vice versa*." *Per Jaital J.* in A. I. R. 1930 Lah. 394=127 Ind. Cas. 908; see also A. I. R. 1934 Pat. 234; A. I. R. 1934 Lah. 233. A Court not having jurisdiction to try a suit can neither transfer its jurisdiction temporarily to an arbitrator nor send the suit to the District Judge for transfer to the proper Court. The only course for the Court is to return the plaint for presentation to the proper Court. The only exception to the rule is where a preliminary decree for accounts has been passed by a Court not having jurisdiction to pass a final decree on the examination of accounts. A. I. R. 1930 Lah. 195=125 Ind. Cas. 334. In a suit for partition if it is found at the time of the final decree that the suit is undervalued, the Court cannot if the value of the property exceeds the pecuniary limits of the Court, declare preliminary decree a nullity and return the plaint for presentation to competent Court. A. I. R. 1930 Cal. 147=125 Ind. Cas. 104; see also A. I. R. 1929 Lah. 248=117 Ind. Cas. 369. This rule applies where suit as ordinarily framed is wrongly instituted in that Court, but does not apply while it is found at the trial whether as the result of admissions made by the parties or evidence led by them, that the relief which the plaintiff is really entitled to is different from that claimed in the suit and that that relief is not cognisable by that Court. In the latter case the Court cannot decline jurisdiction but should proceed with the trial or pass such decree as the circumstances permit. It may in certain fit cases grant permission for the withdrawal of the suit with liberty to file a fresh suit. A. I. R. 1930 Sind 252=25 S. L. R. 68=130 Ind. Cas. 554. A plaint may be returned for proper presentation even at the instance of the plaintiff filing it in wrong Court. A. I. R. 1929 Pat. 722=118 Ind. Cas. 139. Court cannot return a plaint on the ground that the plaintiff has not mentioned therein the list of the documents on which he relies. A. I. R. 1930 Lah. 480=122 Ind. Cas. 488. Where the first suit is instituted in a Court without jurisdiction, and a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject-matter and the parties to the suits are identical. A. I. R. 1929 P. C. 103=56 C. 1048=56 I. A. 128=1929 A. L. J. 254=33 C. W. N. 485=29 L. W. 682=56 M. L. J. 614=49 C. L. J. 462=31 Bom. L. R. 741=(1929) M. W. N. 546 (P. C.)=115 Ind. Cas. 713. Although Order 7, rule 10, does not apply to a chartered High Court, it can by virtue of its inherent powers direct the return of a plaint for presentation to proper Court on dismissing a suit for want of jurisdiction. 12 Rang. 432=A. I. R. 1934 Rang. 342. For passing an order returning plaint to be presented to proper Court, it is not necessary that the Court so returning and the Court to which the plaint is ordered to be presented should be exercising the same kind of jurisdiction. A. I. R. 1934 Pat. 234=149 Ind. Cas. 106. Rejection or return of plaint by Court is not justified merely because the suit is tenable by some other Court. 1936 A. M. L. J. 67. A Court returning a plaint for presentation to the proper Court cannot fix a time for such presentation. *Ibid.* Order 7, rule 10, says the plaint should be returned and the word "plaint" must refer to the plaint which is the basis of the suit at the time it is returned. If a Court has jurisdiction, it is impossible for it to act under Order 7, r. 10, for the Court itself, if it has jurisdiction is the Court in which the suit should be instituted. A. I. R. 1935 Rang. 310=158 Ind. Cas. 613. Where in a suit for possession, the value of land exceeds the pecuniary jurisdiction of the Court in which the suit is filed an order should be passed directing the plaintiff to present the plaint to a proper Court having jurisdiction in the matter. 153 Ind. Cas. 53=37 P. L. R. 125.

Where a Court originally had jurisdiction to try the suit but discovers at the time of passing a decree that it is incompetent to pass the decree because of the pecuniary valuation, Order VII, rule 10, does not apply. A. I. R. 1928 Lah. 484=110 Ind. Cas. 293. Order VII. r. 10, had not been overridden in the Punjab. A. I. R. 1928 Lah. 484=110 Ind. Cas. 293. Court in which the suit is instituted cannot return the plaint for presentation to the proper Court on the ground that it would be more advantageous to the defendant to have the suit tried in that Court. The plaint can be returned only on the ground for want of jurisdiction. A. I. R. 1927 Cal. 87=97 Ind. Cas. 979. Where a Judge holds a case set out in the plaint to be untrue in fact, he ought to dismiss the suit on the merits and not return the plaint under Order VII, rule 10. If he returns the plaint, he fails to exercise the jurisdiction vested in him by law and the order is open to revision. A. I. R. 1926 All. 58=48 A. 168=24 A. L. J. 83=90 Ind. Cas. 353. This rule applies only when it is found that the suit as originally framed was wrongly instituted; it does not apply when it is found at the trial on the evidence that the Court has no jurisdiction to grant relief prayed for. 135 Ind. Cas. 257=A. I. R. 1932 Sind 67=A. L. R. 1932 Sind 293; A. I. R. 1933 Sind 296. Where a Court found that it has no jurisdiction to try a suit, it should at once return it for presentation to the proper Court. It has no power to call on plaintiff to pay deficit Court-fee and on his default to reject the plaint. A. L. R. 1933 Nag. 359. In case of transfer of parties raising valuation of subject-matter of suit beyond the Court's jurisdiction the Court should add parties and return the plaint for presentation to proper Court. A. I. R. 1926 Pat. 28=90 Ind. Cas. 82. Court for determining jurisdiction cannot decide material issue in the case. A. I. R. 1926 Mad. 339=91 Ind. Cas. 737. Where a Court finds that it has no jurisdiction to try a suit it cannot try it on merits. If a decree be passed it can be set aside in revision. A. I. R. 1925 Oudh 735=88 Ind. Cas. 991. Plaint cannot be returned for amendment. After retaining it on the Court file the plaintiff must if necessary be ordered to amend it within a certain time. A. I. R. 1921 Sind 166=17 S. L. R. 223=85 Ind. Cas. 893.

Where a suit under s. 92, included claim for possession, Court should not return plaint altogether. The Court may allow the plaintiffs, to amend the plaint by striking off the claim for possession or may dismiss the claim with regard to that particular relief in its judgments. A. I. R. 1925 All. 683=47 A. 770=23 A. L. J. 661=89 Ind. Cas. 40. A Court should on plaintiff's refusal to pay Court-fee though for a claim exceeding its jurisdiction reject the plaint. If plaintiff pays the requisite Court-fees the plaint should be returned for presentation to proper Court. A. I. R. 1924 Mad. 646=45 M. L. J. 345=34 M. L. T. 92=77 Ind. Cas. 338; 77 Ind. Cas. 781. The provisions of this rule are absolute in their terms. (1920) M. W. N. 163=10 L. W. 535=53 Ind. Cas. 308. Where valuation is not contested, Court must entertain plaint. 18 O. C. 364=33 Ind. Cas. 619. Where plaint is returned both by the second class subordinate Judge's Court as well as Small Cause Court, the correct procedure would be to make an application to the District Judge under the provisions of Order 45, rule 7. 145 Ind. Cas. 261=A. I. R. 1933 Nag. 221. Where the plaint of a pauper suit has been returned by a Munsiff's Court as being undervalued, the plaintiff must get fresh leave to sue as pauper from the subordinate Judge. 1933 M. W. N. 197. Out of two claims, one which is out of jurisdiction shall be regarded as a separate claim. A. I. R. 1921 All. 193=19 A. L. J. 822=64 Ind. Cas. 688; see also 54 Ind. Cas. 655; 54 Ind. Cas. 364=6 O. L. J. 640=41 Ind. Cas. 125=4 O. L. J. 374. In case of want of jurisdiction the plaint must be returned for being presented to the proper Court. 41 M. 701=(1918) M. W. N. 497=24 M. L. T. 45=35 M. L. J. 27=45 Ind. Cas. 266. The Revenue Court must admit the plaint when it is returned to it by the Civil Court. 6 L. W. 239=42 Ind. Cas. 483. Court must entertain plaint when valuation is not contested. 18 O. C. 364=33 Ind. Cas. 619. Failure to adopt proper procedure such as could have given the Court the jurisdiction entails the dismissal of the suit. A. I. R. 1922 Bom. 152=46 B. 229=23 Bom. L. R. 1086=64 Ind. Cas. 919. Where a suit which is ordinarily to be instituted in a Munsiff's Court is filed in a Subordinate Judge's Court who has jurisdiction to entertain the suit and the evidence has been gone into and concluded on both sides but objection is raised when arguments are being heard that the suit ought to have been instituted in the Munsiff's Court, the Subordinate Judge should bring the hearing to a conclusion and deliver judgment and not direct the plaint to be returned to the Munsiff's Court even though it is

irregular on the part of the plaintiff to have instituted the suit in the subordinate Judge's Court. A. I. R. 1934 Cal. 524.

**At any stage of the suit**—These words have been added in the new Code of 1908. There were no such words in the previous Codes. Still under the old Codes it was held that the plaint should be returned at any stage of the suit where it would be discovered that the Court had no jurisdiction to try the suit. 23 W. R. 263 ; 8 C. 834 ; 8 M. 62 ; 2 A. 357 ; 8 B. 313 (F. B.). The plaint should be at once returned where the Court discovers that the valuation is beyond its jurisdiction. A. I. R. 1931 Mad. 69=59 M. L. J. 890=(1930) M. W. N. 656=33 L. W. 68=129 Ind. Cas. 625 ; A. I. R. 1927 Pat. 258=6 Pat. 351=103 Ind. Cas. 435 ; A. I. R. 1922 All. 424=44 A. 686=70 Ind. Cas. 98 Where suit is not cognizable by Small Causes Court, plaint should be returned at any stage but should not be dismissed. 27 C. L. J. 590=41 Ind. Cas. 203.

**Want of jurisdiction.**—Where a Court finds that on correct valuation of plaint suit is beyond its pecuniary jurisdiction, the plaint should be returned for presentation to proper Court. The latter Court can consider whether proper Court-fees have been paid and proceed as provided by law. The former Court has no such power. A. I. R. 1931 Mad. 67=129 Ind. Cas. 826 ; see also A. I. R. 1930 Mad. 699=31 L. W. 831=58 M. L. J. 651=126 Ind. Cas. 111. The jurisdiction in a particular case is determined by the nature of the claim as brought. A. I. R. 1928 Nag. 221=107 Ind. Cas. 671. The subject-matter of the suit or application must be determined by looking into the application itself or the plaint of the suit itself. A. I. R. 1927 Cal. 711=46 C. L. J. 46=104 Ind. Cas. 349. Court in which the suit is instituted cannot return the plaint for presentation to the proper Court on the ground that it would be more advantageous to the defendant to have the suit tried in that Court. The plaint can be returned only on the ground of want of jurisdiction. A. I. R. 1927 Cal. 87=97 Ind. Cas. 979. Where the plaint is not *mala fide* it will determine jurisdiction although it may be mistaken. A. I. R. 1926 All. 747=96 Ind. Cas. 787. Where some causes of action are within and some outside the jurisdiction of a Court, the Court should retain the plaint, strike out that part which is beyond its jurisdiction and try the case. For the struck-out part, the plaintiff may file another suit in proper Court. A. I. R. 1926 Bom. 383=28 Bom. L. R. 521=94 Ind. Cas. 783. Where return of plaint has been ordered, but plaintiff is willing to drop part of his claim to bring his case within Court's pecuniary jurisdiction, Court can admit the plaint as amended. A. I. R. 1926 Mad. 133=22 L. W. 582=(1925) M. W. N. 804=92 Ind. Cas. 800.

A suit should not be dismissed on the ground that the Court has no jurisdiction to try the suit but it should be returned for proper presentation. A. I. R. 1926 Mad. 140=22 L. W. 522=(1925) M. W. N. 771=91 Ind. Cas. 280. Where Judge holds a case set out in the plaint to be untrue in fact, he ought to dismiss the suit on the merits and not to return the plaint under this rule. If he returns the plaint, he fails to exercise jurisdiction vested in him by law and the order is open to revision. A. I. R. 1926 All. 51=48 A. 168=24 A. L. J. 83=90 Ind. Cas. 353. Under Order 7, rule 10, a Court which finds that it has no jurisdiction to entertain a suit should return the plaint for presentation to the proper Court. The suit cannot be dismissed straightway. 133 Ind. Cas. 411=A. I. R. 1931 All. 664 ; see also 129 Ind. Cas. 826=34 L. W. 352=A. I. R. 1931 Mad. 67=61 M. L. J. 43 ; A. I. R. 1933 Nag. 82 ; A. I. R. 1933 Lah. 851=34 P. L. R. 658=145 Ind. Cas. 755. After arguments of both parties the Court cannot raise the question of jurisdiction *suo motu* and return the plaint. 32 P. L. R. 737=131 Ind. Cas. 303. The question of jurisdiction and valuation should be decided at the earliest possible opportunity and where the Court finds that it has no jurisdiction, it should return the plaint for presentation to a Court having jurisdiction. It should not enforce payment of Court-fees. 29 N. L. R. 367=A. I. R. 1933 Nag. 312. Allegations in the plaint determine the jurisdiction of Courts. If the plaint discloses allegations which are cognizable by the Munsiff and he decides against the claim of the plaintiff for rendition of accounts, the plain duty of the Court is to dismiss the suit and not to return the plaint for representation to some other Court, which on the plea of the defendants, would have jurisdiction. 1933 A. L. J. 667=A. I. R. 1933 All. 745.

**The return of plaint by appellate court.**—Even after the trial of the suit, the appellate Court is competent to order for the return of the plaint for presentation to the proper Court. 1 B. 538 ; 55 P. R. 1878 ; W. R. (1864) 65 ; 11 M. 197 ; 5 W. R. Act X, Ruling 87 ; 8 C. 126 ; 9 B. 259 ; 9 B. 266 ; 7 C. L. J. 152. There is no

bar for the exercise of this power even in second appeal. 9 B. 259; 9 B. 266; 10 M. 211. By virtue of s. 107, Order VII, r. 10, applies to appeals. A. I. R. 1923 Nag. 310=8 N. L. R. 63=74 Ind. Cas. 93. The order of an appellate Court returning a plaint is appealable. 8 C. 126; 3 C. W. N. 243=27 C. 275. It is within the power of the High Court to decide questions of jurisdiction necessary for the trial of the suit. A. I. R. 1922 Pat. 368=2 P. L. T. 739=64 Ind. Cas. 496.

**Limitation.**—Where a plaint is returned the time to be excluded under s. 14, Limitation Act, is the period from the date of presentation to the date of return of plaint. A. I. R. 1926 Mad. 178=22 L. W. 816=92 Ind. Cas. 373. Court ordering a return of plaint for presentation to proper Court on payment of additional Court-fee, cannot review its order and extend time previously fixed for payment of Court-fee. A. I. R. 1926 Mad. 133=22 L. W. 582=(1925) M. W. N. 804=92 Ind. Cas. 800. No date was fixed by the Subordinate Judge when he passed his order on 25th March, 1924, on which the plaintiff should ask the office to hand over the plaint to him, in pursuance of the order returning the plaint under Order 7, rule 10, C. P. Code. The plaint was actually returned by the office on 10th April, 1924, on which the proper Court was closed owing to an epidemic of plague in the district. The plaint was presented on 22nd April, when Court re-opened. The lower appellate Court dismissed the suit holding that plaintiff was remiss in not trying to obtain the plaint earlier: *Held* that no litigant party could suffer on account of laches or delay of the Court or its office and that, therefore, the Courts below were not justified in throwing out the plaintiff's suit as barred by limitation. A. L. R. 1933 Lah. 1207=A. I. R. 1933 L. h. 711=145 Ind. Cas. 5=34 P. L. R. 634.

**Appeal.**—The return of a plaint does not deprive the plaintiff of his right of appeal, even after filing the plaint in the directed Court. 41 M. 721=34 M. L. J. 397=45 Ind. Cas. 89. Where on appeal from an order returning a plaint to be presented to the proper Court, an order is passed remanding the case to the trial Court, no further appeal therefrom lies, nor is it liable to a revision. 125 Ind. Cas. 581. High Court can revise the order directing the plaint to be returned for presentation to proper Court. A. I. R. 1930 All. 158=(1929) A. L. J. 1157=124 Ind. Cas. 478. An appeal lies against an order wrongly returning the plaint to be presented to the proper Court. A. I. R. 1930 Nag. 207=13 N. L. J. 4=121 Ind. Cas. 668. Where a plaint is returned by a Civil Court after it had been returned by a Small Causes Court, the order of the Civil Court does not come under Order VII, rule 10, and no appeal lies on it. A. I. R. 1926 Cal. 83=85 Ind. Cas. 1002. Where Civil Court has held that it cannot entertain appeal and that the appeal lies in a Revenue Court, it should not dismiss the appeal, but return the Memorandum of Appeal for presentation to the proper Court. A. I. R. 1925 Oudh 499=12 O. L. J. 362=2 O. W. N. 499=89 Ind. Cas. 511. An appeal lies from an order returning a plaint for presentation to the proper Court but a second appeal does not lie in such a case. 134 Ind. Cas. 203=32 P. L. R. 362=A. I. R. 1931 Lah. 294; A. I. R. 1926 Lah. 141=89 Ind. Cas. 384; A. I. R. 1925 Bom. 431=27 Bom. L. R. 635=88 Ind. Cas. 753. Where the averments contained in the plaint given jurisdiction to the Court to entertain the suit as framed and such Court on finding that the allegations contained in that plaint to be false dismisses the suit, the proper order that the appellate Court should pass is to uphold the decree of the trial Court and not to return the plaint for presentation to the proper Court. A. I. R. 1933 All. 745=1933 A. L. J. 667=A. L. R. 1933 All. 537. An appeal is provided under Order 43, rule 1, clause (a) on an order returning plaint under Order VII, rule 10. The order by the appellate Court becomes final under s. 104, cl. (2) and section 105 does not preclude the aggrieved party from disputing the correctness of the remand order in second appeal if he is otherwise entitled to do so. A. I. R. 1926 Mad. 900=51 M. L. J. 119=24 L. W. 630=97 Ind. Cas. 790. Appellate Court reversing order rejecting plaint should leave parties to seek their own remedies. (1915) M. W. N. 784=32 Ind. Cas. 759. An appeal presented to the High Court wrongly without any excuse, should be dismissed, as the High Court will in such cases refuse to return the Memorandum of Appeal. A. I. R. 1925 Cal. 335=80 Ind. Cas. 858. Where plaint has been returned for presentation to proper Court, the plaintiff can present the same to proper Court even after unsuccessful appeal if it is not barred by limitation. A. I. R. 1925 Bom. 418=27 Bom. L. R. 652=89 Ind. Cas. 68. Order returning a Memorandum of Appeal to be presented to the proper Court can be revised. A. I. R. 1925 Lah. 479=7 Lah. L. J. 285=26 P. L. R. 584=90 Ind. Cas. 603.

**Representation.**—Where a plaint is returned for presentation to proper Court, it can after amendment be represented to the same Court. A. I. R. 1931 Mad. 8=32 L. W. 694=59 M. L. J. 953=129 Ind. Cas. 254. When a plaint is returned for presentation to proper Court, the suit is said to be instituted on date of such presentation and the suit thus presented cannot be said to be in continuation of the suit filed in a Court without jurisdiction. A.I.R. 1928 Bom. 421=30 Bom. L.R. 970=52 B. 548=113 Ind. Cas. 511; A. I. R. 1926 Cal. 355=30 C. W. N. 90. The presentation of a plaint in another Court, after its return by the Court to which it is first presented by mistake is a continuation of the original suit and therefore a fresh *vakaltnama* in another Court is not necessary. A. I. R. 1923 Nag. 182=19 N. L. R. 3=6 N. L. J. 100=71 Ind. Cas. 436. When a plaint is returned for presentation to the proper Court, the plaintiff can pay the deficit Court-fees in the Court having jurisdiction to hear the case by taking advantage of previously paid Court-fess. A. I. R. 1927 Bom. 257=51 B. 236=29 Bom. L. R. 280=101 Ind. Cas. 343. If the Court-fees Act is amended in the meantime increasing the amount of Court-fee payable thereunder the plaintiff should be credited with originally paid Court-fee. A. I. R. 1926 Cal. 355=30 C. W. N. 90=91 Ind. Cas. 862.

Rejection of plaint.

11. [S. 54.] The plaint shall be rejected in the following cases :—

- (a) where it does not disclose a cause of action ;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so ;
- (c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so ;
- (d) where the suit appears from the statement in the plaint to be barred by any law.

*N. B.*—For local amendment in Calcutta.—*Vide infra.*

**Scope**—This rule applies to first proceedings only. A. I. R. 1930 Nag. 224=26 N. L. R. 183=124 Ind. Cas. 241. This rule is only a rule of procedure and is only meant to secure proper Court-fees and stamps. A. I. R. 1930 Cal. 686=58 C. 281=131 Ind. Cas. 587. An order refusing permission to sue in *forma pauperis* does not come under the rule. A. I. R. 1928 Nag. 24=10 N. L. J. 177=105 Ind. Cas. 30. Provisions of this rule is not exhaustive, plaint may be rejected under s. 151. A. I. R. 1924 Oudh 413=11 O. L. J. 260=83 Ind. Cas. 778. The dismissal of a suit and rejection of a plaint are not identical terms. In one case a decree is pissed, in the other it is merely an appealable order. 54 A. 525=138 Ind. Cas. 396=1932 A. L. J. 489=A. I. R. 1932 All. 543; see also 59 C. 388=138 Ind. Cas. 643=A. I. R. 1932 Cal. 482. This rule read with s. 107 (2) would seem to make it clear that the Memorandum of Appeal should first be returned for correct stamping. 1932 M. W. N. 104. Suit not otherwise bad and which has reached the stage of arguments must be dismissed and not rejected. A. I. R. 1928 Oudh 495=5 O. W. N. 927=114 Ind. Cas. 510. It is not absolutely necessary to draw up a decree in an order rejecting a plaint. A. I. R. 1929 Lah. 83=108 Ind. Cas. 597. Court can dismiss the suit filed by next friend of minor, if not in minor's interest. A. I. R. 1924 Oudh 413=11 O. L. J. 260=83 Ind. Cas. 778. Plaint must be rejected as a whole but with due discretion. A. I. R. 1921 Sind 106=17 S. L. R. 9=80 Ind. Cas. 958. Proceedings taken in a plaint insufficiently stamped are not bad in law. A. I. R. 1928 Lah. 221=106 Ind. Cas. 817. Dismissal for default cannot be set aside on the ground that plaint ought to have been rejected. A.I.R. 1924 Pat. 271=2 Pat. 784. A suit can be rejected at any stage of the suit even after its registration. A. I. R. 1935 Cal. 764. An application for leave to sue in *forma pauperis* is not governed by this rule because until the application is granted the suit cannot be regarded as instituted. 158 Ind. Cas. 790=1935 M. W. N. 863=42 L. W. 655=A. I. R. 1935 Mad. 878; see also 40 C. W. N. 747=A. I. R. 1936 Cal. 221=162 Ind. Cas. 689. The mandatory provision contained in Order 7, rule 11, is intended for cases where no other complication intervened, and the Court has sufficient inherent power to depart from the normal procedure to suit in exigencies of the situation. *Ibid.* A plaint can be rejected at any stage of the suit even after registration. 40 C. W. N. 1390. In deciding an

application for rejection of a plaint, under the provisions of Order 7, rule 11, the Court is not entitled to go beyond the pleadings, and cannot look at the affidavits filed in connection with the application. 41 C. W. N. 193.

**Clause (a).—Does not disclose cause of action.**—Cause of action means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his judgement of the Court. It does not contemplate any rule of limitation barring the claim. 54A. 525=138 Ind. Cas. 396=1932 A. L. J. 489=A. I. R. 1932 All. 543. A suit should not be wholly dismissed for non-compliance with s. 80, C. P. Code. A. I. R. 1931 Mad. 175=32 L. W. 810=59 M. L. J. 923=54 M. 416=129 Ind. Cas. 456. In a suit for damages against railway, omission to give details is not fatal. A. I. R. 1929 All. 597=1929 A. L. J. 859=51 A. 805=119 Ind. Cas. 95. In a suit to set aside a mortgage decree on the ground that the execution of the mortgage was fraudulent, fraud in conduct of mortgage suit need not be alleged. A. I. R. 1925 Mad. 792=48 M. L. J. 351=(1925) M. W. N. 162=91 Ind. Cas. 717; A. I. R. 1931 Lah. 77=31 P. L. R. 946=131 Ind. Cas. 129. Where plaint states no cause of action, it must be rejected. A. I. R. 1923 Lah. 290=75 Ind. Cas. 165; 64 Ind. Cas. 919=A. I. R. 1922 Bom. 154=44 B. 229=23 Bom. L. R. 1086; 3 C. W. N. 220; 7 C. 343; 3 A. 766; 15 C. 533 (P.C.). But in money claim decree may be given even though cause of action arises during the conduct of suit. A. I. R. 1923 Lah. 590=6 Lah. L. J. 31=75 Ind. Cas. 562. Mortgagee paying Government revenue for two out of three mortgagors in separate possession and suing all for money, has no cause of action against third for paying his revenue. 14 A. L. J. 605=35 Ind. Cas. 198. Power of appellate Court is co-extensive with trial Court. A. I. R. 1924 Nag. 80=69 Ind. Cas. 554. Rejection of a plaint for no cause of action by appellate Court operates as *res judicata*. 57 Ind. Cas. 684. If the plaint is defective, suit cannot be dismissed or rejected. Court is bound to give time for amendment. 1 Pat. L. T. 188=2 U. P. L. R. (Pat) 29=55 Ind. Cas. 445. There is no provision in the Code for rejection of a plaint in part. A. I. R. 1936 Lah. 1021.

**Clause (b).**—This rule extends to or is applicable to cases where the Court has jurisdiction to try the suit, even if the relief claimed is undervalued. A. I. R. 1927 Bom. 257=51 B. 236=29 Bom. L. R. 280=101 Ind. Cas. 343. Undervalued suit should not be dismissed but plaint should be returned for being presented to proper Court. 41 Ind. Cas. 167; see also 77 Ind. Cas. 781=46 M. L. J. 345; 13 B. 517; 133 Ind. Cas. 654=32 P. L. R. 455=A. I. R. 1931 Lah. 622. Clause (b) gives power to Court in a case of under-valuation of a relief to require the plaintiff to correct the valuation given by him in his plaint and to reject the plaint in case the plaintiff fails to do so. A. I. R. 1934 Cal. 448=59 C. L. J. 233=38 C. W. N. 589=61 C. 796=149 Ind. Cas. 3. Plaint alone can be considered to value suits. Circumstances subsequently influencing Court's judgment are not to be taken into consideration. A. I. R. 1924 Cal. 969=40 C. L. J. 150=79 Ind. Cas. 982; see also 17 B. 56; 33 C. 734=9 C. W. N. 690. This clause applies only to a case in which the relief claimed is undervalued. 59 C. 388=138 Ind. Cas. 643=A. I. R. 1932 Cal. 482. A plaint returned for presentation to the proper Court if again returned on account of wrongful valuation by the latter Court to the Court which first returned it cannot be said to have been filed on the latter date of presentation, to the Court first returning it. A. I. R. 1929 Lah. 409=30 P. L. R. 206=11 Lah. L. J. 251=116 Ind. Cas. 317. Where a Court finds that on a correct valuation of the plaint it is not cognizable by it, the proper thing to be done is to return the plaint so that it may be presented to the proper Court. It has no jurisdiction to ask the plaintiff to amend his valuation and pay additional Court-fee and then return the plaint. A. I. R. 1931 Mad. 67=61 M. L. J. 438=129 Ind. Cas. 269. This rule controls Court-fees Act, s. 7, sub-section (4). A. I. R. 1924 Cal. 448 (F. B.).

**Clause (c).**—The words "properly valued" are sufficiently wide to cover the case where a proper valuation has been arrived at by the Court, equally with the case where the proper valuation has been stated by the plaintiff himself. 36 C. W. N. 567=139 Ind. Cas. 520=A. I. R. 1932 Cal. 685. So a Court can make proper valuation after investigation in course of suit and can require the plaintiff to supply the deficit Court-fees within a fixed time. On failure on the part of the plaintiff to pay the deficit Court-fee, the Court is bound to reject the plaint. *Ibid*; see also A. I. R. 1932 Pat. 111=133 Ind. Cas. 449=A. L. R. 1932 Pat. 451. The question whether a plaint ought to be rejected under Order 7, rule 11, cannot depend on anything which the defendant may say in his written statement. The defect which

entitles the Court to reject the plaint ought to be apparent on the face of the plaint, and it is the duty of the Court under Order 7 to examine a plaint before issuing summons. The discovery of the patent defect should, as a rule, not be deferred until, the summons has gone out, and the written statement has come in. A. I. R. 1933 Sind 1=142 Ind. Cas. 501. Where the plaintiff instituted a suit in the ordinary way and subsequently when called upon to pay additional Court-fee he applied to continue the suit in *forma pauperis*, held that the Court has power to allow him to continue the suit, which has been instituted in *forma pauperis*. A. I. R. 1933 Cal. 567=60 C. 827=57 C. L. J. 441; see also A. I. R. 1933 Mad. 498=64 M. L. J. 728=1933 M. W. N. 458=37 L. W. 325. A plaint without any stamp should be rejected. A. I. R. 1930 Nag. 224=26 N. L. R. 181=124 Ind. Cas. 241. Insufficiency of stamps does not entail the rejection of the plaint, time to provide sufficient stamps, and for the correct valuation of the suit must be given. A. I. R. 1927 Mad. 1002=54 M. L. J. 67=105 Ind. Cas. 881; see also A. I. R. 1930 Oudh 104=6 O. W. N. 1105=5 Luck 474=124=Ind. Cas. 420; A. I. R. 1926 Mad. 676=(1926) M. W. N. 341=51 M. L. J. 92=95 Ind. Cas. 439; A. I. R. 1926 Cal. 504=91 Ind. Cas. 688; 86 Ind. Cas. 491=A. I. R. 1925 Mad. 1045; A. I. R. 1922 Cal. 506=49 C. 880=27 C. W. N. 566=38 C. L. J. 74=70 Ind. Cas. 101; 4 Pat. L. J. 703=55 Ind. Cas. 316; 44 C. 352=21 C. W. N. 834=40 Ind. Cas. 95; 27 P. L. R. 1917=25 P. W. R. 1917=39 Ind. Cas. 766. Court can extend from time to time period given for payment of deficit Court-fee. 51 Ind. Cas. 154; A. I. R. 1926 Nag. 312=93 Ind. Cas. 64. The dismissal of the plaint for non-appearance of the plaintiff on the fixed day and the subsequent non-payment if the deficiency cause the dismissal of the plaint is under Order VII, rule 11 and not under Order IX, r. 8. A. I. R. 1929 Mad. 344=117 Ind. Cas. 789. The plaint is deemed to have been presented within the period of limitation if time is given by the Court to supply the deficit stamps on the day fixed after limitation. A. I. R. 1928 Lah. 274=115 Ind. Cas. 557; see also A. I. R. 1926 Nag. 156=89 Ind. Cas. 419; A. I. R. 1923 All. 538=45 A. 518=21 A. L. J. 387=74 Ind. Cas. 358; A. I. R. 1922 Pat. 56=3. P. L. T. 142=70 Ind. Cas. 378. The language of Order 7, rule 11 (c), leaves no room for doubt that it contemplates cases in which Court-fee on the plaint or on the Memorandum of Appeal itself is not paid. A. I. R. 1937 All. 280. A Court has no jurisdiction to return a plaint presented with an insufficient stamp. It is incumbent upon the Court to receive it, and fix a time within which the deficiency should be made up and if it is not complied with within the time allowed to reject it. A. I. R. 1937 Mad. 266. But there is nothing illegal in permitting a plaintiff to file a plaint with stamps of a denomination smaller than the one required under the rules, if the requisite stamps are not available. *Ibid*. The Court can exercise its power to correct the valuation at any stage of the suit. 58 M. 1051.=68 M. L. J. 755=A. I. R. 1935 Mad. 569=41 L. W. 562=157 Ind. Cas. 94.

Order rejecting plaint for non-payment of Court-fee cannot be restored if signed by Court, but is subject to review. A. I. R. 1923 Pat. 534=2 Pat. 504=4 Pat. L. T. 261=72 Ind. Cas. 629. In arbitration suit, failure to pay stamp-duty as distinguished from Court-fee should not incur dismissal of suit, after decree has been ordered to be drawn up. 17 A. L. J. 493=50 Ind. Cas. 886. No order for additional Court-fee can be issued after the suit is dismissed. A. I. R. 1925 Lah. 326=7 Lah. L. J. 18=86 Ind. Cas. 266. The lower Court returned the plaint and ordered the plaintiff to pay Rs. 57-8-0 to make up the proper Court-fee. The plaintiff reduced the claim without the permission of the Court and returned the plaint with a Court-fee of Rs. 37 which was then correct. The Court held that the plaintiff had not obeyed the order of Court and that the original plaint would not have the same effect as if the proper fee had been paid at the outset and rejected the plaint under this rule: *Held* that the order of the lower Court was wrong and that the plaintiff is always at liberty to relinquish any portion of his claim in order to bring it within a certain Court-fee. 1931 M. W. N. 677=A. I. R. 1931 Mad. 716=134 Ind. Cas. 815=34 L. W. 252.

Clause (d)—If it appears to be barred by any law, plaint should be rejected under clause (d) and not dismissed. 21 C. W. N. 209=29 O. L. J. 17=35 Ind. Cas. 76. In applying the provisions of the Indian Limitation Act to the suit the plaintiff's version is the only one which should be considered. A. I. R. 1927 Nag. 10=9 N. L. J. 198=22 N. L. R. 147=98 Ind. Cas. 22. The Limitation Act is absolute in its terms only the form of the suit and the relief claimed are the only criterion for the applicability of a particular article. A. I. R. 1927 Nag. 10=22 N. L. R. 147=9 N. L. J. 198=98 Ind. Cas. 22. It may be doubtful whether the legislature has intended that,

where a plaint has been rejected on the ground that the claim is barred by limitation, the plaintiff would be at liberty to file a fresh plaint either without any new allegations or with new allegations showing an exemption from the law of limitation. 54 A. 525=1932 A. L. J. 489=A. I. R. 1932 All. 543=138 Ind. Cas. 396=A. L. R. 1933 All. 689. There is revision from an order wrongly dismissing a suit as time-barred. A. I. R. 1928 Lah. 274=115 Ind. Cas. 757.

**Appeal.**—High Court cannot call for revision of a plaint which is rejected for there is scope for appeal on rejection. A. I. R. 1930 Pat. 277=11 P. L. T. 172=122 Ind. Cas. 152; 60 C. L. J. 197=38 C. W. N. 1063. An order passed in appeal on rejection of a plaint that no appeal lies is also a decree and is therefore, subject to second appeal and not revision. A. I. R. 1929 Cal. 226=49 C. L. J. 81=115 Ind. Cas. 368. An order rejecting an appeal from an order disallowing the plaintiff to sue as a pauper and requiring the Court-fees to be paid on a fixed date is subject to revisional proceedings only. A. I. R. 1929 Lah. 125=112 Ind. Cas. 490. According to the practice of Madras High Court, order holding that certain Court-fee is payable is revisable. A. I. R. 1925 Mad. 722=48 M. L. J. 514=1925 M. W. N. 104=87 Ind. Cas. 25. Appeal on rejection of plaint for undervaluation cannot be rejected for deficiency of stamps without ascertaining value of the suit, even though valuation is not changed in appeal. A. I. R. 1926 Cal. 427=87 Ind. Cas. 651. An appeal does not lie against the order of appellate Court setting aside an order of Court of first instance rejecting a plaint under Order 7, rule 11, and directing the trial Court to proceed with the trial of the suit. Such order is not an order under O. 41, rule 23, and is not appealable under Order 41, r. 1 (a). A. I. R. 1937 Lah. 380; see also 6 C. L. J. 214; A. I. R. 1915 Lah. 8; A. I. R. 1929 Lah. 83.

12. [S. 55.] Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.  
Procedure on rejecting plaint.

**Notes.**—A Memorandum of Appeal can be rejected under Order XLI, rule 3, or under this rule on the grounds set forth under rule 11 of Order VII. But when it is so rejected the reasons for rejection ought to be recorded. 15 A. 367

13. [S. 56.] The rejection of the plaint on any of the grounds herein-  
before mentioned shall not of its own force pre-  
clude the plaintiff from presenting a fresh plaint  
Where rejection of plaint does not preclude presentation of fresh plaint.  
in respect of the same cause of action.

Notes.—Unless it is barred by limitation a fresh suit can be brought on the same subject-matter even after the rejection of the plaint under Order 7, rule 11. 14 W. R. 289; 12 A. 553; 15 C. 533; 13 M. 44; 8 A. 282. The dismissal of a suit under ss. 10 and 11 of the Court Fees Act has the effect of rejection of a plaint. 12 A. 129 (130). But when a plaint is rejected on merits after full trial, a subsequent suit on the same subject-matter is barred by *res judicata*. 60 Ind. Cas. 694=(1920) M. W. N. 616=12 L. W. 457. Not amending plaint rejected for multifariousness within time given by Court is not fatal to fresh suit for same cause. A. I. R. 1927 Lah. 83=99 Ind. Cas. 538.

#### *Documents relied on in Plaint.*

14. [S. 59.] (1) Where a plaintiff sues upon a document in his possession or power he shall produce it in Court when the  
Production of document on which plaintiff sues.  
plaint is presented, and shall at the same time deliver the document or a copy thereof to be  
filed with the plaint.

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his  
List of other documents.  
claim he shall enter such documents in a list to be added or annexed to the plaint.

*N. B.*—For local amendment in Oudh.—*Vide infra.*

**Scope.**—It is mandatory to produce along with plaints accounts and other documents on which the claim is based. Other documents of evidence must be produced at the first hearing. 1 Lah. 6=6 P. W. R. 1920=19 P. L. R. 1920=57 Ind. Cas. 187; see



also 21 C. W. N. 553=25 C. L. J. 273=19 Bom. L. R. 394=39 Ind. Cas. 243 (P. C.). Sufficient cause must be shown for non-production of documents along with plaint or at first hearing. A. I. R. 1927 Oudh 612=1 Luck. 56=101 Ind. Cas. 911. The object of the rule is to shut out suspicious documents and to afford as little opportunity as possible for the production of false and fabricated documents in Court. So a document not filed with plaint with Court's knowledge cannot be deemed to be fabricated and should be allowed at any stage. 60 Ind. Cas. 372; 22 B. 173. Document not mentioned in plaint may not be admitted by Court at subsequent stage. 95 Ind. Cas. 258=A. I. R. 1926 Lah. 527=8 Lah. L. J. 345. Documents not mentioned in the plaint are admissible to refresh memory of witness. A. I. R. 1918 P. C. 118=41 A. 33=21 O. C. 328=23 C. W. N. 577=6 O. L. J. 168=(1918) M. W. N. 490=45 I. A. 284 (P. C.)=49 Ind. Cas. 540. Non-production of documents in existence at the date of suit and required to be produced along with plaint should not necessarily cause rejection of suit. 44 Ind. Cas. 21. Documents in possession of third party may be produced during the conduct of the suit. 38 P. W. R. 1916=32 Ind. Cas. 619. Plaintiff not suing on documents such as are not filed along with plaint cannot create by them new rights. Document can be treated as evidence only. 32 M. L. J. 137=26 C. L. J. 273=21 C. W. N. 553=19 Bom. L. R. 394=35 Ind. Cas. 243 (P. C.). Documents not filed with plaint may or may not be admitted. 44 B. 625=22 Bom. L. R. 819=57 Ind. Cas. 598. No need to mention any document in plaint if existence is not known to plaintiff. 63 Ind. Cas. 958. Documents to be produced under Order XIII, rule 1, comprised documents mentioned in Order VII, rule 14, and not documents referred to in Order VII, rule 18 (2) A. I. R. 1922 Pat. 569=4 Pat. L. J. 322=77 Ind. Cas. 848. Appellate Court is not to interfere with lower Court's rejection of a document unless absolutely necessary. 27 C. L. J. 119=46 Ind. Cas. 246; see also 13 C. W. N. 797=10 C. L. J. 33=2 Ind. Cas. 946. In a suit for dissolution of marriage on the ground of wife's adultery, the correspondent served the petitioner with an order under s. 59 of the C.P. Code of 1882 to file a list of documents relied upon by him in support of his suit. The petitioner objected to the application on the ground that on il issues had been framed or until defence had been filed, he did not know what documents must be relevant: *Held* that the petitioner was bound under s. 59 of the C. P. Code of 1882 to file a list of all letters and documents in his possession or power which he relied on relating to the adultery charged. 11 P. R. 1902. None of the rules under Order 7 requires to allow documents which are part of the evidence of the suit to be annexed to the plaint. 58 C. 418=134 Ind. Cas. 538=A. I. R. 1931 Cal. 458. The right of inspection under Order 11, rule 15, extends to documents entered in the list annexed to the plaint. A. I. R. 1931 Mad. 825=61 M. L. J. 704. It is open to a plaintiff to tender in evidence a previous statement in writing by the defendant in the cross-examination of the defendant for the purpose of contradicting him under s. 145, Evidence Act, even though such document was not produced by the plaintiff under Order 7, rule 14. A. I. R. 1937 All. 55.

Statement in case of documents not in his possession or power.

15. [S. 60.] Where any such document is not in the possession or power of the plaintiff he shall, if possible, state in whose possession or power it is.

*N. B.*—For local amendment in Oudh.—*Vide infra*.

16. [S. 61.] Where the suit is founded upon a negotiable instrument, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

**Notes.**—Where plaintiff bases his claim on a lost *hundi* or other negotiable instruments he must furnish security against possible claims. 16 Ind. Cas. 769=166 P. L. R. 1912=273 P. W. R. 1912. In a suit on pronote if it is not returned to the defendant, Court may refrain by way of security from paying money on pronote to plaintiff. 12 L. W. 147=59 Ind. Cas. 363.

17. [S. 62.] (1) Save in so far as is otherwise provided by the \*Bankers Books Evidence Act, 1891, where the document on which the plaintiff sues is an entry in a shop-book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies

(2) The Court or such officer as it appoints in this behalf, shall forthwith mark the document for the purpose of identification; and, after examining and comparing the copy with the original, shall, if it is found correct, certify it to be so and return the book to the plaintiff and cause the copy to be filed.

*N. B.*—For local amendment in Allahabad.—*Vide infra.*

*Notes.*—This section does not require the Court to inspect the document, but the Judge or the officer should mark it for identification. 3 B. 92; see also 15 B. 687; 57 Ind. Cas. 185=6 P. W. R. 1920=19 P. L. R. 1920=1 Lah. 6.

18. [S. 63.] (1) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(2) Nothing in this rule applies to documents produced for cross-examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory.

*N. B.*—For addition of new rules in Allahabad, Bombay, C. P., Lahore, Oudh, Patna, Peshwar and Sind.—*Vide infra.*

*Scope.*—Although the Courts are vested with a discretion under Act VII of 1859 as to the reception of documents not submitted with the plaint sufficient reason must be assigned for the delay in producing them. 98 P. R. 1867. The policy underlying this rule is to exclude evidence, as to the existence of which at the date of the suit, there may be reasonable doubt, and as to the genuineness of which suspicion might rightly arise because it was produced at a late stage. 13 C. W. N. 797=10 C. L. J. 33=2 Ind. Cas. 946; see also 12 C. W. N. 312=8 C. L. J. 147; see also A. I. R. 1936 Lah. 1016. The words of this rule are imperative. 1 Ind. Jur. O. S. 125; 1 Hyde 145; W. R. 1864, Act X 67; 18 W. R. 515. Certified copies does not come within the purview of this rule. A. I. R. 1922 Pat. 322=67 Ind. Cas. 686. The Court may also accept a registered document. 4 M. 417. Documents relied upon in plaint need be entered in the list unless their existence is known to the plaintiff. If such document is admitted in evidence without their being objected to, such objections cannot be allowed for the first time in appeal. A. I. R. 1921 Nag. 49=4 N. L. J. 33=63 Ind. Cas. 968; see also 6 C. 666=7 C. L. R. 497. Appellate Court will not interfere with refusal to admit document if discretion is not properly exercised. A. I. R. 1927 Cal. 168=44 C. L. J. 385=93 Ind. Cas. 258. Non-production of documents does not check working of Order XVII, rule 3. A. I. R. 1924 Lah. 608=76 Ind. Cas. 254. The penalty for the non-production of a document under Order 7, rule 14, is contained in Order 7, rule 18 (1) and Order 7, rule 18 (2) is an exception to Order 7, rule 18 (1). A. I. R. 1937 All. 55=1936 A. L. J. 1195. Where the defendant's case is not cleared till the evidence stage the Court may permit the plaintiff to file a document at that stage if it is otherwise material. A. I. R. 1934 Lah. 126=35 P. L. R. 28=148 Ind. Cas. 1040. No document should be taken after argument is heard unless very good reason is given for non-production. A. I. R. 1935 Lah. 648.

Where relevant documents containing deposition of witnesses in a former suit, filed by the plaintiff after the plaint, but before the examination of the witnesses, it was held plaintiff was entitled to cross-examine witnesses cited on his behalf. Defendant's witnesses are also hostile witnesses under Order VII, rule 18 (2). 54 Ind. Cas. 311; see also 77 Ind. Cas. 848=(1922) Pat. 300=4 U. P. L. R. Pat. 97=A. I. R. (1922) Pat. 569=4 Pat. L. T. 322.

## ORDER VIII.

*Written Statement and Set-off.*

1. [S. 110.] The defendant may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement of his defence.

*N. B.*—For local amendments in Lahore Oudh and Peshwar.—*Vide infra.*

**Scope.**—Ordinarily written statements should be submitted before the first hearing of the suit. 5 W. R. Act X, 39; 4 B. 576. But the Court may extend time for filing the same. 4 B. 576. A written statement filed at or before the first hearing requires no stamp-duty. 12 C. L. R. 367; 5 B. 400. Where the Court calls for a written statement after the first hearing, it is also exempt from stamp-duty. 5 B. 400. In Small Causes Court suits written statement is not necessary in the absence of specific notice in the summons. But, should such a statement be found necessary, time should be granted without burdening the defendant with adjournment costs. A. I. R. 1930 Oudh 171=4 Luck. 529=7 O. W. N. 894=121 Ind. Cas. 894. Exaggeration of claims by the parties does not render them to criminal prosecutions. 129 Ind. Cas. 111=32 Cr. L. J. 238. Written statement should be filed by the defendant or by his agent. Filing of written statement on behalf of the defendant by a stranger is not sanctioned by the Code. 53 A. 466=131 Ind. Cas. 548=1931 A. L. J. 181=A. I. R. 1931 All. 333.

2. [R. S. C. O. 19, r. 15.] The defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as for instance, fraud, limitation, release, payment, performance or facts showing illegality.

**Scope.**—In written statements, it is necessary to plead facts only and not points of law. A. I. R. 1930 Bom. 511=32 Bom. L. R. 1178=128 Ind. Cas. 609; see also A. I. R. 1923 Cal. 578=76 Ind. Cas. 603. Defendants having admitted execution of documents but failing to plead fraud or undue influence and no issue thereon was raised, Court cannot come to the finding that the contents were unknown to the defendants. A. I. R. 1922 Pat. 154=1922 Pat. 184=37 Ind. Cas. 980. Unless suit is barred *prima facie*, appellate Court cannot enter into the enquiry as regards bar by limitation; plea of limitation under special law must be pleaded specifically. 28 C. L. J. 216=46 Ind. Cas. 787; see also 69 Ind. Cas. 194; 34 C. L. J. 205=66 Ind. Cas. 287; 32 C. L. J. 236=60 Ind. Cas. 280. There is a defence of confusion and avoidance when the basis of the claim is admitted but is sought to be set aside on the ground of fraud, release, limitation, etc. 54 Ind. Cas. 131. Plea as regards want of legal necessity in a mortgage suit by the manager of a joint Hindu family cannot in an appeal be raised for the first time. A. I. R. 1922 Pat. 356=3 P. L. T. 367=1 Pat. 612=67 Ind. Cas. 790.

3. [R. S. C. O. 19, r. 17.] It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

**Scope.**—Order VIII, rule 5, should be considered along with rule 3. A. I. R. 1925 Mad. 950=22 L. W. 26=85 Ind. Cas. 900. In a mortgage suit defendant putting plaintiff to proof of mortgage-deed means requiring him to prove that it was duly executed. 6 O. L. J. 600=54 Ind. Cas. 107.

**Except damages.**—In 43 C. 1001=20 C. W. N. 1192=34 Ind. Cas. 235, *Sanderson. C. J.* said: "It should be noted that in this case where the claim is, for unliquidated damages, even if a written statement had been put in, it would not have been necessary for the defendant to deny specifically the damages; it would have been quite sufficient if they had pleaded generally to the damages and in that case even though all other material facts were admitted in the defence there would still

have been the necessity for some enquiry to be made either by the Court which heard the case, or by the official referee or some other person to whom the Court might refer the enquiry, to ascertain the amount of damages to which the plaintiffs would be entitled."

**4. [R. S. C. O. 19. r. 19.]** Where a defendant denies an allegation of

**Evasive denial.**

fact in the plaint, he must not do so evasively but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

**Scope.**—Pleadings should be specific. A. I. R. 1929 All. 721=(1929) A. L. J. 1153=122 Ind. Cas. 598; see also 115 Ind. Cas. 425=29 P. L. R. 715=A. I. R. 1928 Lah. 769; A. I. R. 1923 Cal. 578=76 Ind. Cas. 603. Under certain circumstances as evasive denial may tantamount to admission. 113 Ind. Cas. 370=A. I. R. 1929 Sind 7. Denial by defendant of plaintiff's allegation as to the date of certain event is no evasive denial, nor is it admission notwithstanding the failure of the defendant to give therein his own date. A. I. R. 1924 Mad. 838=47 M. L. J. 520=20 L. W. 399=(1924) M. W. N. 788=82 Ind. Cas. 584.

**5. [R. S. C. O. 19. r. 13.]** Every allegation of fact in the plaint, if not

**Specific denial.**

denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in its discretion require any facts so admitted to be proved otherwise than by such admission.

**Scope.**—This rule implies that the defendant making written defence shall make it specific. But this rule has no application where the defendant had not put in any written defence. A. I. R. 1930 Pat. 293=126 Ind. Cas. 369; A. I. R. 1928 Lah. 769=10 Lah. L. J. 339=29 P. L. R. 715=115 Ind. Cas. 425. Where allegation in plaint is not denied specifically or by implication, it is deemed as admitted and the plaintiff need not prove it unless ordered by Court. 49 Ind. Cas. 783; see also A. I. R. 1923 Nag. 7=68 Ind. Cas. 664; 49 Ind. Cas. 733. This rule should be read with rule 3. A. I. R. 1925 Mad. 950=22 L. W. 26=85 Ind. Cas. 900. Though wording of this rule is defective, it clearly means that evasive denials of facts alleged in the plaint, should be taken as admission of alleged facts. A. I. R. 1927 All. 225=96 Ind. Cas. 778; see also A. I. R. 1924 All. 180=46 A. J. 55=21 A. L. J. 830=79 Ind. Cas. 562; A. I. R. 1929 Sind 7=113 Ind. Cas. 370; but see 71 Ind. Cas. 779=A. I. R. 1923 Lah. 409. Provisions expressly made applicable to allegations in plaint, and to defendant's failure to deny them should not be applied to an oral pleading of the defendant so as to infer from the absence of a reply by plaintiff that the latter accepted it as true. A. I. R. 1925 Nag. 380=85 Ind. Cas. 768. A denial of knowledge of a fact is not a denial of the fact, nor is it even putting the fact in issue. Where a defendant to a mortgage suit instead of denying specifically, or refusing to admit specifically, the mortgage in favour of the mortgagee merely denies knowledge of no mortgage such a procedure is neither a specific denial of the mortgage nor is it a statement that the mortgage is not admitted, and consequently under Order 8, rule 5, it must be held against such defendant that he has by implication admitted the mortgage in favour of the mortgagee. A. I. R. 1934 Rang. 278=152 Ind. Cas. 395. But mere omission to file a written statement does not amount to an admission of the facts stated in the plaint. A. I. R. 1935 Pat. 306=14 Pat. 70=157 Ind. Cas. 433; but see A. I. R. 1936 Bom. 285=38 Bom. L. R. 577=60 Bom. 788. Where it has been held that a defendant who does not put in any defence is bound by all the allegations in the plaint. So according to the views of the Bombay High Court this rule is not confined to a case where a pleading has been put in by the defendant, it equally applies to a case in which the defendant puts in no pleading.

Omission to deny in written statement plaintiff's title does not amount to constructive admission of plaintiff's title. 45 Ind. Cas. 878. Written statements in

the *mofoossil* are not given strict construction as is done in England or in the original side of the High Court in spite of Order VIII, rule 5. 39 Ind. Cas. 460. Evidence is not to be excluded on the ground, evasive denial amounting to admission, or verification of a plaint, except in cases under Negotiable Instrument. Under Order 37, rule 2, Order 8, rule 5. is limited in its application where there is pleading in fact. 20 C. W. N. 1192=43 C. 1001=34 Ind. Cas. 235. In a suit for recovery of land, omission to deny the plaintiff's title thereto, does not mean that the plaintiff had no cause of action against the defendant particularly when there was no such admission at any time before the suit. 20 C. W. N. 636=32 Ind. Cas. 752. Mere general denial in written statement of fact explicitly relied on in the plaint is not enough unless equities are in favour of the defendant under Order VIII, rule 6. A. I. R. 1923 Mad. 114=43 M. L. J. 579=16 L. W. 911=31 M. L. T. 258=(1923) M. W. N. 42=69 Ind. Cas. 724. Evasive denial of facts alleged in the plaint amounts to admission and it would be wrong for the Appellate Court to require proof of them. 39 M. L. J. 463=(1920) M. W. N. 512=28 M. L. T. 213=60 Ind. Cas. 554. Under Order VIII, rule 5, omission to deny allegation of facts is not admission in case of minor defendants. 47 Ind. Cas. 589=35 M. L. J. 372. Defendant's statement that they do not admit plaintiff's allegation, as to the date of a certain event is not evasive denial or admission notwithstanding that defendants do not give their own date for the event. A. I. R. 1924 Mad. 838=47 M. L. J. 520=20 L. W. 399=(1924) M. W. N. 788=82 Ind. Cas. 584. It is not necessary to prove document relied upon by a party and not specifically denied by the other. 41 B. 89=18 Bom. L. R. 946=38 Ind. Cas. 14. A fact admitted by the defendant's *muktear* is not conclusive before the framing of the issues and may be required to prove otherwise. A. I. R. 1924 Lah. 744=6 Lah. L. J. 358=82 Ind. Cas. 617. It cannot be held that the pleading "not known" is tantamount to the pleading "not admitted." A. I. R. 1931 All. 423=133 Ind. Cas. 414. Where the statement in the written statements admits plaintiff's claim, no proof on the plaintiff's part is necessary. 131 Ind. Cas. 206=12 L. L. J. 293=A. I. R. 1931 Lah. 203. A recital in the written statement that a certain allegation in the plaint is not admitted cannot be deemed to be an admission, but amounts to denial by necessary implication. 55 A. 700=145 Ind. Cas. 802=1933 A. L. J. 998=A. I. R. 1933 All. 521. The traversal of a statement in a plaint is enough to put the plaintiff to the proof of it. A. I. R. 1934 Mad. 579=67 M. L. J. 327=1934 M. W. N. 252=151 Ind. Cas. 932.

### 6 [S. 111.] (1) Where in a suit for the recovery of money the defendant claims to set-off against the plaintiff's

Particulars of set-off to be demand any ascertained sum of money legally given in written statement. recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off.

(2) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set-off; but this shall not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree.

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

### *Illustrations.*

(a) A bequeaths Rs. 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs. 1,000 as surety for D; then D sues C for the legacy. C cannot set-off the debt of Rs. 1,000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of Rs. 1,000.

(b) A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C. In a suit for the purchase-money by C.

against B, the latter cannot set-off the debt against the price, for C fills two different characters one as the vendor to B, in which he sues B, and the other as representative to A.

(c) A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set-off. The amount not being ascertained cannot be set-off.

(d) A sues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000. The two claims being both definite pecuniary demands may be set-off.

(e) A sues B for compensation on account of trespass. B holds a promissory-note for Rs. 1,000 from A and claims to set off that amount against any sum that A may recover in the suit. B may do so, for as soon A recovers, both sums are definite pecuniary demands.

(f) A and B sue C for Rs. 1,000. C cannot set off a debt due to him by A alone.

(g) A sues B and C for Rs. 1,000. B cannot set off a debt due to him alone by A.

(h) A owes the partnership firm of B and C Rs. 1,000, B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character. C may set off the debt of Rs. 1,000.

*N. B.*—For local amendment in Patna.—*Vide infra.*

**Scope of the Section.**—A set-off under order 8, rule 6, may be pleaded by a defendant, although the claim of the plaintiff is denied. Set-off is not merely a defence to the plaintiff's claim, and a decree may be granted to the defendant although the suit of the plaintiff is dismissed. A.I.R. 1934 All. 543=1934 A.L.J. 393=150 Ind. Cas. 433. A set off is either legal or equitable. Order 8, rule 6, is restricted to legal set-off. Equitable set-off is allowed if the demands arise out of the transaction or are so connected that they can be looked upon as part of the same transaction and when the amount is unascertained. A. I. R. 1936 Cal. 277. Where in a suit on a promissory-note the defendant puts in a counter-claim that he had pledged gold with plaintiff and prays for a decree for the excess of gold value over plaint amount, but does not stamp his counter-claim, on his admission of the execution of the suit both, the suit must be decreed as the two transactions are separate. But if the defendant stamps his counter claim properly the two cases can be tried together in one suit. But the finding of the stamp paper in the Appellate Court will not validate the counter claim in the trial Court, the defendant's remedy is only to file a separate regular suit on his counter-claim. A. I. R. 1935 Rang. 116=156 Ind. Cas. 425.

**Equitable Set-off.**—This rule deals with legal set-off only and does not apply to equitable set-off. 65 P. W. R. 1917=62 P. R. 1917=39 Ind. Cas. 508. An equitable set-off can be claimed independently of the specific provisions of the Civil Procedure Code. 128 Ind. Cas. 763=A. I. R. 1930 All. 875=I. R. 1931 All. 91. An equitable set-off can be pleaded only in respect of an unascertained sum, and there is no ground for extending the meaning of equitable set-off to a claim for ascertained sums. A. I. R. 1936 Nag. 290. Referring to the corresponding section in Act VIII of 1859, the following observation were made by the High Court of Madras: "These are provisions of a Code regulating procedure only, and whilst we are think that the language used has not the effect of enlarging the right of set-off, we ought at the same time to say, that according to our present opinion, the Civil Procedure Code was not intended to take away right of set-off, whether legal or equitable, which parties would have independently of its provisions. It seems to us that the right of set-off will be found to exist not only in the cases of mutual debts and credits, but also where cross-demands arise out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover and the defendant be driven to a cross-suit." 2 M. 296; see also 35 C. W. N. 17=132 Ind. Cas. 195=A. I. R. 1931 Cal. 358; 17 C. W. N. 1060=19 C. L. J. 152; 11 C. 557; 16 C. 711; 40 B. 407; 20 C. 527; 7 A. 284; 15 A. 9; 27 A. 145; 8 C. W. N. 174; 19 C. W. N. 1183; 20 W. R. 410. Claim of equitable set-off can be allowed independently of the provisions of C. P. Code and no Court-fees need be charged. A. I. R. 1930 All. 875=128 Ind. Cas. 763. The principle underlying the equitable set-off is that even if it is not ascertained sum, it must arise out of the same transaction so as to make it inequitable that the plaintiff should recover and the defendant be driven to a separate suit. A. I. R. 1930 Lah. 808=125 Ind. Cas. 444; see also A. I. R. 1926 Oudh 301=92 Ind. Cas. 787; 90 Ind. Cas. 465=49 M. L. J. 14=(1925) M. W. N. 228=A. I. R. 1925 Mad. 830. Under Order XX, r. 19, equitable set-off can be allowed on payment of Court-fee in a suit for

account. Such set-off is not governed by Order 8, rule 6. A. I. R. 1931 Cal. 358=35 C. W. N. 17=132 Ind. Cas. 195. A legal set-off requires a Court-fee because it is a claim that might be established by a separate suit in which a Court-fee would have to be paid. But there is no such fee required in the case of an equitable set-off which is for an amount that may be equitably deducted from the claim of the plaintiff, where a Court-fee has been paid on the gross amount. An equitable set-off may however only be claimed by the defendant for a claim arising out of the same transaction as the plaintiff's claim. A. I. R. 1934 All. 115=1934 A. L. J. 421. A person cannot have a share in an estate by way of inheritance without paying a debt due from him to the estate, even though the debt be time-barred. 40 C. W. N. 75=62 C. L. J. 430. But in order that a claim for equitable set-off may arise, it is not sufficient that there are cross-demands: it is further necessary that there should be a connection between them which makes it inequitable to drive the defendant to a separate suit as when the demands arise out of the same transaction or when there is on each side knowledge of and confidence in one debt discharging the other. 40 C. W. N. 75.

**In a suit for recovery of money.**—Every suit in which the final decree is for money is a suit for recovery of money. 10 A. 587. It is doubtful whether a mere suit for account is a suit for recovery of money. 13 I. A. 48 (56)=13 C. 124. A suit for enforcement of mortgage security is not a suit for recovery of money. 8 C. W. N. 174. Set-off cannot be claimed in a suit for damages for breach of contract. 2 L. B. R. 186. Even in a money suit set-off cannot be allowed unless the sum is ascertained and legally recoverable. 1 P. L. R. 615=2 P. L. J. 451=40 Ind. Cas. 150; see also 38 Ind. Cas. 203; 1936 A. M. L. J. 60. That the suit is based on negotiable instrument is no bar to claim for set-off by the defendant. A. I. R. 1931 Nag. 12=130 Ind. Cas. 87. In a suit for money the defendant claimed to set-off a sum of money under a mortgage in his favour and in which a current decree had been passed directing an account to be taken of what will be due to the mortgage, held as the amount has not been ascertained and as there is difficulty in treating the written statement to set-off as a plaint, the defendant is not entitled to claim set-off. A. I. R. 1931 Cal. 23=129 Ind. Cas. 420=57 C. 855. A suit on a promissory-note accompanied by deposit of title-deeds is a claim for recovery of money as the words "suits for recovery of money" do not necessarily mean a suit for money pure and simple. A. I. R. 1933 Rang. 13. Set-off under rule 6 has wider meaning than English set-off, but not as wide as counter claim. A. I. R. 1934 All. 543. A set-off under Order 8, rule 6, may be pleaded by a defendant, although claim of the plaintiff is denied. Set-off is not merely a defence to the plaintiff's claim, and a decree may be granted to the defendant although the suit of the plaintiff is dismissed. *Ibid.* Court must treat defendant's claim under Order 8, rule 6, as plaint and grant decree under Order 20, rule 19 (1). *Ibid.* Where a plaintiff sues several defendants, alleging a joint debt, a defendant, who denies the joint debt may plead a set-off due to him alone. The illustration (g) to this rule does not prohibit this. There is nothing in the wording of this rule to show that such a set-off could not be pleaded. *Ibid.*

**Ascertained sum.**—Ascertained sum does not mean sum admitted by the plaintiff. The term is simply contradictory of unliquidated damages, that is the sum of money of which the amount is known. It excludes both unliquidated damages as well as *mesne* profits. A. I. R. 1931 Nag. 12=130 Ind. Cas. 87; see also 82 Ind. Cas. 340; 22 A. L. J. 844; 46 A. 922; A. I. R. 1924 All. 822; 12 S. L. R. 70=49 Ind. Cas. 193. Ascertained sum means conclusive and indisputable amount. 37 Ind. Cas. 367. A counter claim for a definite amount by way of set-off though not admitted is a claim for an ascertained sum. A. I. R. 1933 Rang. 13. Preliminary decree for sale directing accounts to be taken of what is due under the mortgage cannot be a set-off under Order VIII, rule 6. A. I. R. 1931 Cal. 23=57 C. 855=129 Ind. Cas. 420. Set-off claimed under the basis of damages to be ascertained after the protracted enquiry cannot be allowed as such. A. I. R. 1929 All. 52=111 Ind. Cas. 790. Party can set off the costs awarded to him by one order in the same suit as against those awarded to another party by a subsequent order in the same suit. 2 P. L. W. 62=39 Ind. Cas. 888. Sums specified are not necessarily ascertained, so that they may be legally recoverable within the meaning of Order VIII, rule 6. A. I. R. 1926 Sind 225=21 S. L. R. 385. In a money suit set-off cannot be allowed unless the sum is ascertained and legally recoverable. 40 Ind. Cas. 350=2 P. L. J. 451=(1917) Pat. 279; 38 Ind. Cas. 203.

**Counter-Claim.**—Distinction between set-off and counter-claim is that set-off is for ascertained sum or it must arise out of the same transaction as the plaintiff's

claim. Counter-claim need not arise out of the same transaction. Set-off is ground of defence and it should be pleaded in the written statement. Counter claim is not any defence to the plaintiff's claim, it is good ground of independent action against the plaintiff. If the statute of limitation is pleaded in defence of set-off, the plaintiff in order to establish his plea, must prove that the set-off was barred when the plaintiff commenced his action. In the case, however, of counter-claim it is enough for the plaintiff to prove that the counter claim was barred when it was pleaded. A. I. R. 1923 Bom. 113=24 Bom. L. R. 998=77 Ind. Cas. 943; see also 66 Ind. Cas. 209=48 C. 817=25 C. W. N. 800=A. I. R. 1921 Cal. 67; 67 Ind. Cas. 326=24 Bom. L. R. 328=47 B. 182=A. I. R. 1923 Bom. 24; A. I. R. 1934 All. 427; A. I. R. 1923 P. C. 114=40 C. L. J. 1=28 C. W. N. 689=50 I. A. 162=4 Lah. 281=25 Bom. L. R. 1248=45 M. L. J. 497=33 M. L. T. 349=40 C. L. J. 1 (P. C.). There is a different *terminus ad duem* for the case of a mere set-off and the case of counter demand. In the former case the amount claimed must be legally recoverable by him on the date of the suit, while in the latter it must be legally recoverable by him on the date of his written statement. A. I. R. 1934 All. 427=1934 A. L. J. 286=150 Ind. Cas. 105. Counter claim if properly stamped may be tried as a cross-suit. A. I. R. 1924 Rang. 346=2 Rang. 276=82 Ind. Cas. 721. Counter claim must be within time at the date the defendant files his pleadings. A. I. R. 1925 Nag. 445=89 Ind. Cas. 371. A set-off under Order 8, rule 6, is wider than a set-off at English law but it is not as wide as a counter-claim. When the provisions now embodied in Order 8, rule 6, were framed by the legislature the word counter-claim was not introduced, but some of the attributes of counter claim were given to a set-off and some of the attributes of set-off at English law were modified. A set-off under Order 8, rule 6, is not as wide as a counter claim, as the suit of the plaintiff must be for recovery of money and the set-off of the defendant must be of any ascertained sum of money legally recoverable by him from the plaintiff. A. I. R. 1934 All. 543=1934 A. L. J. 393=150 Ind. Cas. 433. No provision is made by C. P. Code, Order 8 for counter-claim in money suits though it provides for set-off. 80 Ind. Cas. 192. Claim to share of profits realised by manager of the tenancy land, cannot be a set-off in a suit for contribution of rent between the plaintiffs and the defendant but can be allowed as a counter-claim. A. I. R. 1926 Nag. 155=8 N. L. J. 205=92 Ind. Cas. 74. Ordinarily a defendant is not allowed to set up a counter-claim in answer to the claim of the plaintiff but the Court may grant equitable relief to the defendant in an appropriate case and enable the defendant to claim compensation for loss occasioned by the act of the plaintiff. 59 C. 833. Where defendant makes a counter-claim to the plaintiff's suit and the Court decides to hear two together but the plaintiff withdraws his suit with liberty to bring a fresh one, the counter-claim can be continued as a plaint and proceeded on merits. A. I. R. 1934 Rang. 160.

**Same Character.**—Claim to set-off is not allowable where the parties claiming are in different capacities. A. I. R. 1927 Lah. 228=8 Lah. 105=28 P. L. R. 427=101 Ind. Cas. 762; see also 39 B. 131=16 Bom. L. R. 746; 5 A. 299; A. I. R. 1936 Pesh. 57. Where capacities of the parties are not varied, defendant is entitled to set-off wages due to him by the plaintiff. 41 C. 163=19 Bom. L. R. 67=30 Ind. Cas. 17. Where a principal is also a banker under another name, in a suit by principal against the agent for sale proceeds in agent's hands, agent can set-off the amount deposited in the bank. A. I. R. 1921 P. C. 103=15 L. W. 201=24 C. W. N. 1004=76 Ind. Cas. 944. Employer cannot counter-claim to set-off month's salary as damages in the same suit. 39 A. 362=15 A. L. J. 262=38 Ind. Cas. 206. In a rent suit, tenant can set-off commission for rent collected. 38 Ind. Cas. 71.

**Omission to claim set-off.**—Omission to claim an equitable set-off or a counter-claim does not bar a fresh suit. A. I. R. 1926 Mad. 1020=51 M. L. J. 258=97 Ind. Cas. 437; see also 90 Ind. Cas. 465=49 M. L. J. 192=1925 M. W. N. 228=A. I. R. 1925 Mad. 830. Set-off which is not claimed as such in the suit cannot be so claimed in execution. A. I. R. 1924 Oudh 434=11 O. L. J. 517=27 O. C. 248=81 Ind. Cas. 651. Omission to plead set-off does not bar a fresh suit but it was so pleaded, and was within the competence of the Court, but was not allowed by the Court, bars a fresh suit in respect of the whole or part of it as the case may be. 12 L. W. 173=60 Ind. Cas. 226.

**Limitation.**—If statute of limitation is pleaded in defence of set-off the plaintiff in order to establish his plea, must prove that the set-off was barred when the plaintiff commenced his action. A. I. R. 1923 Bom. 113=24 Bom. L. R. 998=77



Ind. Cas. 943 ; see also 7 A. 284 ; 39 M. 939 ; 31 P. L. R. 107=122 Ind. Cas. 490. Claim which is time-barred cannot be claimed as legal set-off. A. I. R. 1936 Pesh. 57=160 Ind. Cas. 908. But time-barred debt may be claimed as equitable set-off. A. I. R. 1926 Pat. 77=7 P. L. T. 158=90 Ind. Cas. 785 ; see also 14 C. W. N. 170 ; 12 C. W. N. 60 ; 19 C. W. N. 1183 ; 32 C. 576. Expiry of the period of limitation only bars the remedy and does not extinguish the right. Limitation affects only the plaintiff and not the defendant. A. I. R. 1926 Lah. 633=96 Ind. Cas. 844. Claim time-barred at the time of filing written statement cannot be allowed to be set-off. 47 Ind. Cas. 938 ; 44 Ind. Cas. 428=34 M. L. J. 32 ; 42 M. 863=37 M. L. J. 193=10 L. W. 183=26 M. L. T. 276=53 Ind. Cas. 234 ; 62 Ind. Cas. 852=41 M. L. J. 370.

**Not exceeding the pecuniary jurisdiction.**—The whole of the sum claimed as set-off should be within the jurisdiction of the Court. A. I. R. 1925 Rang. 22=2 Rang. 349=84 Ind. Cas. 956 ; 84 Ind. Cas. 971=A. I. R. 1925 Rang. 65=2 Rang. 462 ; see also 20 C. 527 ; 3 N. W. P. H. C. R. 114 ; 17 P. R. 1890 ; 21 C. 419 ; 14 B. 371 ; 15 A. 404 ; 18 W. R. 339 ; but see 12 B. 31. The amount of the set-off must be within the pecuniary limits of the jurisdiction of the Court in which the plaintiff's suit is brought. The nature of the set-off must also be within the cognizance of the Court. A Court cannot entertain a set-off if its nature is such that if it is made the subject-matter of a separate suit, it will not come within its jurisdiction. But a Court can entertain a set-off as a defence to an action, even if it would have no territorial jurisdiction in respect of the subject-matter of the set-off, if a suit was filed in respect of such subject-matter. In this respect there is a distinction between set-off and counter-claim. In one sense both are cross-actions, but a set-off is also a ground of defence, if established, it accords answers to the plaintiff's claim either wholly or *pro tanto*, for a set-off is really a debt claimed by the defendant against the plaintiff balancing debt claimed by the plaintiff against the defendant. A counter-claim on the other hand is really a weapon of offence, and enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action. It is allowed to be pleaded by the defendant at his option, subject to certain rules, in order to avoid multiplicity of proceedings between the parties. 34 Bom. L. R. 1401.

**Court fee.**—Court-fee is payable for the excess over plaintiff's claim in case of claim to set-off exceeding plaintiff's claim and if the decree for the excess is prayed for. A. I. R. 1927 Nag. 74=97 Ind. Cas. 916. What is a plea of satisfaction cannot be a set-off and the Court-fee was unnecessary. A. I. R. 1927 Nag. 120=9 N. L. J. 227. A legal set-off requires a Court-fee because it is a claim and might be established by a separate suit in which a Court-fee would have to be paid. But there is no such fee required in the case of equitable set-off which is for an amount that may equitably be deducted from the claim of the plaintiff where a Court-fee has been paid on the gross amount. An equitable set-off may however only be claimed by the defendant for a claim arising out of the same transaction as the plaintiff's claim. A. I. R. 1934 All. 115.

**Attorney's lien.**—No set-off can be allowed at least to the extent of attorney's lien when a creditor's petition against the debtor is dismissed with costs to be paid to the debtor. A. I. R. 1930 Bom. 516=32 Bom. L. R. 1076=128 Ind. Cas. 24. Whether an attorney's lien should or should not be allowed to intercept a set-off between the parties to a suit is in India a matter of discretion. Attorney's lien is not allowed to prevail over rights of parties to a suit. 34 Bom. L. R. 1429=A. I. R. 1932 Bom. 619=A. L. R. 1932 Bom. 1195. The law relating to solicitor's lien in the High Courts in India is still governed by the relevant principles of English law—the Civil Procedure Code not being abrogated the preexisting law on the subject. 38 C. W. N. 1037.

**Sub-section (2).**—The Provisions of Order 8, rule 6, and Order 20, rule 19(1), read together, show that the Court must treat the claim of the defendant exactly as if the defendant had filed a plaint and the Court must pass a decree in favour of the defendant, if his claim is established, even though the claim of the plaintiff against the defendant is dismissed. A. I. R. 1934 All. 543=1934 A. L. J. 393 ; A. I. R. 1934 Rang. 160=152 Ind. Cas. 552. Where there has been an order for costs against the defendant and costs have been taxed and the precise amount of the taxed costs has been paid into Court, the defendant is not entitled to a set-off claimed by him against the plaintiff in answer to the plaintiff's attorney's claim to exercise his right of lien. 40 C. W. N. 458.

7. [R. S. C. O. 20, P. 7.] Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly.

8. [New.] Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in its written statement.

9. [S. 112.] No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same.

**Notes.**—In order to file pleadings subsequent to written statement, order of Court is necessary. A. I. R. 1925 Bo.n. 395=27 Bo.n. L. R. 890=91 Ind. Cas. 272. But Court has discretionary power to allow additional written statement setting up totally new case. (1918) Pat. 323=48 Ind. Cas. 746. Order VIII, rule 9 and Order XIV, rule 5, preclude party to adduce evidence with regard to any plea unless if written statement is amended and issues framed accordingly. 25 M. L. T. 257=(1919) M. W. N. 23=9 L. W. 193=49 Ind. Cas. 273. Under Order 8, rule 9, an additional written statement otherwise than by way of defence to a set-off shall only be presented by leave of the Court and on such terms as the Court thinks fit and hence a minor defendant is not entitled on attaining majority to put in an additional written statement without leave of the Court consequently the refusal of the trial Court to grant permission except in the one instance named would not be a matter with which the High Court could interfere in revision. A. I. R. 1935 Mad. 117=41 L. W. 640=153 Ind. Cas. 453.

10. [S 113.] Where any party from whom a written statement is so required fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

*N. B.*—For addition of new rules in Allahabad, Bombay, C. P., Lahore, Oudh, Patna, Peshawar and Sind.—*Vide infra*.

**Scope.**—This rule applies only on failure to file written statement required by Order 8, rule 9, and not in other cases. A. I. R. 1925 Oudh 567=12 O. L. J. 532=2 O. W. N. 391=88 Ind. Cas. 540; see also A. I. R. 1928 Rang. 261=6 Rang. 466=112 Ind. Cas. 438. This rule enables the Court to declare *ex parte* against defendant on his failure to file written statement within fixed time. (1917) M. W. N. 241=40 Ind. Cas. 223. Order requiring written statement must be unconditional, otherwise decree would be interfered with in revision. A. I. R. 1937 Mad. 1007=53 M. L. J. 504=39 M. L. T. 273=105 Ind. Cas. 288. Court has power to strike out defence of defaulting party. A. I. R. 1929 Lah. 459=115 Ind. Cas. 31. Provisions of this rule apply to corporations as well as to other litigants. A. I. R. 1929 Lah. 459=115 Ind. Cas. 31. Order refusing to strike out the plaint is not subject to appeal. A. I. R. 1931 Lah. 77=131 Ind. Cas. 129=31 P. L. R. 946.

## ORDER IX.

### *Appearance of Parties and Consequence of Non-appearance.*

1. [S. 96.] On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court.

Parties to appear on day fixed in summons for defendant to appear and answer.

**Scope of Order IX.**—The provisions of order IX are not applicable to execution proceedings. A. I. R. 1929 Lah. 744=121 Ind. Cas. 189 ; see also A. I. R. 1925 Oudh 552=28 O. C. 158=85 Ind. Cas. 450 ; A. I. R. 1925 Cal. 510=41 C. L. J. 286=79 Ind. Cas. 351 ; A. I. R. 1921 Sind 55=17 S. L. R. 105=83 Ind. Cas. 749 ; 8 S. L. R. 325 ; 5 P. L. W. 208 ; 15 A. 84 ; 18 B. 429 ; A. I. R. 1926 Mad. 412=50 M. L. J. 220=23 L. W. 227=(1926) M. W. N. 245=92 Ind. Cas. 533 ; A. I. R. 1927 Cal. 420=100 Ind. Cas. 518 ; A. I. R. 1926 Cal. 735=43 C. L. J. 285=94 Ind. Cas. 172. This order is also not applicable to Provincial Insolvency Act regarding annulment order. A. I. R. 1926 Mad. 942=49 M. 935=51 M. L. J. 209=(1926) M. W. N. 674=97 Ind. Cas. 706. Order IX also does not apply to Order X, rule 4. A. I. R. 1921 Mad. 417=14 L. W. 15=63 Ind. Cas. 961. This order is not applicable where Courts sit after prescribed times without consent of parties and pleaders. A. I. R. 1925 Pat. 772=4 Pat. 646=26 Cr. L. J. 1441=89 Ind. Cas. 961. By virtue of section 141, C. P. Code, this order is extended to applications under Order IX itself. A. I. R. 1926 Mad. 325=50 M. L. J. 75=23 L. W. 409=92 Ind. Cas. 802. The rules of this order in strictness do not apply to Probate Proceedings. 29 Ind. Cas. 133=13 A. L. J. 441=37 A. 380. An issue referred to a Civil Court for decision by a Revenue Court is an original matter in the nature of a suit. The Civil Court has jurisdiction under the provisions of s. 141 and order 9 to entertain an application for the setting aside of an *ex parte* decision and to decide the issue on the merits. A. I. R. 1934 All. 86=1934 A. L. J. 831=56 A. 390. The provisions of Order 9, C. P. Code, by themselves do not apply to a case in which the plaintiff or the defendant has already appeared but has failed to appear at on adjourned hearing of the case. For such a case the procedure is laid down in Order 17, which deals with adjournment. 156 Ind. Cas. 754=1935 A. L. J. 209=A. I. R. 1935 All. 210. The provisions of this order do not in terms apply to execution proceedings but applications can be restored under the inherent powers of Court. 13 Lah. 761=142 Ind. Cas. 686=34 P. L. R. 70=A. I. R. 1933 Lah. 99 ; see also 145 Ind. Cas. 995=1933=A. L. J. 1032 A. I. R. 1933 All. 783 (F. B.) ; 143 Ind. Cas. 1=37 M. L. W. 607=1933 M. W. N. 566=64 M. L. J. 664=56 Mad. 490=A. I. R. 1933 Mad. 418 (F. B.) ; 133 Ind. Cas. 65=25 S. L. R. 475=A. I. R. 1931 Sind 97 (F. B.).

**Scope of the section.**—*Ex parte* decree cannot be justified when the case is taken for hearing on a wrong date and a party apply for time. A. I. R. 1929 Pat. 609=10 P. L. T. 589=120 Ind. Cas. 304. Mere presence of party is appearance. A. I. R. 1924 Nag. 26=76 Ind. Cas. 288 ; see also A. I. R. 1922 Pat. 485=1 Pat. 188=68 Ind. Cas. 337. Appearance by a pleader means appearance by a pleader when he is duly instructed and able to answer all the material questions. A. I. R. 1928 Mad. 831=110 Ind. Cas. 377 ; A. I. R. 1929 All. 729=96 Ind. Cas. 564 ; 82 Ind. Cas. 107=47 M. L. J. 514 ; 22 A. 66 ; 4 C. 318 ; A. I. R. 1922 Pat. 485=1 Pat. 188=69 Ind. Cas. 837 ; 8 A. 140 ; 4 B. H. C. R. A. C. 206 ; 20 A. 195 ; 12 C. 605 ; 23 B. 414. The term "day fixed in the summons" refers to the day fixed for the first hearing of the suit. 2 A. 67=5 I. A. 233. The mere putting of a written statement is not appearance. 1 N. W. P. H. C. R. 154.

**2. [S. 97.]** Where on the day so fixed it is found that the summons has

Dismissal of suit where summons not served in consequence of plaintiff's failure to pay costs.

not been served upon the defendant in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, the Court may make an order that the suit be dismissed :

Provided that no such order shall be made although the summons has not been served upon the defendant, if on the day fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

*N. B.*—For local amendment in Allahabad.—*Vide infra.*

**Scope.**—When a time is not fixed for the deposit of process-fee an order for dismissal is irregular. 3 B. L. R. App. 25=11 W. R. 290 ; 158 Ind. Cas. 250. This section is only applicable to cases in which plaintiff fails to file *tallubana* for the first hearing. 65 P. W. R. 1908. The default under this rule, owing to the plaintiff's omission to deposit the requisite *Tallubana* in the proper Court is not excused by the fact of its having been committed by an ignorant *karpurdas*. 11 W. R. 417. The failure contemplated by Order IX, rule 2, is not confined to an entire omission to pay the requisite Court-fee, but also includes an omission

to pay that fee within the time which the Court is required to fix for payment under Order XLVIII, rule 1, 7 N. L. R. 114. A guardian *ad litem* is not a defendant in a suit, and the penal provisions of Order 9, r. 2 of the Code have no application to the case of a failure to pay in process-fee for summons to be served on him. 115 P.W.R. 1911. Court can dismiss a suit under this order, for plaintiff's failure to pay damages for not getting summons served. A. I. R. 1927 All. 464=100 Ind. Cas. 691. Dismissal under Order 9, rule 2, on failure to pay postal charges (according to proviso of Lahore High Court) when process-fee is paid, is not proper. A. I. R. 1927 Lah. 157=9 Lah. L. J. 96=99 Ind. Cas. 909. Dismissal is not proper where process-fee was paid not on fixed day but in sufficient time for service of summons. A. I. R. 1922 Lah. 63=4 Lah. L. J. 71=67 Ind. Cas. 945. Dismissal under Order IX, rule 2, is not justified if plaintiff fails to give defendant's correct address or does not accompany process-server. A. I. R. 1932 Lah. 170=9 Lah. L. J. 135=99 Ind. Cas. 898. Where process-fee has not been paid for one defendant, dismissal as against other defendants is improper. A. I. R. 1921 Pat. 422=2 P. L. T. 256=60 Ind. Cas. 377. Court should give reasonable time for paying process-fees; two days' time when party is absent is not reasonable time. 55 Ind. Cas. 650. Where plaintiff failed to file affidavits of service of summons on guardian of minor defendants, decree is not binding on minor; but dismissal against major defendants is improper. 1 P. L. T. 125=55 Ind. Cas. 826. Rule 4 does not apply where date is fixed for paying process-fee only. A. I. R. 1921 Pat. 422=2 P. L. T. 256=60 Ind. Cas. 377. Where defendant asks time for filing written statement, dismissal under this section is improper, even when the plaintiff failed to file process-fee in as much as filing application amounts to appearance. 53 Ind. Cas. 41. An order dismissing a suit for default is not appealable. 38 A. 357=14 A. L. J. 347=33 Ind. Cas. 737. There is no appeal from the order of an appellate Court restoring a suit dismissed for want of payment of process-fee. 9 Ind. Cas. 484. Where the plaintiff deposited process-fee several times for service of summonses on the defendant but the summonses could not be served and the Court ultimately dismissed the suit, held that in the circumstances it was the duty of the Court to direct the issue of substituted service under Order 5, rule 20, and that the dismissal of the suit was bad. 12 P. L. T. 644=135 Ind. Cas. 99=A. I. R. 1931 Pat. 420. Non-payment of process-fee required for fresh summons with the application is no ground for dismissal of suit. A. I. R. 1933 Pat. 582.

Where neither party appears, **3. [S. 98.]** Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

**Scope.**—Unless a date has been fixed for the appearance of the defendants and neither party appears when the suit is called on for hearing on that date, Order 9, rule 3, would not apply. A. I. R. 1935 Lah. 656=159 Ind. Cas. 226. The provisions of this rule is not obligatory. The Court is at liberty to exercise its discretion in a suitable case. A. I. R. 1936 Pat. 437=162 Ind. Cas. 557. The order of a District Munsiff to strike a case off his file on neither party appearing, is an illegal order. 10 M. 270; see also 17 W. R. 219; 21 W. R. 124. Where a suit is referred to arbitration and is pending before the arbitrators, the Court has no power to dismiss the suit under this rule. 10 P. R. 1899. The dismissal of a suit for default on an adjourned date, of which the parties had no notice is illegal. 14 C. P. L. R. 134. The officers presiding over Courts of Justice, when on tour should not dismiss any suit for default in appearance, without satisfactory evidence that due notice of the exact date and place of hearing was given to the parties. 37 P. R. 1904. Where parties are absent on date of re-hearing fixed for want of time of Court, the dismissal if made is under Order 9, rule 3 and not under Order 17, rule 3. 32 Ind. Cas. 714. Where defendant is absent but plaintiff fails to produce evidence, the dismissal is one under Order 17, rule 3 and not under Order 9 rule 3 and no fresh suit is barred. 40 A. 590=16 A. L. J. 462=46 Ind. Cas. 390. Where parties are absent on day fixed for hearing preliminary issues, suit should not be dismissed. A. I. R. 1929 Lah. 830=31 P. L. R. 441=122 Ind. Cas. 465. Where date is fixed for hearing application in suit only, suit cannot be dismissed. A. I. R. 1927 Sind 228=102 Ind. Cas. 416. Where preliminary, mortgage decree for sale has been passed, an application for final decree cannot be dismissed for default of appearance. A. I. R. 1934 Pat. 18. Where plaintiff is ill and the Counsel is late only by a few minutes, a case should be restored if dismissed for default. A. I. R. 1934 Lah. 34. Where the plaintiff has deposited the fee for service

of summons but the summons has not been issued to the defendant, and a date is fixed for the appearance of the plaintiff only, the Court cannot dismiss the suit for non-appearance of the plaintiff, but should issue summons to the defendant and fix a date for the hearing of the suit. 32 P. L. R. 300=A. I. R. (1931) Lah. 69. When the plaintiff was absent from Court on account of unavoidable delay, held, the order dismissing the suit for default ought to be set aside. A. I. R. 1931 Pat. 87=130 Ind. Cas. 542. Where fresh summons was ordered to be issued along with amended plaint and summons was not issued on account of failure of plaintiff to file copies of amended plaint, the non-appearance of parties on day fixed is governed by rule 3 and not by rule 5. A. I. R. 1934 Pat. 18. Where an application to restore a suit dismissed for default under Order 9, rule 3, is also dismissed in default, a second application to restore it is competent. A. I. R. 1934 Pesh. 13=148 Ind. Cas. 917. When an application is made for the amendment of issues and the Court fixes a day for the consideration of the application for amendment but the parties do not appear on the fixed date the Court has no right to dismiss the suit for default. It can only dismiss the application for amendment. A. I. R. 1934 Lah. 237=35 P. L. R. 342.

A suit cannot be dismissed for non-appearance on day fixed for judgment. A. I. R. 1927 Lah. 888=9 Lah. L. J. 178=28 P. L. R. 324=100 Ind. Cas. 472. Where date is only for seeing date fixed for defendant's appearance, absence of plaintiff does not entail dismissal. A. I. R. 1995 Lah. 95=78 Ind. Cas. 15. Dismissal for non-appearance of pleader is wrong if authorized agent is present with witness. A. I. R. 1922 Pat. 504=3 P. L. T. 447=68 Ind. Cas. 659. Dismissal is also improper when parties are absent at hearing for amendment of issues. 6 P. L. J. 331=2 P. L. T. 760=63 Ind. Cas. 746. Where an adjournment had been granted at the request of the plaintiff, in order to enable the latter to amend his plaint and on the date fixed the plaintiff's pleader again applied for time, and therefore the Court dismissed the suit : *Held* (1) that the order under rules 2 and 3 of Order 17 of the C. P. Code, the Court had no power to proceed with the disposal of the suit : (2) that the Court could not be said to have acted under rule 3, Order 9, because the plaintiff's pleader did in fact appear and ask for an adjournment and there was nothing in the order recorded to show that he was not willing to prosecute the suit upon the original plaint without amending it. 4 Pat. L. J. 277=51 Ind. Cas. 189. Where date for defendant's appearance has not been fixed, rule 3 does not apply. A. I. R. 1927 All. 439=49 A. 592=25 A. L. J. 437=101 Ind. Cas. 676 ; see also A. I. R. 1921 Lah. 320=27 P. L. R. 1921=60 Ind. Cas. 475 ; A. I. R. 1931 Lah. 69=130 Ind. Cas. 771.

In case of dismissal under Order 9, rule 3, remedy of the plaintiff lies either in fresh suit or in an application for restoration. 39 Ind. Cas. 191=20 O. C. 66 ; 63 Ind. Cas. 239 ; 43 Ind. Cas. 518=16 A. L. J. 143 ; 43 Ind. Cas. 180 ; 44 B. 767=22 Bom. L. R. 328=56 Ind. Cas. 455 ; A. I. R. 1925 Nag. 31=76 Ind. Cas. 46 ; 85 Ind. Cas. 788=A. I. R. 1925 All. 425. But where restoration is impossible for want of sufficient cause, inherent power cannot be used. A. I. R. 1927 Pat. 369=9 P. L. T. 136=103 Ind. Cas. 620. Obstruction by the picketing volunteers is unavoidable cause sufficient to set aside order of dismissal in default. A. I. R. 1931 Pat. 87=130 Ind. Cas. 542. Where application for restoration of a case dismissed under rule 3 is filed, no notice need be served on the other party. A. I. R. 1923 Oudh 55=24 O. C. 347=9 O. L. J. 52=64 Ind. Cas. 767. Where dismissal under rule 3 is by Court without jurisdiction, fresh application lies to competent Court. 58 Ind. Cas. 203. Same Court only can set aside order of dismissal for default. 100 P. L. R. 1920=2 Lah. L. J. 48=19 P. W. R. 1920=56 Ind. Cas. 884. But striking off of suit as settled is tantamount to withdrawal and therefore no fresh suit lies. (1916) M. W. N. 171=32 Ind. Cas. 624. Order X, r. 4, is not governed by Order IX, r. 3. 1921 M. W. N. 390=14 L. W. 15=63 Ind. Cas. 961. Where date is fixed for consideration of application for amendment of issues and parties are absent, suit cannot be dismissed. A. I. R. 1934 Lah. 237.

**Appeal.**—An order of dismissal under this section is not a decree and hence no appeal lies from it. 29 C. 60. No application for review is either maintainable. 33 P. L. R. 1909=44 P. L. R. 1909=31 P. R. 1909 (2 C. W. N. 318 F.)

#### 4. [S. 99.] Where a suit is dismissed under rule 2 or rule 3, the plaintiff

may (subject to the law of limitation) bring a fresh suit ; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the

**Court-fee and postal charges (if any)** required within the time fixed before the issue of the summons or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

**N. B.**—For local amendment in Bombay.—*Vide infra*.

**Scope.**—In case of dismissal under rule 3 fresh suit lies. 14 R. D. 395; see A. I. R. 1929 All. 131=56 A. 837=26 A. L. J. 776=115 Ind. Cas. 118. In case of dismissal of pauper application, fresh application lies. A. I. R. 1924 Rang. 161=2 Bur. L. J. 217=76 Ind. Cas. 785. The two remedies allowed to a plaintiff whose suit is dismissed under Order 9, rule 2 or 3, C. P. Code, the remedy of bringing a fresh suit, or of applying to have the dismissal set aside are not mutually exclusive. Thus, if he fails in his attempt to have the dismissal set aside, he still has the remedy of bringing a fresh suit. 63 Ind. Cas. 239; A. I. R. 1926 All. 678=96 Ind. Cas. 187. Where the plaintiff is in jail and his muktear is absent through mistake, restoration application on same date should be entertained. A. I. R. 1929 Lah. 882=124 Ind. Cas. 320; see also A. I. R. 1930 Lah. 70=31 P. L. R. 335=123 Ind. Cas. 834. Where suit is dismissed for default of plaintiff, some applying for restoration, restoration of entire suit is proper. A. I. R. 1930 All. 168=(1929) A. L. J. 1103=120 Ind. Cas. 560. In case of dismissal through mistake of Court, Court has inherent power to restore. A. I. R. 1928 Lah. 534=108 Ind. Cas. 603. Absence through *bona fide* mistake is "sufficient cause" for restoration. A. I. R. 1926 Lah. 634=96 Ind. Cas. 881. Remark "file" amounts to neither rejection nor dismissal. A. I. R. 1924 Pat. 698=5 P. L. T. 567=79 Ind. Cas. 598. Where in case of dismissal for default, restoration against some defendants is prayed for Court cannot implead them on its own motion. A. I. R. 1922 Oudh 160=25 O. C. 67=68 Ind. Cas. 246. Where duly authorized agent is present, suit cannot be dismissed for default. A. I. R. 1922 Pat. 504=3 P. L. T. 447=68 Ind. Cas. 659. Where restoration application is dismissed for default, second restoration application lies. A. I. R. 1927 Lah. 71=27 P. L. R. 564=99 Ind. Cas. 1055. Provisions of this rule apply to proceedings under Order 21, r. 100, though not to Order XXI, r. 90. A. I. R. 1923 Pat. 239=4 P. L. T. 93=(1923) Pat. 78=1 P. L. R. 134=2 Pat. 372=71 Ind. Cas. 484. Where claim is substantial and is likely to be time-barred, inherent power ought to be used. A. I. R. 1924 Pat. 274=4 P. L. T. 647=(1924) Pat. 280=72 Ind. Cas. 668. Where execution application is dismissed under rule 2 or rule 3, proceedings under rule 4 cannot be taken. A. I. R. 1925 Oudh 552=28 O. C. 158=85 Ind. Cas. 450. Where defendant was not prepared to proceed but asked for time, dismissal should be under Order IX, rule 8. A. I. R. 1928 Pat. 335=7 Pat. 333=9 P. L. T. 669=109 Ind. Cas. 264. In an application under this rule, notice to defendant is not necessary. A. I. R. 1923 Oudh 55=9 O. L. J. 52=24 O. C. 347. Suit can be restored on payment of cost where the dismissal is owing to the mistake or laches of pleader. 43 C. 157=20 C. W. N. 594=23 C. L. J. 443=34 Ind. Cas. 634. Order IX does apply to execution proceedings. 35 Ind. Cas. 337. Rule 4 does not apply where date is fixed not for hearing of case but for paying process-fees. A. I. R. 1921 Pat. 422=2 P. L. T. 256=60 Ind. Cas. 377. A suit cannot be dismissed against all defendants where default to pay process-fees for the attendance of one of several defendants is made. 2 P. L. T. 256=60 Ind. Cas. 377. Where suit has been dismissed for default also application for restoration has been dismissed for default, application under Order IX, rule 9, lies. 44 C. 950=21 C. W. N. 30=24 C. L. J. 446=35 Ind. Cas. 613. Cases under Order XXI, rules 100 and 101 are not suits within this rule. 52 Ind. Cas. 416. Where application for insolvency is dismissed, fresh application lies. A. I. R. 1928 Pat. 116=107 Ind. Cas. 842. In case of dismissal of suit under Order 9, rule 2, time covered by restoration proceedings cannot be excluded for limitation. A. I. R. 1929 Nag. 219=25 N. L. R. 99=116 Ind. Cas. 509. Section 5, Limitation Act, is not applicable to applications under Order IX, rule 4. A. I. R. 1928 Mad. 556=(1928) M. W. N. 239=110 Ind. Cas. 47; see also A. I. R. 1929 All. 127=51 A. 487=1929 A. L. J. 329=113 Ind. Cas. 767. No Judge other than one who dismissed suit for default has jurisdiction to set aside order of dismissal. 2 Lah. L. J. 48=100 P. L. R. 1920=19 P. W. R. 1920=56 Ind. Cas. 884. Restoration application is not to be dismissed summarily. A. I. R. 1927 Lah. 71=27 P. L. R. 564=99 Ind. Cas. 1055. Dismissal of application for making final decree does not bar subsequent application. 140 Ind. Cas. 324=63 M. L. J. 719=36 M. L. W. 638=56 M. 310=A. I. R. 1933 Mad. 55. If sufficient cause is shown Court must restore case to file. 141 Ind. Cas. 48=28 N. L. R. 295=A. I.

R. 1933 Nag. 39. Where the suit restored under this section, notice must as of right be issued to defendant of this date. 145 Ind. Cas. 804=1933 A. I. R. 962=A. I. R. 1933 All. 522. After dismissal of first application for restoration without its merits being gone into, a second application for restoration within period of limitation is competent. The application may also be treated as an application for review of the first Order. 141 Ind. Cas. 48=28 N. L. R. 295=A. I. R. 1933 Nag. 39 ; A. I. R. 1934 Pesh. 13. Where order of restoration is made, all interlocutory matters whether pending in trial Court or appellate Courts are also restored unless order of restoration expressly mentions anything against this view. A. I. R. 1934 Mad. 49. Where application for amendment of decree is dismissed for default, a subsequent application is not barred. 144 Ind. Cas. 59=12 Pat. 179=A. I. R. 1933 Pat. 208. Where remedy under Order 9, rule 4 or 9 is barred by limitation, application under Order 47, rule 1, merely to escape limitation is not maintainable. A. I. R. 1933 Pat. 557. If there are minor plaintiffs or defendants who are represented as they may be by a next friend or guardian *ad litem* and the next friend or the guardian is absent, though whatever cause it may be, at the trial, then that fact alone is sufficient reason for setting aside an *ex parte* decree passed against minor defendants or for setting aside an order of dismissal of the suit in the case of minor plaintiffs. A. I. R. 1934 Mad. 616=1934 M. W. N. 1176=152 Ind. Cas. 163. The mere fact that the District Judge put down in his order of remand that the parties were to appear before the Subordinate Judge on a certain date does not prove that his direction was actually conveyed to the counsel of the parties or to the parties by the counsel concerned for absence of parties on such date, there is sufficient cause within the meaning of Order 9, rule 4. A. I. R. 1935 Lah. 163. This rule does not create but declares the right of bringing a fresh suit while at the same time permitting the plaintiff in the alternative to proceed with his original suit. These alternative provisions are not exclusive. Where the application for restoration is rejected, the plaintiff is not precluded thereby from bringing a fresh suit if within time. 15 Pat. 716=17 P. L. T. 644 ; see also A. I. R. 1937 Oudh 262 ; A. I. R. 1937 Pat. 9.

**Appeal.**—An order under Order IX, rule 4, is not appealable. 2 P. L. W. 172=42 Ind. Cas. 613. Refusal to set aside order of dismissal is not appealable. 43 Ind. Cas. 180. Where execution application was dismissed for default and the appellant filed an appeal on the ground that he had gone to call his pleader and learnt on his return that the application was dismissed. No affidavit from pleader has been filed : *Held* that in the absence of an affidavit from the pleader the appeal must be dismissed. 64 P. L. R. 1918. Where restoration application has been rejected without perusal of record or taking evidence, revision lies. A. I. R. 1927 Lah. 239=100 Ind. Cas. 677.

**5.\* [S. 99A.]** (1) Where, after a summons has been issued to the defendant, or to one of several defendants, and plaintiff, after summons returned unserved, fails for three months to apply for fresh summons, certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that—

- (a) he has failed after using his best endeavours to discover the residence of the defendant who was not been served, or
  - (b) such defendant is avoiding service of process, or
  - (c) there is any other sufficient cause for extending the time,
- in which case the Court may extend the time for making such application for such period as it thinks fit.

(2) In such case the plaintiff may (subject to the law of limitation) bring a fresh suit.

**Scope.**—Order IX, rule 5, of the Civil Procedure Code, is only an enabling provision enacted for a special purpose only. 5 Ind. Cas. 537. This rule is not

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\* This sub-rule was substituted by s. 2 of the Code of Civil Procedure (Amendment) Act, 1920 (24 of 1920).

very happily expressed, but it means that when a plaintiff fails for a period of three months from the return of summons, unserved to apply for the issue of a fresh summons and on that application to satisfy the Court that he has used his best endeavours to discover the residence of the defendant who has not been served, or that such defendant is avoiding service of process, then, and only then, the Court may dismiss the suit as against such defendant under that section. 7 Bom. L. R. 928. Rule 5 has no application to a case when plaintiff has failed to appear; and the fact that summons is returned unserved on the opposite party, is no ground for setting aside the order of dismissal for default. A. I. R. 1926 Cal. 112=90 Ind. Cas. 675. Where original summons is returned unserved, the application for fresh summons, if made within one year (now three months) of the return of original summons is not time-barred. 2 Lah. L. J. 774=1 Lah. 137=56 Ind. Cas. 191. When records of suit were placed in the record room, on account of non-service of summons on one of the defendants, a subsequent suit against the same defendants on same cause of action is barred. 40 Ind. Cas. 448; but see 28 A. 743=3 A. L. J. 576. The effect of discharging a decree for the reason that it was passed without service of summons on a defendant, is that the entire decree is discharged and suit is revived. 23 C. L. J. 436=20 C. W. N. 943=34 Ind. Cas. 394. This rule does not apply to appeals. A. I. R. 1927 Bom. 68=50 B. 815=28 Bom. L. R. 1446=100 Ind. Cas. 147; see also 17 Ind. Cas. 294; but see 21 Ind. Cas. 420=25 M. L. J. 451. Order 9, rule 5, applies to a case where the suit was consigned to the record room merely because the defendant's address was not furnished by the plaintiff and Order 9, rule 2, has no application. A. I. R. 1931 Lah. 655=132 Ind. Cas. 524. Where summons issued to defendant returned unserved, dismissal of suit before expiry of the three months is premature and irregular. A. I. R. 1933 Pat. 575. Court cannot dismiss suit simply because summonses are not served, it should proceed under Order 9, rule 1. 135 Ind. Cas. 817=33 Bom. L.R. 1056= A. I. R. 1931 Bom. 253; see also 135 Ind. Cas. 347=1931 M. W. N. 1002=A. I. R. 1931 Mad. 795. Inherent power of Court can be exercised when power expressly conferred are exhausted. A. I. R. 1933 Pat. 582. An order staying proceeding cannot be justified where it appears from the report of the peon that the defendant is absconding. 38 P. L. R. 197.

Procedure when only plaintiff appears.

When summons duly served.

When summons not duly served.

(c) if it is proved that the summons was served on the defendant, but not

When summons served but not in due time.

future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant.

(2) Where it is owing to the plaintiff's default that the summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

**Scope.**—The phrase "when the suit is called on for hearing" when an appearance under Order IX is in question, means on the first day of hearing, and when an appearance under Order XVII, is in question it is limited to the commencement of the hearing on each day of hearing. A. I. R. 1927 Mad. 799=26 L. W. 76=104 Ind. Cas. 371. Where a date is fixed for arguments on a preliminary issue but the defendant is absent *ex parte* decree cannot be passed. A. I. R. 1924 Lah. 224=72 Ind. Cas. 900. Order IX, rule 6, contemplates a hearing of the suit on the day fixed in the summons for the defendant's appearance, whereas Order 17, rule 2, contemplates hearing of the suit at some later stage to which it has been adjourned. Subject to Order IX, r. 7, in all cases, where there is default of appearance at all events at the first hearing whether on the original date fixed in the summons or on some other date to which that hearing is adjourned, the modes of disposing of the suit directed by Order

6. [S. 100.] (1) Where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then—

(a) if it is proved that the summons was duly served, the Court may proceed *ex parte*;

(b) if it is not proved that the summons was duly served, the Court shall direct a second summons to be issued and served on the defendant;



IX apply and the decision is *ex parte*. A I R. 1922 Pat. 485=1 Pat. 188=69 Ind. Cas. 837; see also 69 Ind. Cas. 883. Rule 6 is not penal but is meant to prevent undue delay. 134 Ind. Cas. 268=27 N. L. R. 50=A. I. R. 1931 Nag. 122. Where pleader engaged by defendant merely to apply for adjournment, made that application, but the Court refused adjournment and decreed suit *ex parte*, the Court's decision was decree and defendant's remedy was by appeal. 133 Ind. Cas. 622=1931 A. L. J. 646=A. I. R. 1931 All. 703.

Clause (a).—This rule lays down when the Court may proceed *ex parte* but there appears to be no explanation in the Code what is *ex parte* procedure is though the plaintiff is always called upon in quite general terms to prove his case. A. I. R. 1923 Nag. 83=69 Ind. Cas. 619; see also 39 A. 143=14 A. L. J. 1226; 20 C. W. N. 1192=43 C. 1001=34 Ind. Cas. 235. Even in an *ex parte* suit plaintiff must prove his case by reliable evidence. A. I. R. 1929 All. 612=118 Ind. Cas. 527; 37 Ind. Cas. 27=3 O. L. J. 468; 81 Ind. Cas. 867=A. I. R. 1924 Cal. 806=39 C. L. J. 279; 108 Ind. Cas. 895; 108 Ind. Cas. 879=11 N. L. J. 78=A. I. R. 1928 Nag. 165; A. I. R. 1926 Oudh 192=92 Ind. Cas. 119; A. I. R. 1924 Cal. 647=28 C. W. N. 300=77 Ind. Cas. 551. Court cannot pass *ex parte* decree without giving proper notice of the date fixed for disposal of the suit to defendant. 38 Ind. Cas. 678=15 A. L. J. 24. On the date fixed for hearing the defendant was absent, and the suit was decided on evidence produced by plaintiff and the Court remarked in the judgment that it was to be an *ex parte* decree, held that the proper procedure for the Court to have adopted is that under Order XVII, r. 3. A. I. R. 1923 Oudh. 18=9 O. L. J. 543=72 Ind. Cas. 394. Where Court orders that the suit should proceed *ex parte* and fixes a date, on that date if defendant appears, an *ex parte* decree should not pass. A. I. R. 1922 All. 110=20 A. L. J. 270=66 Ind. Cas. 892; see also 64 Ind. Cas. 958=A. I. R. 1922 All. 33=20 A. L. J. 39.

7. [S. 101.] Where the Court has adjourned the hearing of the suit *ex parte*, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance he may upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

Scope.—Court has discretion to set aside order declaring proceedings *ex parte* but the Court should interpret rule liberally. A. I. R. 1931 Oudh 159=8 O. W. N. 80=131 Ind. Cas. 447; see also A. I. R. 1927 Mad. 1197=27 L. W. 361=1928 M. W. N. 203=108 Ind. Cas. 297; 106 Ind. Cas. 664=A. I. R. 1928 Mad. 211=39 M. L. T. 656. What rule 7 requires is that if sufficient cause is shown for non-appearance the defendant may upon terms, be placed in the same position, retrospectively as if he had appeared at the earlier stage. A. I. R. 1926 Sind 181=92 Ind. Cas. 493; see also A. I. R. 1923 Oudh 177=26 O. C. 10=10 O. L. J. 36=73 Ind. Cas. 591; A. I. R. 1922 Bom. 345=70 Ind. Cas. 762; 9 B. L. R. App. 15; A. I. R. 1922 All. 110=20 A. L. J. 270=66 Ind. Cas. 892. "Good cause" in this rule includes non-service of summons. 1936 A. M. L. J. 18. No evidence in support of the facts stated in his petition need be given. 8 C. 272. Application under Order IX, rule 7, can be made through a vakil even when Court has decided to proceed *ex parte* owing to the non-appearance of the defendant in person as per order of the Court. 27 M. L. T. 71=(1920) M. W. N. 241=11 L. W. 289=55 Ind. Cas. 945. Operation of Order VII cannot be extended to the subsequent hearings of the suit, so that the defendant can conduct his case from the day of his appearance. A. I. R. 1925 Mad. 1274=49 M. L. J. 273=(1925) M. W. N. 647=91 Ind. Cas. 545. Court should send for pleader when party appears by him before ordering dismissal for default. A. I. R. 1930 All. 217=(1930) A. L. J. 632=127 Ind. Cas. 523. Application for restitution dismissed for default can be restored. A. I. R. 1922 All. 223=44 A. 407=20 A. L. J. 226=66 Ind. Cas. 144. Where application to set aside order declaring suit to proceed *ex parte* is dismissed under this rule and an *ex parte* decree is passed against a defendant, it is open to the defendant to apply under Order IX, rule 13, to set aside that order or to prefer an appeal from the *ex parte* decree and in such an appeal the question whether the lower Court was wrong in proceeding to decide the suit *ex parte* can be gone into. 113 Ind. Cas. 409; 87 Ind. Cas. 222.=A. I. R. 1925 Oudh 645=28 O. C. 85.

8. [S. 102.] Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

**Scope.**—This rule is not applicable to execution proceedings. A. I. R. 1929 Bom. 217=31 Bom. L. R. 400=118 Ind. Cas. 700. This rule is clearly intended to have application to proceedings before a decree is passed and not after a decree is passed. A. I. R. 1927 Oudh 49=3 O. W. N. 921=98 Ind. Cas. 1029. Where suit is dismissed in default of plaintiff, the decree is really one under Order IX, rule 8. 1929 A. L. J. 391=116 Ind. Cas. 752; see also A. I. R. 1928 Pat. 335=7 Pat. 333=9 P. L. T. 669=109 Ind. Cas. 264; A. I. R. 1925 Oudh 433=2 O. W. N. 432=89 Ind. Cas. 418. Under Order IX, rule 8 date fixed for settlement of issue is the date fixed for hearing. (1919) Pat. 32=48 Ind. Cas. 192. Dismissal of suit for plaintiff's non-appearance, after he has proved his case is not justifiable. 31 Ind. Cas. 869. Dismissal of suit where plaintiff appears without pleader is dismissal for default. 3 P. L. J. 355=47 Ind. Cas. 27. Non-appearance of one of two or more plaintiffs does not entail dismissal of suit as against others. 4 P. L. J. 152=50 Ind. Cas. 323. Rule to dismiss the suit for default under Order IX, rule 8, is mandatory and defendant's statement cannot be recorded. 55 Ind. Cas. 966; see also 57 Ind. Cas. 75=A. I. R. 1921 Pat. 325=2 P. L. T. 36. Non-production of Commissioner's report does not entail dismissal. 54 Ind. Cas. 568. Order of dismissal for default in case where plaintiff is present but subsequently absents himself is not proper. A. I. R. 1921 Lah. 139=3 Lah. L. J. 449. Dismissal of suit for non-appearance of a next friend adversely interested to minor is illegal. A. I. R. 1921 Pat. 103=6 P. L. J. 317=63 Ind. Cas. 736. Dismissal of suit for not appointing guardian for minor on day fixed is illegal and does not become *res judicata*. A. I. R. 1922 Pat. 252=(1922) Pat. Sup. 81=6 P. L. J. 650=2 P. L. T. 572=63 Ind. Cas. 570. If one of two plaintiffs appears case comes under purview of Order IX, rule 10, and not under Order IX rule 8. A. I. R. 1921 Cal. 176=48 C. 57=62 Ind. Cas. 112. Order of dismissal of suit for default after framing of suit is under rule 8. A. I. R. 1922 Mad. 416=(1922) M. W. N. 483=72 Ind. Cas. 482. Appearance of plaintiff by pleader without instruction on day of hearing entails dismissal of suit for default. A. I. R. 1922 All. 68=20 A. L. J. 123=65 Ind. Cas. 775; A. I. R. 1923 Pat. 156=68 Ind. Cas. 942. The Court has absolute discretion whether to wait for pleader or not. 66 Ind. Cas. 789=A. I. R. 1921 Sind 50=15 S. L. R. 172. But in all cases entire caution should be exercised when on an adjourned date the parties fail to appear. A. I. R. 1923 Bom. 27=24 Bom. L. R. 775=46 B. 1026=68 Ind. Cas. 514.

Order of dismissal of suit for default after plaintiff's death is a nullity where the fact of death is not known. A. I. R. 1924 Oudh 114=73 Ind. Cas. 238. Where the plaintiff is absent and fails to pay additional Court-fees as ordered on the date of hearing, order for dismissal is under Order VII, rule 11. A. I. R. 1929 Mad. 344=117 Ind. Cas. 789. Where suit for ejectment is barred under this rule, fresh suit is barred on the same cause of action. 13 R. D. 387. Non-appearance of a person added as plaintiff in pursuance of the orders of Court does not justify dismissal of the original suit. A. I. R. 1926 Lah. 577=95 Ind. Cas. 865. Order of dismissal of suit for non-appearance on a date not fixed for hearing is *ultra vires*. A. I. R. 1929 Lah. 374=106 Ind. Cas. 830. Court has inherent power to restore a case dismissed for default on sufficient cause being shown. A. I. R. 1927 Rang. 58=5 Bur. L. J. 139=99 Ind. Cas. 151. Where party comes to Court after the order of dismissal is passed, he is entitled to have the suit restored on payment of costs. A. I. R. 1925 Bom. 423=27 Bom. L. R. 685=89 Ind. Cas. 225; A. I. R. 1925 All. 601=87 Ind. Cas. 118. In case of dismissal of suit in default, remedy is to apply for a review or apply for an order to set aside the order of dismissal. A. I. R. 1925 Bom. 395=80 Ind. Cas. 128. After dismissal of a suit for default a second suit is barred on the same cause of action. But a single fact alone makes different cause of action, and fresh suit lies. A. I. R. 1925 Nag. 366=87 Ind. Cas. 35. Fresh suit is not barred on the same cause of action by the order of dismissal for default so far as absentee defendants are concerned. A. I. R. 1926 All. 169=48 A. 97=23 A. L. J. 993=90 Ind. Cas. 2.

**Mistake of pleader as to the date fixed and consequential failure to appear need not be excused.** A. I. R. 1925 Oudh 682=2 O. W. N. 574=89 Ind. Cas. 64. Where pleader's clerk is present in Court when case is called, but the suit is dismissed before the clerk fetched the pleader from the Bar-room, order of dismissal is not justified. A. I. R. 1924 Oudh 405=11 O. L. J. 243=78 Ind. Cas. 123. Dismissal of suit is not justified for plaintiff's absence where it is adjourned on his petitions for appointment of guardian. A. I. R. 1924 Pat. 714=5 P. L. T. 424=1924 Pat. 215=78 Ind. Cas. 224. Where after the transfer of the suit, the transferee Court issued notice to plaintiff and his counsel to appear on certain day, but notice on plaintiff was not served whilst notice on counsel was served but he refused to accept notice, the Court is not competent to dismiss the suit on the ground that service of notice on counsel is good. A. I. R. 1934 Lah. 91. Where preliminary decree is passed, a suit cannot be dismissed unless decree is reversed in appeal. 144 Ind. Cas. 883=A. I. R. 1933 Sind 200. The word "appear" in this rule means appearing in suit. Where a party is present in precincts of Court or in Court room but not taking part in suit cannot be said to have appeared. 138 Ind. Cas. 87=36 C. W. N. 158=59 C. 756=A. I. R. 1932 Cal. 418. Where plaintiff's pleader was engaged elsewhere when suit was called and the Court asked the plaintiff to engage another pleader and on his failure to do so dismissed the suit, an application for restoration is one under Order 9, rule 9. 138 Ind. Cas. 342=36 C. W. N. 160=59 C. 906=A. I. R. 1932 Cal. 425; see also 38 P. L. R. 484. Where party is absent on date of hearing, and the suit is dismissed for non-production of evidence, the dismissal is not on merits but for default. 132 Ind. Cas. 206=A. I. R. 1931 Lah. 505. In a representative suit, when the plaintiff on record dies, the Court cannot dismiss the suit for default because the persons represented are not co-nominees parties and they cannot be said to be in default. A. I. R. 1931 Mad. 590=60 M. L. J. 659=132 Ind. Cas. 289=54 M. 770. Where a suit is transferred to another Court, a notice should be served on the party. A. I. R. 1936 Lah. 560=164 Ind. Cas. 142. An order dismissing the suit of the plaintiff for default on a date fixed for the submission of the report of the Commissioner as to the market value of the property in suit for purposes of Court-fees, is without jurisdiction, as such date is not the date of the hearing within the meaning of Order 9, rule 8, C. P. Code. 161 Ind. Cas. 790=38 P. L. R. 88=A. I. R. 1936 Lah. 280.

**Admission in defence.**—If cause of action exists plaintiff must get decree on admission of defence. A. I. R. 1921 Pat. 297=65 Ind. Cas. 644. The words in rule 8 "admits the claim or part thereof" are applicable to cases where Court, on examining pleadings considers that the defendant is ready to pay admitted claim then and there and submit to relief claimed. Claim being synonymous with amount sued for refers to right claimed. 35 Ind. Cas. 65. In case of joint interest of several defendants, admission by some is relevant against all. A. I. R. 1923 Lah. 123=69 Ind. Cas. 35. In pre-emption suit plaintiff's non-appearance entails dismissal even if mere right to pre-emption is admitted. 60 Ind. Cas. 724. Where defendant partly admits the claim and sets up counter claim, part of the claim admitted should be decreed even in the absence of the plaintiff. A. I. R. 1921 Sind. 50=15 S. L. R. 172=66 Ind. Cas. 789. Where plaintiff was present in Court in all hearings except one and part of his claim is admitted, dismissal of his suit for default is not proper. A. I. R. 1925 Pat. 712=3 P. L. R. 249=89 Ind. Cas. 614.

**Appeal.**—Improper dismissal is subject to revisional proceedings and not to appeal. 54 Ind. Cas. 568. No review lies in case of dismissal of suit in default under r. 8. A. I. R. 1925 Bom. 521=27 Bom. L. R. 1150=49 B. 839=90 Ind. Cas. 610. Appeal lies against the order refusing to restore the suit by application under rule 9. A. I. R. 1926 Cal. 246=90 Ind. Cas. 768; see also 57 Ind. Cas. 245=2 U. P. L. R. 288. Order of dismissal of suit after refusing to grant application for adjournment by one of the plaintiffs who was present is decree and appealable. 4 P. L. W. 366=45 Ind. Cas. 189. Dismissal of suit for plaintiff's inability to produce evidence is not dismissal under Order IX, rule 8 and is therefore subject to appeal and review. 3 P. L. W. 428=1 P. L. W. 790=39 Ind. Cas. 946. Order of dismissal of an application for restoration of application dismissed in default for restoration of the suit dismissed in default, is appealable. A. I. R. 1923 Nag. 293=19 N. L. R. 119=75 Ind. Cas. 589; 161 Ind. Cas. 840=1936 A. L. J. 305=A. I. R. 1936 All. 737. Order dismissing suit for default where part of claim is rejected is appealable. A. I. R. 1923 P. C. 114=40 C. L. J. 1=28 C. W. N. 689=50 I. A. 162=4 Lah. 284=25 Bom. L. R. 1248=45 M. L. J. 497=33 M. L. T. 349 (P. C.)=75 Ind. Cas. 7.

Dismissal of suit is not justified for failure to amend plaint or for failure of payment of costs of adjournment; such a dismissal amounts to material irregularity and revision lies. A. I. R. 1926 Lah. 571=96 Ind. Cas. 312; see also A. I. R. 1926 Lah. 612=27 P. L. R. 644=8 Lah. L. J. 423=96 Ind. Cas. 359. Where plaintiff is adjudged insolvent during the pendency of suit and the Court was informed of the fact of insolvency the official assignee should be called upon before the dismissal of the suit. In such a case dismissal for default is bad and can be set aside in appeal. A. I. R. 1927 Cal. 76=53 Cal. 844=31 C. W. N. 22=98 Ind. Cas. 781.

Appeal does not lie against the order of dismissal of suit for default. Appeal may be treated as revision if question of jurisdiction is involved. A. I. R. 1925 Pat. 374=6 P. L. T. 127=86 Ind. Cas. 787. Order of dismissal of suit after preliminary decree is open to revision. A. I. R. 1925 Pat. 433=6 P. L. T. 152=86 Ind. Cas. 785.

9. [S. 103.] (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. Decree against plaintiff by default bars fresh suit.

But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.

*N. B.*—For local amendments in Bombay, Calcutta and Lahore.—*Vide infra*.

**Scope.**—In case of a suit dismissed for default, two courses are open to the plaintiff, he can either make an application for restoration, under Order IX, rule 9, or for review under Order XLVII, r. 1. The application for restoration must be made within 30 days from the order of dismissal, but if such an application has been made and dismissed on the ground that it was barred by limitation, the rules of limitation cannot be evaded by making another application by way of review. A. I. R. 1925 Lah. 517=86 Ind. Cas. 616. This section contemplates that when the suit has been dismissed for default or has been decreed in the absence of party, the party at default can only have the decree vacated on showing sufficient cause. A. I. R. 1927 Sind 223=103 Ind. Cas. 129. In considering the question of setting aside an order of dismissal, the essential question to be considered is whether or not there was sufficient cause for non-appearance of the plaintiff on the date fixed. A. I. R. 1931 All. 452=132 Ind. Cas. 431. Rule 9 has no application to proceedings in execution. A. I. R. 1927 Cal. 938=45 C. L. J. 60=100 Ind. Cas. 343; see also A. I. R. 1927 Mad. 355=25 L. W. 192=52 M. L. J. 123=99 Ind. Cas. 954; A. I. R. 1925 Mad. 126=47 M. L. J. 269=20 L. W. 192=1924 M. W. N. 672=81 Ind. Cas. 841; A. I. R. 1926 Mad. 980=50 M. 67=51 M. L. J. 219=(1926) M. W. N. 890=26 L. W. 878=97 Ind. Cas. 1008. Although a person against whom an *ex parte* decree has been made is entitled to appeal against it instead of resorting to the procedure prescribed by Order 9, rule 13, yet his contentions on appeal must be limited either to questions of law or to such arguments as arise upon the record as it stood when the *ex parte* decree was passed. 151 Ind. Cas. 529=11 O. W. N. 256=A. I. R. 1934 Oudh 131. Where a suit is dismissed for default of plaintiff in ignorance of the plaintiff's death and subsequently an application is filed by his legal representative to bring him on record, the Court can set aside order of dismissal and restore suit to file under s. 151 and substitute the legal representative's name for the deceased plaintiff. A. I. R. 1935 Nag. 189=31 N. L. R. 374=158 Ind. Cas. 602. Where a suit is dismissed in default it cannot be restored and unless a valid cause is established or non-service of notice is proved. 158 Ind. Cas. 922=A. I. R. 1935 Pesh. 145.

After a decree has once been made in a suit, a suit cannot be dismissed without reversing the decree in appeal. The parties have on the making of the decree acquired rights or incurred liabilities which are fixed unless or until the decree is varied or set aside. A. I. R. 1924 P. C. 198=5 P. L. T. 623=35 M. L. J. 143=47 M. L. J. 441=20 L. W. 491=4 Pat. 61=51 I. A. 321=22 A. L. J. 990=26 Bom. L. R. 1129=40 C. L. J. 439=29 C. W. N. 391=81 Ind. Cas. 747. The clause in rule 9, "where a suit is wholly or partly dismissed under r. 8" means a suit dismissed in part or in its entirety, and not a suit dismissed wholly or partly under s. 8, or partly under some other rule. A. I. R. 1926 All. 169=48 A. 97=23 A. L. J. 993=90 Ind.

**Cas. 2.** Application to restore a suit dismissed for default if dismissed cannot be restored. A. I. R. 1929 Cal. 17=32 C. W. N. 811=115 Ind. Cas. 357. Granting extension of time not known to law upon application is illegal under Order IX, r. 9, and should be set aside in revision. A. I. R. 1931 Cal. 319=52 C. L. J. 23=129 Ind. Cas. 778. Order setting aside order of dismissal without considering evidence is vitiated by material irregularity. 132 Ind. Cas. 431=1931 A. L. J. 962=A. I. R. 1931 All. 452. Court is not empowered under Order 9, rule 9 to set aside dismissal of a suit for default of appearance as a matter of grace. A. I. R. 1925 Mad. 209=20 L. W. 829=48 M. L. J. 152=85 Ind. Cas. 499.

An application by a pleader, instructed only to apply for an adjournment, which is refused is not an appearance within the meaning of C. P. Code. A. I. R. 1927 Rang. 46=4 Rang. 408=99 Ind. Cas. 717. As regards the meaning of the word "appearance", *vide* 34 C. 403=11 C. W. N. 329 (F. B.); 23 B. 414; 13 Bom. L. R. 1222; 21 A. L. J. 503=74 Ind. Cas. 845; 47 M. 819 (F. B.)=82 Ind. Cas. 102; A. I. R. 1928 All. 760; 46 Ind. Cas. 488=3 P. L. J. 481. Without enquiry a trial Court ought not to summarily dismiss an application for restoration of the suits. 105 Ind. Cas. 821 (Lah). Order 9, rule 9, is applicable to applications for setting aside sales in execution made under Order XXI, rule 90. 20 C. W. N. 1203=33 Ind. Cas. 581; 23 O. C. 349=59 Ind. Cas. 575. If an appeal from an *ex parte* decree is dismissed for default, the first Court can allow the application to set aside that *ex parte* decree. 39 A. 393=15 A. L. J. 286=39 Ind. Cas. 519. A stranger to a decree made a claim under Order XXI, r. 100 and his claim was dismissed for non-appearance on the date fixed for hearing. He applied under Order XI, rule 9, for re-hearing of the case: *Held* that the Court would re-hear the application. 3 Pat. L. J. 250=4 Pat. L. W. 102=43 Ind. Cas. 951. Plaintiff can apply for review of judgment when the suit is dismissed for default and he has not appealed under Order IX, rule 9 to set the order aside. 37 M. L. J. 59=9 L. W. 311=50 Ind. Cas. 327. It has no application to proceedings in execution, instituted under Order 21, rule 90. 4 Pat. L. J. 135=49 Ind. Cas. 617=(1919) Pat. 75 (F. B.); see also 47 Ind. Cas. 154=5 Pat. L. W. 208=4 Pat. L. J. 330=(1918) Pat. 265=47 Ind. Cas. 154. Order 9, rule 9, is not applicable to an order dismissing for default an application to set aside a sale held in execution of a decree. 52 Ind. Cas. 416. But the Court has an inherent power to set aside a dismissal of an application for execution for default if the ends of justice renders it necessary to do so. A. I. R. 1927 Lah. 67=2 Lah. 66=64 P. L. R. 1921=60 Ind. Cas. 720. This rule applies to the dismissal of an application for probate. 52 Ind. Cas. 639.

Where an order dismissing a suit for default is set aside under Order IX, rule 9, such order may operate in favour of all the plaintiffs though some of them only have applied if the Court setting aside the order of dismissal so directs. 7 O. L. J. 1=23 O. C. 18. Where case was fixed for the plaintiffs compliance with direction of Court under Order XI, r. 12, and suit is dismissed for their default under Order IX, rule 21, such dismissal cannot be set aside by application under Order IX, rule 9. Such order is a decree and is appealable under Order XLIII, r. 1 (f). 88 Ind. Cas. 751=A. I. R. 1925 Rang. 218=3 Rang. 63. Order 9, rule 9, has no application to an application under Order XXI, rule 2 (2). Consequently no appeal lies under Order XLIII, rule 1 (c), against an order dismissing an application for the revival of an application under Order XXI, rule 2 (2) dismissed for default. 63 Ind. Cas. 855.

Where a suit is restored against some defendants on plaintiff's application, restoration against others by Court after limitation is *ultra vires*. A. I. R. 1925 Oudh 105=11 O. L. J. 573=80 Ind. Cas. 75. Order IX, rule 9, applies to an application for final decree for foreclosure dismissed for default, the application for final decree for foreclosure not being a proceeding in execution. A. I. R. 1924 Oudh 30=26 O. C. 194=74 Ind. Cas. 701. The plaintiff's pleader was instructed only to ask for adjournment which was not granted and the case dismissed, held that the dismissal was under Order XVII, r. 2 and an application for restoration under Order 9, rule 9, was maintainable. A. I. R. 1923 Pat. 530=1 Pat. L. R. 281=74 Ind. Cas. 693; but see 157 Ind. Cas. 1021=1935 A. L. J. 724=A. I. R. 1935 All. 398; A. I. R. 1936 All. 659=1936 A. L. J. 635; A. I. R. 1936 Lah. 1000. Order IX, rule 9, does not apply to execution proceedings. A. I. R. 1923 All. 544=74 Ind. Cas. 7; see also A. I. R. 1922 Oudh 201=73 Ind. Cas. 73. Order IX, r. 9, can apply by force of s. 141 to a proceeding under Order XXI, r. 100. A. I. R. 1923 Pat. 239=2 Pat. 372=4 P. L. T. 93=1 Pat. L. R. 134=71 Ind. Cas. 484. Where an application to

have a suit decided *ex parte* restored to the file is dismissed for default, an application to set aside that dismissal lies under Order IX, r. 9 read with s. 141. A. I. R. 1923 Oudh 146=9 O. L. J. 627=74 Ind. Cas. 380. Where a suit by a minor represented by a guardian is dismissed for default and a petition is put in to restore the suit to file, the suit has to be restored to file whether or not the guardian had sufficient reasons for non-appearance. 155 Ind. Cas. 575=1935 M. W. N. 110=41 L. W. 117=A. I. R. 1935 Mad. 196; see also 68 M. L. J. 615=58 Mad. 929=41 L. W. 649=A. I. R. 1935 Mad. 565.

Application under s. 158, Bengal Tenancy Act for fair assessment of rent when no rent was paid previously is not a suit within the meaning of Order IX, rule 9. A. I. R. 1923 Pat. 381=2 Pat. 192=4 P. L. T. 705=74 Ind. Cas. 464. This rule is applicable to probate and guardianship proceedings by virtue of s. 141, C. P. Code. 38 P. L. R. 973=A. I. R. 1936 Lah. 863; see also A. I. R. 1936 Lah. 712=38 P. L. R. 263=164 Ind. Cas. 334.

**Plaintiff shall be precluded from bringing a fresh suit.**—Dismissal of a suit by a Burman Buddhist for administration of estate bars a fresh suit by him for partition in respect of the same property. A. I. R. 1928 Rang. 73=5 Rang. 785=108 Ind. Cas. 809. Where suit is dismissed for default, fresh suit upon same cause of action is barred. L. R. 10 A. 11 Rev.=13 R. D. 148; see also 15 I. A. 66=15 C. 422; 39 M. L. J. 412; 15 L. R. 1 (Rev.)=18 R. D. 1. It is doubtful whether dismissal of suit under Order IX, rule 8, precludes those claiming through the plaintiff from bringing fresh suit. A. I. R. 1929 Pat. 485=9 Pat. 447=11 P. L. T. 505=122 Ind. Cas. 801. Cause of action, depends on grounds and not on relief. A. I. R. 1929 Pat. 685=9 Pat. 447=11 P. L. T. 505=122 Ind. Cas. 801. If causes of action are different, Order 9, rule 9, does not bar the second suit. A. I. R. 1930 Oudh 510=7 O. W. N. 988=6 Luck. 106=130 Ind. Cas. 65; see also 16 C. 98=15 I. A. 156; 9 C. 426; 10 B. 28; 12 A. L. J. 53; 14 C. W. N. 298; 45 A. 81=74 Ind. Cas. 991. For the application of this rule, the suit must be by the same plaintiff and cause of action must be the same. 144 Ind. Cas. 651=34 P. L. R. 73=14 Lah. 485=A. I. R. 1933 Lah. 365. A previous dismissal of a suit for redemption of a mortgage does not bar a second suit for redemption. A. I. R. 1928 Bom. 67=52 B. 111=30 Bom. L. R. 34=108 Ind. Cas. 22. Death of plaintiff during a suit where part of his claim is admitted does not bar fresh suit but is subject to Order XXII, r. 3. A. I. R. 1930 Oudh 3=5 Luck. 241=123 Ind. Cas. 855. Two suits have same cause of action if material facts and occasions giving rise to cause of action are the same in each. A. I. R. 1929 Pat. 685=11 P. L. T. 505=9 Pat. 447=122 Ind. Cas. 801. If sale-proceeds of the mortgaged property are insufficient and application for personal decree is dismissed, a fresh application is barred. A. I. R. 1930 Rang. 257=8 Rang. 316=126 Ind. Cas. 648. Where the dismissal for default is under rule 3, Order IX, there is no bar to a fresh suit, while a dismissal under rule 8 of Order IX precludes a second suit. It is incumbent on the party who relies on the bar of Order IX to show that the dismissal of the previous application was under s. 8. A. I. R. 1925 Mad. 986=85 Ind. Cas. 982. The provisions of Order IX, r. 9, cannot be nullified in the case of minor plaintiffs by only changing guardian *ad litem* from time to time and alleging their knowledge at various times. A. I. R. 1921 Sind 200=80 Ind. Cas. 985. A subsequent suit, in effect the same as previous suit but claiming a different relief is barred by r. 9. A. I. R. 1926 Lah. 562=96 Ind. Cas. 207. The dismissal of a prior application for probate without trial of the question as to genuineness of the Will is not decision binding for all purposes and this rule does not apply to such cases. A. I. R. 1926 Cal. 1057=53 C. 578=98 Ind. Cas. 374. Where a suit for partition and separate enjoyment is dismissed for default, a subsequent suit by the assignee based on assignor's right of partition is not barred. A. I. R. 1926 Mad. 1018=49 M. 939=51 M. L. J. 254=24 L. W. 298=(1926) M. W. N. 815=97 Ind. Cas. 622. Where application to restore suit is dismissed for default and plaintiff appeals and assigns his interest, the substituted plaintiff is estopped from bringing a fresh suit for same cause of action. A. I. R. 1929 Pat. 685=9 Pat. 447=11 P. L. T. 505=122 Ind. Cas. 801. But attaching creditors are not bound by dismissal if mortgagees fraudulently allowed it to be dismissed. A. I. R. 1929 All. 861=122 Ind. Cas. 766.

If decree gives decree-holder right to apply for personal decree for balance, separate personal decree must be passed for it on application. Dismissal of application for default bars fresh application. A. I. R. 1930 Nag. 188=26 N. L. R. 154=124 Ind. Cas. 249. Where suit is dismissed for non-payment

of proper Court-fee, fresh suit is not barred under Order 9, rule 9, but the case comes under Order 7, rule 11. 133 Ind. Cas. 449=A. I. R. 1932 Pat. 11. Where a suit for declaration was dismissed for default, a subsequent suit for partition and possession of a share is not barred, the cause of action being different. 12 L. W. 431=39 M. L. J. 412=60 Ind. Cas. 201. Plaintiff after his suit has been dismissed on one cause of action is not precluded from bringing another suit upon another cause of action. A. I. R. 1923 All. 409=45 A. 81=74 Ind. Cas. 991. The dismissal for default, of a partition suit does not bar for the institution of a second suit for partition by reason of Order 9, r. 9, C. P. Code. The reason is that even after such dismissal the jointness continues and there is a continuing cause of action. 156 Ind. Cas 109=A. I. R. 1935 Mad. 458=1935 M. W. N. 666.

**Restoration on sufficient cause.**—Showing sufficient cause is condition precedent for restoration of suit. Section 151 does not work in the absence of good cause. A. I. R. 1930 Rang. 65=126 Ind. Cas. 542. Dismissal for non-appearance of pleader of *pardanashin* lady for being engaged in another Court is restorable if application is made on same day. A. I. R. 1930 Lah. 943=31 P. L. R. 550=129 Ind. Cas. 890. Non-appearance of plaintiff's agent under *bona fide* belief that he had no work amounts to sufficient cause. A. I. R. 1929 Rang. 224=122 Ind. Cas. 288. If false cause is shown for non-appearance, Court is justified in refusing to restore suit. False cause is not sufficient cause. A. I. R. 1929 Rang. 224=122 Ind. Cas. 288. Execution can be dismissed for default must be restored if good cause and exercise of due diligence is shown by decree-holder. A. I. R. 1929 Lah. 509=30 P. L. R. 243=11 Lah. L. J. 142=120 Ind. Cas. 276. In deciding the question of "sufficient cause" the Court should consider plaintiff's inability to attend. 148 Ind. Cas. 329. No rigid rule can be laid down that in all cases where a party arrives late at Court and finds his suit dismissed he is entitled to have as of course his suit restored on payment of such costs as may be incurred by reason of his default. Each case must be dealt with on its merits bearing in mind that Order 9, rule 9, requires that "sufficient cause" be shown and that dismissal of a suit for non-appearance of the plaintiff is a heavy penalty. What is sufficient cause in each case must quite obviously depend upon the particular facts. A. I. R. 1935 Sind 198=158 Ind. Cas. 942. When sufficient cause is shown re-opening is mandatory, but when sufficient cause is not shown such re-opening is discretionary with the trial Judge. A. I. R. 1936 Rang. 335=164 Ind. Cas. 236. Where a suit has been dismissed in default under Order 9, rule 8, on account of the failure of the representative of plaintiff firm to appear on the date of hearing and the representative alleges that he was unable to appear on the due date by reason of his missing the last train available by a few minutes, the question to be considered by the Court is whether the representative honestly intended to be in Court and he did his best to get there in time. Once the Court is satisfied that the man did try to get there, and that he could have been there but for the fact of having missed his train by a few minutes, it is the duty of the Court to set aside the order of dismissal after directing him to pay costs to the other party. A. I. R. 1936 Rang. 204=162 Ind. Cas. 842; see also A. I. R. 1936 Rang. 335=164 Ind. Cas. 236. If the Court is of opinion that there was a reasonable attempt by the pleader to appear or be represented but that he was unable to do so because of causes which he could not reasonably control, then it must be held that there is a good case for restoration. A. I. R. 1929 Lah. 96=10 Lah. 570=30 P. L. R. 628=114 Ind. Cas. 76. Where the absence of one of the parties for fetching his pleader and of other because of his blindness, in such a case restoration should be ordered. A. I. R. 1928 Lah. 454=10 Lah. L. J. 70=111 Ind. Cas. 848. Sufficient cause for non-appearance must depend on the facts of each case. Where the pleader was actually sitting in the adjoining Court room and did not hear the call but soon after appeared and applied for restoration: *Held*, that there was sufficient cause for restoration. A. I. R. 1927 Sind 228=102 Ind. Cas. 416.

Plaintiff's explanation for his counsel's absence is condition precedent for restoring suit dismissed for default. 117 Ind. Cas. 382. Where suit is dismissed for pleader's absence, mere negligence is not a ground for restoring the suit though it may be ground for a suit for damages against the agent or pleader. A. I. R. 1929 Lah. 148=112 Ind. Cas. 379. No orders of dismissal in default should be passed till the end of the day when the Court rises for the day, because there can be no default until the Court rose for the day. The Court has inherent power to rescind mistaken order of dismissal for default under s. 151. A. I. R. 1928 All. 301=26 A. L. J. 382=

108 Ind. Cas. 576. The pleader being busy elsewhere the plaintiff's agents going to call him is no excuse for restoring the suit. A. I. R. 1927 Oudh 211=4 O. W. N. 508. A mis-judgment by a counsel, as to the time when his case would be taken up, who does not state that he was engaged in some other Court, is not a sufficient ground for absentsing himself when his case is taken up. A. I. R. 1927 Lah. 224=100 Ind. Cas. 793. Late arrival of a train, which prevented a party from appearing in Court is a sufficient cause within rule 9. A. I. R. 1927 Lah. 40=98 Ind. Cas. 868. Where plaintiff after calling of case ran away to call his pleader and returned a few minutes after the suit was dismissed, the case should be restored. A. I. R. 1926 Lah. 650=96 Ind. Cas. 821. The dismissal of suit for default must be set aside. Where plaintiff or his counsel is not informed about the adjournment. 96 Ind. Cas. 245. When the plaintiff attended the Court, but went to a well in order to ease himself, and on his return he found that the case had been dismissed in default, *held* that the case should have been restored. 8 Lah. L. J. 422=27 P. L. R. 431=96 Ind. Cas. 402.

The provisions of s. 151 should be applied with the greatest caution. Where a party is absent from the Court when he ought to have been present, and does not give any satisfactory reason for his absence, then Court should not exercise its inherent powers in his favour, so as to interfere with the rights of third parties, such as an auction purchaser, which have come into existence owing to his default. A. I. R. 1926 Bom. 377=50 B. 457=28 Bom. L. R. 686=96 Ind. Cas. 411. But Court has power to interfere under s. 151 in fit cases where sufficient cause under Order IX, r. 13, is not shown. A. I. R. 1926 Sind 249=20 S. L. R. 266=95 Ind. Cas. 533. Illness of plaintiff can be a sufficient cause. A. I. R. 1926 Lah. 541=95 Ind. Cas. 240. A party who has engaged a counsel to represent him can remain personally absent, therefore if his counsel fails or betrays him he has sufficient cause for his personal absence. A. I. R. 1926 Nag. 409=9 N. L. J. 145=95 Ind. Cas. 260. A plaintiff should be given an opportunity to prove the cause of his non-appearance before dismissing suit for his appearance, though ordered to appear in the Court in person. 3 O. L. J. 712=38 Ind. Cas. 477. Applications under Order IX, rule 6 have to be disposed of on evidence and not on the ground that they are *bona fide* or otherwise. 22 C. W. N. 671=42 Ind. Cas. 649. Restoration of suit without sufficient cause is not bad. 48 Ind. Cas. 961.

Where suit was dismissed for default but subsequently was restored on plaintiff's application, the restoration relates back to the date of the application. 50 Ind. Cas. 727. An order of a Collector restoring an execution case to his file after it was dismissed by him in default of the decree-holder is illegal and without jurisdiction. 51 Ind. Cas. 237. An order under Order IX, r. 9, setting aside an order of dismissal for default made on the application of some of the plaintiffs may operate in favour of all of them, if the Court setting aside the order so directs. 7 O. L. J. 1=2 U. P. L. R. 46=23 O. C. 18=55 Ind. Cas. 481.

Puncture of tyre on the way to Court amounts to sufficient cause. A. I. R. 1934 Lah. 416. Where plaintiff is absent but his pleader is present and is willing to argue the case, the case should not be dismissed. A. I. R. 1933 All. 539. So also where notice of transfer of a case was not served upon the plaintiff and the case has been dismissed for default by the transferee Court, it should be restored on the application of the plaintiff. A. I. R. 1933 Lah. 558=14 Lah. 240=34 P. L. R. 540. Where a suit has been dismissed for default, it should only be restored on showing sufficient cause for default. 141 Ind. Cas. 188=34 P. L. R. 88=A. I. R. 1933 Lah. 169; see also 143 Ind. Cas. 158=A. I. R. 1933 Pesh. 59. Inherent power cannot be exercised to restore case where no sufficient cause is established. A. I. R. 1933 Pesh. 59=143 Ind. Cas. 158. Pauper application dismissed for default as no steps were taken for prosecution, can be restored on finding that some steps were taken. 140 Ind. Cas. 220=36 M. L. W. 586=1932 M. W. N. 1262=A. I. R. 1933 Mad. 5. Appeal dismissed for default of guardian. Application for removal of guardian on ground of negligence of duty and for setting aside dismissal for default Court should take evidence on the question as to whether guardian negligent in his duty unless respondent admits facts of guardian's negligence. A. I. R. 1925 Mad. 774=21 L. W. 325=87 Ind. Cas. 117. Not obtaining a carriage in time to be present in Court is not a sufficient cause for his absence. A. I. R. 1921 Sind. 55=17 S. L. R. 105=83 Ind. Cas. 749. Order IX, rule 9, makes it compulsory on a Court to set aside a dismissal where the plaintiff satisfies the Court that there was sufficient cause for non-appearance. Still the Court can restore the case for any other valid reason.



44 B. 82=21 Bom. L. R. 952=53 Ind. Cas. 252; see also 54 Ind. Cas. 44= 12 Bur. L. T. 158.

Where plaintiff was a female and her husband was in Court with her witnesses on the day in question, nor was vakil actually engaged in another Court, when the case was called at 4 p. m., her husband went to call the vakil, and the suit was dismissed: *Held* that the plaintiff has done all that lay in her power to have the case proceeded with and the suit should be restored. 93 Ind. Cas. 211=23 L. W. 430; see also A. I. R. 1934 Oudh 491=11 O. W. N. 1373=152 Ind. Cas. 110. Where a party appears a few minutes after the case has been called and dismissed during his absence, he should only be made to pay the costs of the application to restore the suit and his suit should be restored and heard on merits. A. I. R. 1923 Bom. 480=77 Ind. Cas. 901. Illness of a brother is not sufficient cause to set aside a dismissal for default. A. I. R. 1924 Pat. 271=2 Pat. 784=74 Ind. Cas. 847. Where a suit was called for hearing the plaintiff who was present in Court left the Court precincts to fetch his pleader who was engaged in another Court, the case had been called and dismissed for default in the meantime: *Held*, that in the circumstances of the case the suit should be restored for re-hearing on condition of the plaintiff paying into the Court the costs of the defendant within a prescribed time failing which his application should stand dismissed. A. I. R. 1923 All. 189=71 Ind. Cas. 283.

Where the plaintiff deliberately refused to proceed with the suit, during various dates of hearing, the fact the plaintiff was not aware of the last date of hearing is no ground for holding order dismissing the suit improper. A. I. R. 1921 Mad. 617=13 L. W. 334=62 Ind. Cas. 378. Words "satisfies" and "was prevented by sufficient cause" should receive same interpretation as in Order 41, r. 19 and Limitation Act, s. 5. A. I. R. 1934 Nag. 183.

**Notice.**—No notice need be given to judgment-debtor if execution application dismissed for default is restored provided notice of date of attendance is not given to him. A. I. R. 1930 Lah. 20=11 Lah. 93=31 P. L. R. 375=119 Ind. Cas. 494.

**Revision.**—Wrongful dismissal of suit for default after preliminary decree is passed is subject to revisional proceedings. A. I. R. 1930 Mad. 158=57 M. L. J. 781=53 M. 395=30 L. W. 979=124 Ind. Cas. 605; A. I. R. 1928 Mad. 963=28 L. W. 497. Where the suit was dismissed under Order 9, rule 8 and was restored under Order 9, rule 9, no revision is competent from order of restoration. 143 Ind. Cas. 307=1932 A. L. J. 1100=A. I. R. 1933 All. 118; see also A. I. R. 1933 Oudh 331=143 Ind. Cas. 222. But under certain circumstances an order restoring the suit dismissed for default is subject to revisional proceedings. A. I. R. 1929 All. 599=51 A. 908=117 Ind. Cas. 111. Where a Court disbelieving the plaintiff passes an order refusing to restore a suit dismissed for default, no revision lies. A. I. R. 1922 Lah. 290=3 Lah. 79=77 Ind. Cas. 336. Appeal can lie against an order of dismissal of an application for restoration of the suit dismissed in default. A. I. R. 1923 Nag. 293=19 N. L. R. 119=75 Ind. Cas. 589. Order passed on a petition under Order 9, rule 9, for restoration of dismissed petition is revisable. A. I. R. 1934 Mad. 669=40 L. W. 774=1934 M. W. N. 1114=151 Ind. Cas. 765=67 M. L. J. 485.

**Dismissal of application under Order 9, rule 9.**—Where an application under Order 9, rule 9, has been dismissed for default, Court has inherent power to deal with application for setting aside order of dismissal. A. I. R. 1933 Rang. 406. Order IX, rule 9, does not apply to set aside dismissal under rule 9 because s. 141 does not authorise such procedure. If a second application is in time, it may be treated as an application to restore the suit itself. If it is not in time, s. 151 may be revoked. A. I. R. 1927 Cal. 534=54 C. 405=31 C. W. N. 576=103 Ind. Cas. 69; but see 94 Ind. Cas. 151=1926 Mad. 654=24 L. W. 538; 93 Ind. Cas. 94=A. I. R. 1926 Rang. 74. Where an application for setting aside dismissal of a suit for default is dismissed for default, a subsequent application to restore it is maintainable either under Order IX and s. 141 or under s. 151. A. I. R. 1925 All. 773=23 A. L. J. 817=47 A. 878=89 Ind. Cas. 350. No application can lie under Order IX, to set aside a dismissal for default of an application under Order IX, rule 9. 4 Pat. L. J. 287=51 Ind. Cas. 152. An order dismissing for default an application to set aside the dismissal of a suit under Order IX, rule 9, does not come under rule 1 (c) of Order 43 and therefore is not appealable. A. I. R. 1928 Pat. 335=2 Pat. 333=9 P. L. T. 669=109 Ind. Cas. 264.

**Limitation.**—Application under Order 9, rule 9, made after period of limitation, cannot be entertained. A. I. R. 1931 Cal. 319=52 C. L. J. 23=129 Ind. Cas. 778. Section 5 and Art. 164 of the Limitation Act apply to applications under Order IX, rule 9. A. I. R. 1929 Bom. 262=53 B. 453=31 Bom. L. R. 484=122 Ind. Cas. 76. Application for an order to set aside the dismissal, must be filed within the period of 30 days. Extension of that period cannot be made by a Court under s. 151. A. I. R. 1928 Nag. 91=23 N. L. R. 183=107 Ind. Cas. 193 ; 1 P. L. T. 573=58 Ind. Cas. 191 ; 1 Pat. L. J. 547=38 Ind. Cas. 63. Section 5, Limitation Act, does not apply to an application under Order IX, rule 9 and, therefore the Court cannot admit the application on the ground that the applicant had sufficient cause for not preferring his application within the time prescribed. A. I. R. 1925 Bom. 521=27 Bom. L. R. 1150=49 B. 839=90 Ind. Cas. 610. Where an application to set aside *ex parte* decree is dismissed for default, a fresh application lies only within 30 days of the decree. A. I. R. 1924 All. 503=46 A. 319=22 A. L. J. 191=78 Ind. Cas. 358 ; 41 Ind. Cas. 586=21 C. W. N. 769.

10. [S. 105.] Where there are more plaintiffs than one, and one or more of them appear, and the others do not appear, the Court may, at the instance of the plaintiff or plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit.

**Notes.**—Where one of several plaintiffs in a suit does not appear, the Court has discretion under Order IX, rule 10 of the Code of Civil Procedure, to permit the suit to proceed in the same way as if all the plaintiffs had appeared. A decree, therefore, in a suit on a mortgage-bond by two plaintiffs in favour of both the plaintiffs, although one of them only has appeared, is not illegal. In such a case Order IX, rule 8, Civil Procedure Code, does not apply. 62 Ind. Cas. 112.

11. [S. 106.] Where there are more defendants than one, and one or more of them appear and the others do not appear, the suit shall proceed, and the Court shall, at the time of pronouncing judgment, make such order as it thinks fit with respect to the defendants who do not appear.

**Scope.**—Where all the defendants did not enter appearance, and a decree is passed against all of them on a ground common to them all, it was held that the decree was not an *ex parte* decree against those defendants who were not present. 12 W. R. 376 ; see also 9 W. R. 597 ; but see 15 W. R. 210. Order IX, rule 13, must be read with rule 11, and effect should be given to all the provisions contained in them. It cannot be laid down as an inflexible rule of law, that whenever an order is made under s. 108 of the Code, the effect is to set aside the whole decree, although it may have been made against some of the defendants after a contest, or although an unsuccessful effort may have been made by some of the defendants to set aside the *ex parte* decree. 6 C. L. J. 226. There is nothing in this rule which conflicts with or limits the operation of Order 9, rule 13 and the application of the latter rule is not limited to the case of a sole defendant who has not appeared, or to the case where there are several defendants and none of them has appeared. 8. C. W. N. 621. Having regard to the language of rules 11 and 13 of Order IX, an application by a co-defendant praying for setting aside an *ex parte* decree in a Small Cause suit, if granted, does not re-open the case against the defendant or defendants who were present and contested the case. 18 B. 42.

12. [S. 107.] Where a plaintiff or defendant, who has been ordered to appear in person, does not appear in person, or show sufficient cause to the satisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the foregoing rules applicable to plaintiffs and defendants, respectively, who do not appear.

**Scope.**—The Court is competent to order a party to appear in person. 17 Ind. Cas. 762=23 M. L. J. 676=13 M. L. T. 19. This rule contemplates a summons issued after the perusal of the plaint for the first appearance of the defendant in person on the date specified for the hearing, or an order passed at the same time for the personal appearance of the plaintiff on that date. It does not contemplate the summoning of a party as a witness at any stage of the proceedings. 6 C. P. L. R. 83. Where a defendant is ordered to appear in person before a Court, the Court's order striking out his defence for his persistent failure to attend is quite proper and competent. A. I. R. 1928 Oudh 262=5 O. W. N. 291=111 Ind. Cas. 473 ; see also 41 M. 256=41 Ind. Cas. 719=6 L. W. 337 ; 4 Pat. L. J. 152. But a plaintiff should be given an opportunity to prove the cause of his non-appearance, though ordered to appear in the Court in person. 3 O. L. J. 712=38 Ind. Cas. 477. Minor represented by a guardian can be compelled to appear by a direction to his guardian and the failure on the part of the guardian to comply with the direction, will entitle the Court to act under Order IX, rule 12. 27 M. L. T. 171=(1920) M. W. N. 241=11 L. W. 289=55 Ind. Cas. 945. This rule covers case of party ordered to appear in person but not appearing. 138 Ind. Cas. 613=1932 A. L. J. 726=A. I. R. 1932 All. 595. In such a case appearance by pleader is no appearance. 137 Ind. Cas. 792=36 L. W. 422=1932 M. W. N. 423=A. I. R. 1932 Mad. 414. The order should be free from ambiguity. 1933 M. W. N. 696=A. I. R. 1933 Mad. 821.

*Setting aside Decrees Ex parte.*

**13. [S. 108.]** In any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside ; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit :

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also.

*N. B.*—For local amendments in Allahabad, Bombay, Lahore, Madras, Nagpur, Oudh, Peshwar, Rangoon and Sind.—*Vide infra.*

**Scope.**—This rule has no application where on the face of a decree it is *inter partes*. A. I. R. 1925 Cal. 1010=42 C. L. J. 224=90 Ind. Cas. 512. Court has no jurisdiction to restore unless conditions mentioned in the rule are fulfilled. 133 Ind. Cas. 129=1931 A. L. J. 377=53 A. 612=A. I. R. 1931 All. 294 (F. B.). The two branches of the rule are distinct and the defendant whatever his position may be in respect of one branch, is entitled to the benefit of the section if he satisfies the Court that he has made good his contention under the other branch. A. I. R. 1925 Cal. 627=52 C. 179=88 Ind. Cas. 508. For the purposes of this rule proceedings under part 20 of Sch. II of C. P. Code are suits. A. I. R. 1928 Mad. 969=55 M. L. J. 262 29 L. W. 490=112 Ind. Cas. 691. The word "appearance" implies that the party is present at the trial either in person or through pleader for the purpose of conducting the case. A. I. R. 1922 Pat. 485=1 Pat. 188=69 Ind. Cas. 837. The first object and purpose for which Courts sit is that the parties shall be heard. The object of the rule is to ensure within reasonable limits as to public convenience, that every defendant shall have a hearing. 22 C. 981. This rule contemplates the case of a Court setting aside its own decree and not that of another Court. 4 C. W. N. 456. This rule does not apply to the setting aside of an *ex parte* order declaring a person an insolvent. 8 C. W. N. 468. An application for substitution of names was decided *ex parte*. On an application made for re-hearing held that Order 9, rule 13, was applicable to proceedings of this kind as well as to suits. 6 A. L. J. 760. Where proceedings under this rule have been initiated by the defendant, the legal representative of the defendant is entitled to continue such pro-

ceedings. A. W. N. 1937, 176=4 A. L. J. 480=29 A. 574. But it is not competent to the legal representative of a deceased defendant against whom an *ex parte* decree has been passed to apply to the Court under this rule to get such *ex parte* decree set aside, since the section in term is limited to the defendant against whom the decree has been passed *ex parte*. 21 A. 274=A. W. N. 1899, 58 ; (29 C. 33 Diss). Court should not deprive a man of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right so far as other side is concerned by making the man to balame, pay for it. A. I. R. 1923 Mad. 63=16 L. W. 583=46 M. 60=43 M. L. J. 632=68 Ind. Cas. 97. The Court to which business of the Court is transferred, can entertain an application to set aside an *ex parte* decree passed by the other Court. A. I. R. 1922 Mad. 10=42 M. L. J. 344=15 L. W. 458=65 Ind. Cas. 787. Knowledge that a particular decree has been passed against him in a particular Court in favour of a particular person for a particular sum is essential before applicant can apply. A. I. R. 1923 Bom. 193=25 Bom. L. R. 74=47 B. 485=72 Ind. Cas. 130. A Court has no jurisdiction to set aside *ex parte* decree at the instance of a person not affected by the decision, and expressly exempted from the decree, 61 Ind. Cas. 484. A minor defendant not represented in the suit by a properly appointed guardian cannot apply under Order IX, rule 13. A. I. R. 1922 Nag. 249=18 N. L. R. 138=66 Ind. Cas. 460. Where first application for setting aside *ex parte* decree is dismissed for default, second application is allowable. A. I. R. 1923 Cal. 552=76 Ind. Cas. 533. Where a decree against several defendants some of whom were *ex parte* in the trial Court was appealed against by the contesting defendants impleading the *ex parte* ones as respondents, the latter cannot maintain an application in the appellate Court to set aside the *ex parte* decree under Order IX, r. 13 of the Code. A. I. R. 1922 Mad. 33=14 L. W. 609=(1921) M. W. N. 796=42 M. L. J. 12=30 M. L. T. 15=66 Ind. Cas. 59. Where order to set aside *ex parte* decree was passed on condition of payment of cost, but no cost was deposited, the appellate Court cannot set aside the *ex parte* decree. A. I. R. 1922 Oudh 14. Failure to impose any condition as to costs does not make the order setting aside an *ex parte* decree *ultra vires*. 32 Ind. Cas. 684. Contesting defendants can apply under Order 9, rule 13. A. I. R. 1934 All. 163. Where an order under Order 17, rule 2, has been passed, the proper procedure is to set it aside by an application under Order 9, rule 13 and not by review application. A. I. R. 1934 Cal. 116.

An *ex parte* decree must be set aside, where suit is transferred without notice to defendant. A. I. R. 1923 Lah. 441=84 Ind. Cas. 238. Where notice of adjourned hearing is not given to defendant *ex parte* decree against him should be set aside. A. I. R. 1923 All. 79=20 A. L. J. 912=77 Ind. Cas. 91. An *ex parte* decree could not be set aside without notice to plaintiff and the plaintiff's pleader does not represent the plaintiff after the *ex parte* decree. 63 Ind. Cas. 47. Where a case was disposed of in the absence of defendants after Court hours, an application for restoration should be granted. 1933 A. L. J. 1298=A. I. R. 1933 All. 652. Where date is fixed in the absence of parties, an *ex parte* decree should be set aside. 144 Ind. Cas. 154=A. I. R. 1933 All. 276. Rule 13 does not apply to execution proceedings under Order 21. 134 Ind. Cas. 806=55 Mad. 17=61 M. L. J. 348=1931 M. W. N. 533=A. I. R. 1931 Mad. 656 (F. B.). Where an *ex parte* decree has been passed against a minor and the guardian was found to be improper and negligent, the Court can set aside the *ex parte* decree and order for the appointment of a new guardian. 143 Ind. Cas. 326=1932 A. L. J. 1128=55 A. 136=A. I. R. 1933 All. 116. This rule does not apply to set aside an *ex parte* order. 135 Ind. Cas. 547=53 A. 715=1931 A. L. J. 529=A. I. R. 1932 All. 92. Execution application can be restored under inherent power of the Court. 142 Ind. Cas. 686=13 Lah. 761=34 P. L. R. 70=A. I. R. 1933 Lah. 99. Under Order 9, rule 13, C. P. Code, it is clearly illegal for the Court to proceed with the suit on the same day on which it restored the suit to file. 155 Ind. Cas. 575=1935 M. W. N. 110=A. I. R. 1935 Mad. 196=41 L. W. 117.

**Decree is passed ex-parte.**—Where pleader is present decree passed is not *ex parte* though party himself is absent. A. I. R. 1927 Pat. 291=6 Pat. 383=9 Pat. L. T. 63=63 Ind. Cas. 71 ; A. I. R. 1922 All. 497=77 Ind. Cas. 527. But where pleader for defendant was present but took no part in the proceedings, decree would be *ex parte*. A. I. R. 1924 Bom. 139=25 Bom. L. R. 1922=82 Ind. Cas. 124. Where defendant's pleader was instructed to ask for an adjournment which was refused consequently the defendant and his pleader though present in Court took no part,

n the trial, and the Court after hearing evidence and arguments on plaintiff's behalf, decrees the suit, the decree being *ex parte* is liable to be set aside under Order IX, rule 13, for sufficient cause. A. I. R. 1922 Pat. 485=1 Pat. 188=69 Ind. Cas. 837; but see A. I. R. 1934 Oudh 171; A. I. R. 1935 Mad. 210=68 M. L. J. 123=58 M. 817; A. I. R. 1935 All. 565=1935 A. L. J. 377. But where a pleader on behalf of the defendant, applies for examination of a witness on commission, which is refused, and then retires in that case a decree if passed would not be an *ex parte* decree. A. I. R. 1931 All. 294=1931 A. L. J. 377; see also A. I. R. 1935 Mad. 210=68 M. L. J. 123=58 M. 817. Where defendants were not present to prosecute their application to set aside the award, a decree passed against them is not *ex parte* decree. A. I. R. 1924 Pat. 603=1924 Pat. 170=3 Pat. 839=6 P. L. T. 212=83 Ind. Cas. 26. An *ex parte* decree may be passed even in a case in which the Court acts under Order 17, rule 3. A. I. R. 1923 Lah. 281=69 Ind. Cas. 368. It can never be said that a decree against a firm is *ex parte* against one of the partners because he has not appeared. A. I. R. 1924 Bom. 366=26 Bom. L. R. 388=80 Ind. Cas. 773. Where after many hearings, on final hearing day defendant's vakil states that he has no instruction but Court proceeds with the case on merits, order is not under Order IX, rule 13 but Order XXXVII, rule 3 applies. A. I. R. 1925 Mad. 316=82 Ind. Cas. 1028. Where a date is fixed for argument and defendant remains absent *ex parte* decree cannot be passed. A. I. R. 1924 Lah. 224=72 Ind. Cas. 900. Where a suit is decided *ex parte* against one of the defendants, and the decision is upheld in appeal the party against whom the *ex parte* decree was passed can apply to the trial Court for setting aside the *ex parte* order. 24 O. C. 282=64 Ind. Cas. 308. A decree against a minor in a case in which he is fully represented by his father as guardian *ad litem* though *ex parte* is binding on him. 37 Ind. Cas. 389.

**Application to set aside *ex parte* decree.**—In considering whether *ex parte* decree should be set aside, Court should come to a finding whether the facts set forth in the petition are true or false. A. I. R. 1926 Oudh 118=90 Ind. Cas. 745. A minor can apply to have the *ex parte* decree set aside where the guardian is negligent in conducting the suit. A. I. R. 1925 Pat. 512=6 P. L. T. 855=88 Ind. Cas. 987. Trying Courts have jurisdiction to entertain application to set aside *ex parte* decree even when presented after dismissal of defendant's appeal against it. A. I. R. 1927 Mad. 722=53 M. L. J. 110=26 L. W. 19=103 Ind. Cas. 146. The question whether a particular decree is or is not *ex parte* is a mixed question of law and fact. A. I. R. 1937 Pat. 17.

**Decree passed by fraud.**—Separate suit is maintainable to challenge *ex parte* decree passed against plaintiff by practising fraud on him. A. I. R. 1926 Nag. 388=94 Ind. Cas. 56; see also 55 Ind. Cas. 412; 58 Ind. Cas. 317=2 U.P.L.R. (Pat) 242; 1 Lah. 344=22 P. W. R. 1920=2 Lah. L. J. 623=56 Ind. Cas. 878; A. I. R. 1922 Sind 20=16 S. L. R. 209=70 Ind. Cas. 852; A. I. R. 1924 Pat. 241=5 Pat. L. T. 37=75 Ind. Cas. 343; A. I. R. 1925 Rang. 200=4 Bur. L. J. 18=3 Rang. 65=86 Ind. Cas. 537. If an application to set aside a decree on the ground of fraud is dismissed, a suit for declaring the decree void for same fraud does not lie. A. I. R. 1924 Pat. 238=2 Pat. 833=5 P. L. T. 66=2 P. L. R. 65=74 Ind. Cas. 826; see also A. I. R. 1924 Pat. 769=81 Ind. Cas. 1035; 138 Ind. Cas. 682=A. I. R. 1930 Sind 298=24 S. L. R. 232. Where application to set aside an *ex parte* decree is dismissed a separate suit to set aside decree on ground of fraud lies. 144 Ind. Cas. 1013=A. I. R. 1933 Rang. 123. Where plaintiff gives wrong address of defendant, but takes no part in service of summons, service is not deliberately suppressed nor is decree obtained by fraud. 143 Ind. Cas. 710=60 C. 98=A. I. R. 1933 Cal. 274. Where plaintiff puts a false case before the Court, the decree can be set aside on the ground of fraud. 133 Ind. Cas. 769=1931 M. W. N. 1016=34 M. L. W. 69=A. I. R. 1931 Mad. 679.

**Legal representative whether can apply.**—Where *ex parte* decree has been passed, heirs of defendant can apply for setting it aside. A. I. R. 1923 All. 30=83 Ind. Cas. 601. A legal representative can file application to set aside *ex parte* decree before he is actually brought on record. A. I. R. 1925 Oudh 370=27 O. C. 299=85 Ind. Cas. 529. Representatives of deceased can get usual period of six months for applying to be brought on record in an application under Order IX, rule 13. 96 P. R. 1918=47 Ind. Cas. 962.

**Inherent powers of Court to set aside *ex parte* decree.**—In the absence of conditions mentioned in rule 13, Court has no jurisdiction to restore suit. A. I. R.

1931 All. 294=(1931) A. L. J. 377 (F. B.); see also 34 C. W. N. 419=52 C. L. J. 524=128 Ind. Cas. 94=A. I. R. 1930 Cal. 488; A. I. R. 1930 Rang. 152=127 Ind. Cas. 176; 34 C. W. N. 222=A. I. R. 1930 Cal. 387=126 Ind. Cas. 779; 97 Ind. Cas. 936=24 L. W. 439=(1926) M. W. N. 707; A. I. R. 1922 Pat. 479=1 Pat. 277=65 Ind. Cas. 341; A. I. R. 1922 All. 441=19 A. L. J. 907=64 Ind. Cas. 527; A. I. R. 1921 Sind 38=15 S. L. R. 61=63 Ind. Cas. 131; 26 M. L. T. 377=43 M. 94=37 M. L. J. 599=10 L. W. 606=53 Ind. Cas. 847; but see 32 C. W. N. 10=A. I. R. 1928 Cal. 772=55 C. 473=106 Ind. Cas. 91, where it has been laid down that independently of Order IX, r. 13, Court has discretion. It is the general practice on the original side to follow the analogy of r. 13, Order IX. But the terms of rule 13 do not prevent the Court where there is an element of negligence from restoring the suit on proper terms. A. I. R. 1928 Cal. 864=32 C. W. N. 411=116 Ind. Cas. 633. Court can under special circumstances set aside *ex parte* decree on the application of a person who was not a party to the original suit. A. I. R. 1928 Rang. 273=6 Rang. 494=113 Ind. Cas. 811. Inherent power under s. 151 to set aside dismissal does not extend to case in which aggrieved party had a definite remedy open to him but failed to resort to it within time. A. I. R. 1924 Rang. 274=8 Bur. L. J. 47=82 Ind. Cas. 413. If an appeal from an *ex parte* decree is dismissed for default, the first Court can allow application to set aside *ex parte* decree. 39 A. 393=15 A. L. J. 286=39 Ind. Cas. 519. Court which passed the *ex parte* decree has no jurisdiction to set aside an *ex parte* decree once decree has been affirmed on appeal. A. I. R. 1921 Oudh 141=24 O. C. 282=64 Ind. Cas. 603; see also A. I. R. 1923 Pat. 331=4 P. L. T. 115=71 Ind. Cas. 383. Where appeal against *ex parte* decree is dismissed, original Court cannot set it aside. A. I. R. 1929 Oudh 35=5 O. W. N. 1037=4 Luck. 201=114 Ind. Cas. 319. Court cannot set aside *ex parte* decree when defendant's absence is not shown to be for sufficient cause. A. I. R. 1923 Lah. 147=73 Ind. Cas. 660. Where *bona fides* of defendants are doubtful, terms should be imposed before granting application to set it aside. A. I. R. 1926 Sind 50=90 Ind. Cas. 236. Defendant is not entitled to have the decree set aside merely because he appears though late on the day of hearing. A. I. R. 1929 Bom. 250=31 Bom. L. R. 463=119 Ind. Cas. 187. Court has inherent jurisdiction to set aside *ex parte* decree under Order XXXIV, r. 6, passed by oversight against person not a mortgagor. A. I. R. 1921 Pat. 491=60 Ind. Cas. 368. A Court has no jurisdiction to set aside an order setting aside an *ex parte* decree, at the instance of a third party. 61 Ind. Cas. 534.

**Service of summons.**—"No decree shall be made against a party behind his back", is the cardinal principle underlying rules for service of summons. 134 Ind. Cas. 1202=55 M. 223=61 M. L. J. 920=1931 M. W. N. 1069=34 M. L. W. 496=A. I. R. 1931 Mad. 813. Under this rule a defendant is entitled to have the *ex parte* decree set aside as against him if the summons was not duly served even when he has knowledge of the suit. 43 C. 447=23 C. L. J. 183=20 C. W. N. 173=34 Ind. Cas. 799; see also 43 Ind. Cas. 632; 135 Ind. Cas. 110=12 P. L. T. 911=A. I. R. 1932 Pat. 150; A. I. R. 1930 Sind 298=24 S. L. R. 232=128 Ind. Cas. 682. Defendant seeking to set aside *ex parte* decree must prove that summons was not duly served on him. A. I. R. 1928 Mad. 655=54 M. L. J. 448=108 Ind. Cas. 889; see also A. I. R. 1924 Pat. 446=3 Pat. 236=2 Pat. L. R. 58=5 P. L. T. 576=78 Ind. Cas. 889; 145 Ind. Cas. 370=A. I. R. 1933 Rang. 156; A. I. R. 1933 Lah. 288. Summons has no relevance to real proceeding cannot be said to be duly served. A. I. R. 1924 All. 818=22 A. L. J. 791=46 A. 861=82 Ind. Cas. 184. Where it is found that provisions as to summons were not strictly complied with *ex parte* decree passed against the party should be set aside. A. I. R. 1928 Sind. 111=108 Ind. Cas. 660; see also A. I. R. 1926 Cal. 327=30 C. W. N. 104=91 Ind. Cas. 965. Where summons is served on son of *pardanashin* lady living in the same house, the service is a proper one. A. I. R. 1926 Cal. 845=94 Ind. Cas. 228. Where it is found that the defendant refused summons, *ex parte* decree cannot be set aside. A. I. R. 1925 Nag. 356=88 Ind. Cas. 46. As regards summons by registered post returned as refused, *vide* 39 C. W. N. 934. There is no due service of summons under Order 9, rule 13, C. P. Code, where substituted service has been ordered by the Court and effected on a misrepresentation of facts. 38 C. W. N. 1066=A. I. R. 1934 Cal. 745=152 Ind. Cas. 830. In the case of service by registered post if defendant represents to the Court that he had not been offered the postal packet he is entitled to retrieval where an *ex parte* decree has been passed. A. I. R. 1922 Bom. 377=46 B. 130=23 Bom. L. R. 908=64 Ind. Cas. 386. In the case of substituted service a summons is duly served even though it does not come to the defendant's knowledge. A. I. R. 1925 Lah. 639=7 Lah. L. J. 448=26 P. L. R. 704=92 Ind. Cas. 272. The word

"duly" does not mean "personally". A. I. R. 1927 Mad. 507=52 M. L. J. 477=38 M. L. T. (H. C.) 275=102 Ind. Cas. 243. *Ex parte* decree should be set aside where there is nothing on record to show that provisions of Order V, rr. 19 and 20 were satisfied before ordering substituted service. A. I. R. 1928 Lah. 799=116 Ind. Cas. 211. A decree should be set aside where substituted service has been obtained by fraud practised on the Court. A. I. R. 1935 Lah. 129=37 P. L. R. 121. Mere assertion of ignorance of decree by defendant and acceptance of that by Court will not give Court jurisdiction to set aside *ex parte* decree. Whether summons was served or not must be decided. A. I. R. 1926 Mad. 558=23 L. W. 319=94 Ind. Cas. 420. Substituted service may be good service under certain circumstances. 135 Ind. Cas. 344=55 Mad. 240=61 M. L. J. 931=1931 M. W. N. 1079=A. I. R. 1931 Mad. 812. Though return of summons means that it has been served personally yet defendant can get *ex parte* decree against him set aside on various allegations. 134 Ind. Cas. 1202=55 M. 223=61 M. L. J. 920=1931 M. W. N. 1069=34 M. L. W. 496=A. I. R. 1931 Mad. 113. Where summons was personally delivered to defendant but defendant refused to sign acknowledgment *ex parte* decree cannot be set aside, even in the absence of substituted service. 144 Ind. Cas. 1019=1933 A. L. J. 165=A. I. R. 1933 All. 165.

**Sufficient cause.**—Under this rule it is necessary that the Court should find that the defendants were prevented by any sufficient cause from appearing when the suit was called on for hearing. A. I. R. 1935 All. 565=1935 A. L. J. 377. There is sufficient ground for showing latitude to the defendant where the defendant is actually present but could not appear on account of counsel's fault. 18 R. D. 583. After finding on an application under Order 9, rule 13, C. P. Code, that sufficient cause for non-production had not been proved the Court cannot properly restore the suit under other grounds, purporting to act under s. 151. 39 C. W. N. 894. An application under Order 9, rule 13, was filed on ground of defendant's illness. Affidavits were filed in support by certificates of medical practitioners. There was a counter affidavit filed on behalf of the plaintiff showing to the negative that the defendants were not ill: *Held* that in the absence of any clear motive for the defendants to have deliberately absented themselves from the Court on the day fixed for hearing of the case, the Court should hold that the defendants made out a sufficient cause for their non-appearance on the date fixed for hearing of the case. A. I. R. 1934 All. 163=147 Ind. Cas. 1186. Late arrival of train is sufficient cause. A. I. R. 1927 Lah. 40=98 Ind. Cas. 868. Gross negligence of guardian *ad litem* is not in itself a legal ground for setting aside decree or order passed *ex parte*. A. I. R. 1931 Mad. 6=59 M. L. J. 918=32 L. W. 662=129 Ind. Cas. 249. Slips of advocates entitle a party to have the decree set aside. A. I. R. 1931 Cal. 298=34 C. W. N. 1119=58 C. 549; see also A. I. R. 1930 Lah. 913=129 Ind. Cas. 890; A. I. R. 1929 Lah. 69=110 Ind. Cas. 444; but see A. I. R. 1927 Lah. 791=28 P. L. R. 204=9 Lah. L. J. 780=101 Ind. Cas. 444. Absence of pleader is sufficient cause for setting aside the *ex parte* decree. A. I. R. 1926 Mad. 256=22 L. W. 695=92 Ind. Cas. 776. The giving of wrong date by the bench clerk is sufficient cause. A. I. R. 1924 Rang. 271=3 Bur. L. J. 34=83 Ind. Cas. 256. Where default is due to agent's missing train, it is sufficient cause. A. I. R. 1928 Nag. 75=105 Ind. Cas. 842; see also A. I. R. 1926 Oudh 75=88 Ind. Cas. 481. The words "was prevented by any sufficient cause from appearing" must be liberally construed. A. I. R. 1927 Oudh 173=4 O. W. N. 356=110 Ind. Cas. 632. While considering whether it is proper to set aside an *ex parte* decree no special concession in favour of criminals who were in jail is to be made. A. I. R. 1929 Oudh 35=5 O. W. N. 1037=4 Luck. 201=114 Ind. Cas. 319. Where there is even an element of negligence, the Court on the original side may restore the suit upon proper terms. A. I. R. 1928 Cal. 772=55 C. 473=32 C. W. N. 10=106 Ind. Cas. 91. Pressure of work is sufficient cause. A. I. R. 1927 Rang. 150=5 Rang. 80=102 Ind. Cas. 379. Where minor is not properly represented decree against him is a nullity and suit cannot be restored. A. I. R. 1924 Mad. 489=46 M. L. J. 348=19 L. W. 233=34 M. L. T. 94=1924 M. W. N. 289=78 Ind. Cas. 76; but see A. I. R. 1923 All. 213=21 A. L. J. 185=71 Ind. Cas. 456. A minor cannot apply to set aside an *ex parte* decree under Order IX, r. 13, on the ground that a guardian *ad litem* was not properly appointed for him in the suit. 50 Ind. Cas. 783.

A suit can be restored only when Court is satisfied that defendant was prevented by any sufficient cause from appearing. 1 P. L. T. 69=61 Ind. Cas. 965; see also A. I. R. 1923 Mad. 63=43 M. L. J. 632=46 M. 60=16 L. W. 53=(1922) M. W. N.

660=68 Ind. Cas. 971 ; 60 Ind. Cas. 475=22 P. W. R. 1921 ; A. I. R. 1923 All. 549=21 A. L. J. 500=74 Ind. Cas. 845. Mere absence of a party's pleader is not a sufficient cause for a failure to appear under Order IX, r. 13. A. I. R. 1921 Nag. 3=4 N. L. J. 16=62 Ind. Cas. 253. Mere bad management of a suit by the guardian is by itself not a sufficient cause. 45 Ind. Cas. 882. Counsel's mistake to inform the date is sufficient cause. A. I. R. 1923 Mad. 581=49 M. L. J. 488=72 Ind. Cas. 669.

Where defendant is ill, and in support of it, affidavit and medical certificates are filed as well as counter affidavits are also filed by the opposite party, held sufficient cause was made out for non-appearance. A. I. R. 1934 All. 163. "Sufficient cause" includes suppression of summons by means of fraud. 132 Ind. Cas. 355=12 P. L. T. 493=10 Pat. 516=A. I. R. 1931 Pat. 204 (F. B.). *Ex parte* decree against a minor can be set aside only if by negligence of guardian minor has been prejudiced. 129 Ind. Cas. 249=59 M. L. J. 918=32 M. L. W. 662=A. I. R. 1931 Mad. 6. Plaintiff's strenuous attempt to get witnesses to Court is sufficient cause. 142 Ind. Cas. 86=56 C. L. J. 12=A. I. R. 1933 Cal. 73. Where defendants are present but the counsel being engaged in another Court is not present and the suit is decreed *ex parte*, such a decree cannot be set aside under this rule but the case can be restored under s. 151 on payment of cost. 141 Ind. Cas. 402=34 Bom. L. R. 1425=A. I. R. 1932 Bom. 634. Where *ex parte* decree is passed through default of guardian, such default constitutes sufficient reason for non-appearance of minors. A. I. R. 1934 Mad. 428 ; see also 58 M. 1045=A. I. R. 1935 Mad. 435=68 M. L. J. 693. The Court has no power apart from the provisions of Order 9, rule 13, to set aside an *ex parte* decree passed by itself. *Ibid.*

**Execution proceedings.**—An application to have an *ex parte* order in execution proceedings set aside is not maintainable under Order IX, rule 13. A. I. R. 1929 All. 485=121 Ind. Cas. 552. An application under Order 21, r. 58, C. P. Code, is a proceeding in execution and hence Order 9, rule 13, is not applicable. 40 L. W. 665=A. I. R. 1934 Mad. 699=1934 M. W. N. 1312.

**Final decree.**—An application to set aside a final decree, where law contemplates a final decree, passed *ex parte* is maintainable under this rule. 35 M. L. J. 375=48 Ind. Cas. 71 ; see also 35 Ind. Cas. 288=8 L. B. R. 450=9 Bur. L. T. 245. Failure to issue notice on an application for final decree does not make decree illegal. A. I. R. 1930 Mad. 105=30 L. W. 551=120 Ind. Cas. 72.

**Conditional order.**—In restoring a case for re-hearing under this rule, the Court may make it a condition that the decretal amount or some portion thereof be paid into Court. 5 Pat. L. J. 420=1 P. L. T. 443=57 Ind. Cas. 300. Where an *ex parte* decree is set aside on condition of furnishing security the Court must adjourn the case in order to take security and pass final orders only after the party has tendered or failed to furnish security. (1917) M. W. N. 815=6 L. W. 767=43 Ind. Cas. 1. Order of restoration conditional on payment of costs within certain time is proper order. A. I. R. 1926 All. 142=48 A. 199=24 A. L. J. 120=90 Ind. Cas. 243. But the Court has no power to extend the time for payment of cost. A. I. R. 1936 All. 477=1936 A. L. J. 566. Where there has been no default on the part of the party asking for re-hearing *e.g.*, where he has not been duly served, it is inequitable for the Court to impose condition. 5 Pat. L. J. 420=1 Pat. L. T. 443=57 Ind. Cas. 300. Onerous condition should not be imposed. A. I. R. 1924 Oudh. 229=74 Ind. Cas. 86. Order giving time to pay decretal amount does not of itself operate as a stay of execution of *ex parte* decree. 3 L. W. 35=32 Ind. Cas. 731. Where condition is imposed for setting aside an *ex parte* decree no appeal lies from order imposing such conditions. A. I. R. 1926 Bom. 353=50 B. 326=28 Bom. L. R. 578. But an appeal lies from order rejecting application for an order to set aside decree passed *ex parte* when that order is made because conditions which were lawfully imposed on defendants were not complied with. 28 Bom. L. R. 1245=A. I. R. 1927 Bom. 1 (F. B.)=51 B. 67=99 Ind. Cas. 384 ; A. I. R. 1925 Mad. 1182=88 Ind. Cas. 196.

**Miscellaneous proceedings.**—This rule applies to proceedings in connection with appointment of common manager under s. 95, Bengal Tenancy Act by virtue of s. 141, C. P. Code. 99 Ind. Cas. 741. Provisions of r. 13 of Order IX, apply, to a decree passed under Sch. II, para 21 (2). 62 Ind. Cas. 927. For application of the rule in insolvency proceedings, *vide* A. I. R. 1927 Mad. 897=103 Ind. Cas. 381, 135 Ind. Cas. 750=33 M. L. W. 735=61 M. L. J. 719=1931 M. W. N. 924=A. I. R. 1932 Mad. 63.



**Ex parte decree in small cause suit.**—The Code of Civil Procedure governs the procedure of Small Cause Courts to some extent, and this rule applies to such Courts. 68 M. L. J. 466 (F. B.)=A. I. R. 1935 Mad. 380=58 M. 687 (F. B.).

**Procedure.**—Where preliminary decree was passed *ex parte* but further consideration of suit was adjourned to latter date, *ex parte* decree need not be set aside. A. I. R. 1928 Mad. 214=106 Ind. Cas. 810. An application under this section must be made even where non-service of summons is apparent. A. I. R. 1927 Lah. 372=101 Ind. Cas. 617. In an application under this rule, what the Court has to find is not whether the defendant has any good defence on the merits, but whether there is proper service, and if there is proper service, whether there was sufficient cause for his non-service. A. I. R. 1926 Mad. 31=49 M. L. J. 445=22 L. W. 423=90 Ind. Cas. 1042. Restoration of suit cannot be refused where defendant appears on the same day though late. A. I. R. 1924 Bom. 392=26 Bom. L. R. 321=80 Ind. Cas. 237. Where an *ex parte* decree is passed against the defendant in the absence of his pleader, the latter need not file a fresh *vakalatnama* in order to apply to set aside the *ex parte* decree. A. I. R. 1922 Bom. 207=47 B. 11=24 Bom. L. R. 744=69 Ind. Cas. 169. During the pendency of the appeal an application to set aside the *ex parte* decree of the first Court does not lie in the appellate Court but ought to be filed in the first Court. A. I. R. 1922 Mad. 33=42 M. L. J. 12=14 L. W. 609=66 Ind. Cas. 59 ; 62 Ind. Cas. 755=41 M. L. J. 90=44 M. 731. In case of transfer of territorial jurisdiction after decree, new Court can entertain application to set aside *ex parte* decree. A. I. R. 1922 Mad. 10=42 M. L. J. 344=15 L. W. 458=31 M. L. T. 79=65 Ind. Cas. 727. A Court ought not to set aside an *ex parte* decree on a ground not taken by the defendant. 23 O. C. 104=57 Ind. Cas. 563. Application to set aside an *ex parte* decree cannot be altered to one for review, to avoid limitation. 57 Ind. Cas. 15. The fact that an application under Order IX, rule 13, could have been preferred and that it was barred on the date of the review application, is no bar to a review application if suit is maintainable under Order XLVIII, rule 1. 38 M. L. J. 224=(1920) M. W. N. 228=11 L. W. 217=55 Ind. Cas. 444. There is no provision in the Code for naming persons in whose favour an *ex parte* decree is passed as parties in the application to set aside such decree. All that is necessary being an indication should be given in the application of the particulars of the suit in which the *ex parte* decree has been passed. 62 C. 1057=39 C. W. N. 863=A. I. R. 1935 Cal. 506. Where a Court decides an *ex parte* decree under Order 9, rule 13, although it is not obligatory on the Court to state reasons, it is most desirable that it should state why it thinks the *ex parte* decree should be set aside. A. I. R. 1936 Mad. 524=163 Ind. Cas. 732.

**Sub-section (2).**—Cause of action against all defendants not being joint and indivisible, Court at the instance of some of the defendants alone can set aside *ex parte* decree as regards defendants applying only. A. I. R. 1926 Mad. 256=22 L. W. 695=(1926) M. W. N. 112=92 Ind. Cas. 776. Where joint decree is passed against several defendants and the individual interest of each is non-ascertainable, Court is entitled to set aside entire decree. A. I. R. 1930 Cal. 700=34 C. W. N. 679=128 Ind. Cas. 182. *Ex parte* decree passed against absent defendant may be set aside only as against him, but not against another defendant who was present and against whom suit was dismissed by consent. A. I. R. 1927 Sind. 245=104 Ind. Cas. 216. An *ex parte* decree cannot be set aside against judgment-debtor without setting it aside against security also. 40 Ind. Cas. 400. An *ex parte* mortgage decree should be set aside in its entirety even on application by some of the defendants. 41 Ind. Cas. 181 ; see also A. I. R. 1924 Pat. 771=(1924) Pat. 252=78 Ind. Cas. 408. Where decree, passed against several defendants is not capable of being set aside against some of them only it should be set aside *in toto* on the application of some defendants only. A. I. R. 1927 Mad. 550=38 M. L. T. 315=101 Ind. Cas. 98 ; 129 Ind. Cas. 249=59 M. L. J. 918=A. I. R. 1931 Mad. 6. Where defences of defendants are distinct, by setting aside of an *ex parte* decree, the non-applicants will not be benefited. A. I. R. 1925 Oudh 181=81 Ind. Cas. 520.

**Effect of restoration.**—When *ex parte* decree is set aside, defendant is entitled to be restored to his original position. A. I. R. 1923 Pat. 371=1923 Pat. 1=2. Pat. 277=1 Pat. L. R. 338=72 Ind. Cas. 912 ; see also 21 C. W. N. 1087=27 C. L. J. 592=41 Ind. Cas. 256. Where *ex parte* decree is set aside in appeal all proceedings from defendant's non-appearance are set aside. A. I. R. 1928 Mad. 969=55 M. L. J. 262=29 L. W. 490. Where a decree is set aside a decree-holder's purchase in execution of an *ex parte* decree against judgment-debtor of his property, becomes

*ipso facto* void. 2 L. W. 1066=31 Ind. Cas. 805. Where an *ex parte* decree has been set aside in subsequent suit, the question whether original suit revives depends on pleadings, issues and actual decision in subsequent suit. 132 Ind. Cas. 355=12 P. L. T. 493=10 Pat. 516=A. I. R. 1931 Pat. 204 (F. B.).

**Appeal from *ex parte* decree**—It is open to a defendant to prefer an appeal against the *ex parte* decree as also to make an application under Order IX, rule 13 and then to come up in appeal under Order 43, rule 1, clause (d). If he proceeds in an appeal against the original *ex parte* decree, he will be at some disadvantage because the Court of appeal will not be in possession of the materials which prevented his appearance. A. I. R. 1929 Pat. 609=10 P. L. T. 589=120 Ind. Cas. 303. Appeal lies against an *ex parte* decree passed in application filed under para 20, Sch. II, C. P. Code. A. I. R. 1928 Mad. 969=55 M. L. J. 252=29 L. W. 490=112 Ind. Cas. 691. Where *ex parte* decree was appealed against and r. 13 was not availed of, propriety of the order refusing adjournment can be raised in appeal. A. I. R. 1928 Cal. 812=32 C. W. N. 101=106 Ind. Cas. 542; but see 87 Ind. Cas. 222=A. I. R. 1925 Oudh 645=28 O. C. 85. Second appeal lies against *ex parte* decision even when other remedies are available. A. I. R. 1925 Cal. 497=80 Ind. Cas. 14. Where order granting application for the hearing of case is not appealed against, the order cannot be questioned in second appeal from decision in that suit. A. I. R. 1928 Oudh 405=5 O. W. N. 713=110 Ind. Cas. 702. If a defendant makes a default in appearance on an adjourned date, after evidence of some defendants is recorded and the Court decides the suit on merits, the defendant can appeal from the decree and cannot apply for setting aside the *ex parte* decree. 3 O. L. J. 127=34 Ind. Cas. 855. In appeal from *ex parte* decree, the appellate Court can reverse decree merely on the ground that *ex parte* proceedings were wrong. A. I. R. 1923 Oudh 117=26 O. C. 10=10 O. L. J. 36=73 Ind. Cas. 591; A. I. R. 1929 Pat. 609=10 P. L. T. 589=120 Ind. Cas. 304; A. I. R. 1922 Lah. 439=3 Lah. 357=69 Ind. Cas. 499. But question of service of summons can only be considered in the special proceedings under Order IX and not in appeal from *ex parte* decree. A. I. R. 1924 Rang. 137=2 Bur. L. J. 282=2 Rang. 108=79 Ind. Cas. 506. If however the defendant can show that there is an error, defect or irregularity in an order rejecting his application for time which affects the decision of the case, there is no reason why he will not succeed. A. I. R. 1929 Pat. 609=10 P. L. T. 589=120 Ind. Cas. 304; see also 56 Ind. Cas. 165=1 P. L. T. 467. Where an appellate Court confirms an *ex parte* decree on an appeal by the defendant, the decree of the appellate Court is not an *ex parte* decree. A. I. R. 1922 Mad. 33=14 L. W. 609=(1921) M. W. N. 746=42 M. L. J. 12=66 Ind. Cas. 59. Where an application to have an *ex parte* decree set aside has been dismissed, the propriety of dismissal can be questioned in an appeal from the decree or under s. 105. 12 L. W. 507=(1920) M. W. N. 780=29 M. L. T. 63=38 M. L. J. 697=60 Ind. Cas. 215; A. I. R. 1934 Oudh 131. If an applicant to set aside an *ex parte* decree is not joined in an appeal against that decree either as an appellant or respondent and the appellate Court has not adjudicated upon his case the decree of the lower Court does not merge in that of the Appellate Court and the absent defendants can even after decision of appeal apply to have the *ex parte* order set aside provided they did not take part in the appeal. 39 A. 13=14 A. L. J. 853=36 Ind. Cas. 307; see also 36 C. W. N. 747=145 Ind. Cas. 586=A. I. R. 1932 Cal. 773. In case of revision of *ex parte* decree by plaintiff, where defendant opposes the revision, the *ex parte* decree merges in High Court decree and the trial Court cannot entertain an application under this rule. A. I. R. 1934 All. 134.

**Limitation.**—An application under Order IX, r. 13, must be made within one month from the decree or from the knowledge of the passing of the decree. A. I. R. 1921 Pat. 69=1921 Pat. 100=2 P. L. T. 11=57 Ind. Cas. 333. Where application to set aside an *ex parte* decree presented more than 30 days after decree, onus is on defendant of proving that it was presented within 30 days of his having knowledge. 109 Ind. Cas. 82 (Lah); see also 92 Ind. Cas. 295. In case of non-service of summons the Court should decide whether application is within time from date when petitioner came to know of *ex parte* decree. A. I. R. 1925 Lah. 577=7 Lah. L. J. 408=26 P. L. R. 600=91 Ind. Cas. 798. An *ex parte* final decree cannot be set aside under Order IX, r. 13, on the ground that the application was time-barred. A. I. R. 1922 Pat. 479=1 Pat. 277=65 Ind. Cas. 341; A. I. R. 1936 Rang. 305. Where defendant proved that a summons was never sent to be served on him and there was no rebuttal, and his application to set aside *ex parte* decree was made on the 37th day after the decree was passed: Held under the circumstances, the onus was

upon plaintiff to show that the defendant had knowledge of decree more than 39 days before date of his application. A. I. R. 1924 Lah. 233=73 Ind. Cas. 43. Section 5 of the Limitation Act does not apply to applications under Order IX, rule 13. 32 Ind. Cas. 975. But Madras High Court rule extending s. 5, Limitation Act, to applications under Order IX, r. 13 is *intra vires*. A. I. R. 1924 Mad. 14 (F. B.)=47 M. L. J. 403=20 L. W. 332=35 M. L. T. 43=(1924) M. W. N. 682=47 M. 824=80 Ind. Cas. 877. Under O. IX, r. 13, as amended by the Madras High Court, time should be extended only on justifiable grounds. A. I. R. 1922 Mad. 33=14 L. W. 909=30 M. L. T. 151 (H. C.)=1921 M. W. N. 796=42 M. L. J. 12=66 Ind. Cas. 59. Court cannot extend period prescribed by Art. 164 of the Limitation Act. A. I. R. 1934 Nag. 43.

**Proviso.**—Under this proviso the whole decree may be set aside if the decree is one and indivisible. A. I. R. 1934 All. 1051=151 Ind. Cas. 963. The words "against a defendant" do not necessarily imply that the only defendant against whom relief has been in terms granted by the decree can apply for an order to set aside. They are comprehensive enough to include a case in which a decree adversely affects the rights of a contesting defendant. A. I. R. 1934 All. 163=147 Ind. Cas. 1186.

**Appeal.**—Application to set aside *ex parte* decree must either be allowed or disallowed. Orders disallowing application are appealable. 144 Ind. Cas. 186=A. I. R. 1933 Rang. 63. Provisions for appeal against an Order IX, rule 13, is not limited to where the application under Order IX, rule 13, is dismissed on merits. A. I. R. 1929 Pat. 529=8 Pat. 533=10 P. L. T. 211=117 Ind. Cas. 317; see also 37 Ind. Cas. 835; 36 Ind. Cas. 798. Appeal against order refusing to set aside *ex parte* decree lies only where decree is appealable. A. I. R. 1924 Pat. 603=(1924) Pat. 170=3 Pat. 839=6 P. L. T. 212=83 Ind. Cas. 26. Order setting aside *ex parte* decree is not appealable. A. I. R. 1931 All. 294=1931 A. L. J. 377; see also A. I. R. 1927 Lah. 775=26 P. L. R. 163=105 Ind. Cas. 610; A. I. R. 1926 Cal. 327=30 C. W. N. 104=91 Ind. Cas. 965; A. I. R. 1923 Lah. 425=72 Ind. Cas. 410. Where a successor of a Small Cause Court not empowered to pass decree in question, refuses to set aside the *ex parte* decree passed by his predecessors, the order rejecting application is not appealable. A. I. R. 1922 All. 50=20 A. L. J. 208=65 Ind. Cas. 957. No appeal lies against an order refusing to restore an application to set aside a decree dismissed for default. A. I. R. 1922 All. 337=20 A. L. J. 519=67 Ind. Cas. 320; see also 36 C. W. N. 540=139 Ind. Cas. 502=A. I. R. 1932 Cal. 687. Order dismissing application for restoration of application to set aside *ex parte* decree is non-appealable. A. I. R. 1924 All. 682=45 A. 538=22 A. L. J. 427=79 Ind. Cas. 323. No appeal lies against an order dismissing application to set aside award with the intervention of Court passed in default of defendant. A. I. R. 1924 Pat. 603=3 Pat. 839=6 P. L. T. 212=83 Ind. Cas. 26. Order refusing to set aside *ex parte* decree is not appealable. A. I. R. 1925 All. 267=47 A. 140=85 Ind. Cas. 470. No appeal lies against order refusing to set aside *ex parte* decree made in reference to Land Acquisition Act, such order not being an award. A. I. R. 1926 Cal. 816=94 Ind. Cas. 330. Where in an application to set aside *ex parte* decree, applicant dies, the order bringing legal representatives on record is not appealable. A. I. R. 1925 All. 431=23 A. L. J. 442=47 A. 741=88 Ind. Cas. 95. Appeal from order rejecting application for setting aside *ex parte* order can be treated as appeal from *ex parte* decree. A. I. R. 1926 Cal. 1232=45 C. L. J. 117=97 Ind. Cas. 313. In an appeal from order rejecting application to set aside *ex parte* decree, appellate Court cannot go beyond provisions contained in Order IX, rule 13. A. I. R. 1929 All. 610=48 A. 175=24 A. L. J. 56=90 Ind. Cas. 180. Appellate Court cannot set aside *ex parte* decree under Order IX, rule 13, unless it was satisfied that defendant was prevented by sufficient cause from appearing. Court has power apart from Order IX, r. 13 to set aside *ex parte* decree made by itself. A. I. R. 1923 Lah. 147=73 Ind. Cas. 660. No appeal lies from an order made under rule 13. 138 Ind. Cas. 748=36 C. W. N. 352=59 C. 1057=A. I. R. 1932 Cal. 558. Right of appeal is not matter of procedure but substantive right and hence cannot arise by implication for restoration of suit dismissed. 139 Ind. Cas. 296=28 N. L. R. 83=A. I. R. 1932 Nag. 101 (F. B.). Order setting aside *ex parte* decree is judgment and cannot be set aside save under s. 152 or on review. 145 Ind. Cas. 302=10 O. W. N. 794=A. I. R. 1933 Oudh 385;

**Revision.**—Order setting aside an *ex parte* decree is open to revision. A. I. R. 1921 Oudh 141=24 O. C. 282=64 Ind. Cas. 303; A. I. R. 1925 Nag. 356=88 Ind. Cas. 46; *contra*; A. I. R. 1926 Pat. 29=90 Ind. Cas. 329; A. I. R. 1922 All. 441=19

A. I. R. 907=64 Ind. Cas. 527. Where application to set aside *ex parte* decree is rejected, order is not revisable. A. I. R. 1924 Pat. 816=76 Ind. Cas. 60. Court has inherent jurisdiction to overset former order striking out defence and passing *ex parte* decree against defendants. A. I. R. 1930 All. 701. Where *ex parte* decree has been set aside and plaintiff accepts costs, the order cannot be revised. A. I. R. 1926 Lah. 637=96 Ind. Cas. 782; see also A. I. R. 1927 Lah. 55=8 Lah. L. J. 273=27 P. L. R. 458=96 Ind. Cas. 420. Where application for setting aside *ex parte* decree has been rejected, as decree to be set aside had merged in appellate decree, no revision lies. A. I. R. 1926 Cal. 344=90 Ind. Cas. 724. Where application for restoration has been decided according to law, High Court will not interfere under s. 107, Government of India Act. A. I. R. 1926 Pat. 37=89 Ind. Cas. 863. All defendants must be made parties to revision which is applied for setting aside *ex parte* decree passed against them all. A. I. R. 1925 Cal. 509=78 Ind. Cas. 132.

**Suit to set aside.**—Suit to set aside *ex parte* decree is barred where the question raised in suit are raised and decided by the Court passing the application. (1921) Pat. 3=1 P. L. T. 735=6 Pat. L. J. 1=3 U. P. L. R. (Pat) 1=60 Ind. Cas. 124. In a suit to set aside decree as fraudulent, non-service of summons may be incidentally proved as index to fraud. A. I. R. 1924 Pat. 241=5 P. L. T. 37=75 Ind. Cas. 343. False claim and perjured evidence is not sufficient ground to set aside *ex parte* decree. Fraud must be practised in relation to proceedings in Court. A. I. R. 1927 Cal. 84=31 C. W. N. 258=97 Ind. Cas. 279. If a decree is impeached because summons was not served on a party, the remedy is an application under Order IX, rule 13, and not in separate suit. 40 Ind. Cas. 2; see also 57 Ind. Cas. 551=22 Bom. L. R. 798. But failure to have an *ex parte* decree set aside does not debar a party from seeking relief in a properly framed suit on the ground that the original suit was a fraudulent one and that the proceedings therein were vitiated by fraud. 20 C. W. N. 819=36 Ind. Cas. 389; see also A. I. R. 1927 Rang. 281=5 Rang. 471=6 Bur. L. J. 148=104 Ind. Cas. 313. Dismissal of an application to set aside *ex parte* decree if confirmed on appeal bars a subsequent suit to set aside the decree. 3 L. W. 572=20 M. L. T. 126=(1916) 2 M. W. N. 63=63 Ind. Cas. 128. A suit to set aside an *ex parte* fraudulent decree is competent, though not proceeded by an application under Order IX, rule 13. 10 Bur. L. T. 10=34 Ind. Cas. 264.

**Proviso.**—Where a decree passed on the basis of trust-deed executed by father and son is set aside under this rule against the son only, it should be set aside as against the father also on the ground that the decree is indivisible. 155 Ind. Cas. 837.

14. [S. 109.] No decree shall be set aside on any such applications as aforesaid unless notice thereof has been served on the opposite party.

**N.B.**—For local amendments in Bombay and Madras.—*Vide infra*.

**Notes.**—This rule is imperative. Notice to affected party is essential before setting aside *ex parte* decree. A. I. R. 1923 Rang. 49=11 L. B. R. 394=1 Bur. L. J. 200=70 Ind. Cas. 144; 24 M. L. J. 482=13 M. L. T. 344=19 Ind. Cas. 21; 63 Ind. Cas. 47. The words "opposite party" mean plaintiff obtaining *ex parte* decree against the appealing defendants. A. I. R. 1927 Cal. 692=31 C. W. N. 906=103 Ind. Cas. 860; see also 20 M. L. J. 524=8 M. L. T. 234=7 Ind. Cas. 66; 26 C. 267=3 C. W. N. 261; 57 Ind. Cas. 563. The principle of representation cannot be urged as against the definite provisions of rule 14. A. I. R. 1934 Pat. 396. As regards hearing of "opposite party" in a mortgage suit *vide* 1936 A. L. J. 544=A. I. R. 1936 All. 410.

## ORDER X.

### *Examination of Parties by the Court.*

1. [S. 117.] At the first hearing of the suit the Court shall ascertain

Ascertainment whether allegations in pleadings are admitted or denied.

from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint or written statement (if any) of the opposite party, and as are not expressly

or by necessary implication admitted or denied by the party against whom they are made. The Court shall record such admissions and denials.

**Scope.**—Statement of party when it is not substantiated by evidence of party in witness-box cannot be treated as evidence against opposite party. A. I. R. 1930 Lah. 947=129 Ind. Cas. 301. A written replication is not a substitute for the oral examination. A. I. R. 1929 Oudh 178=8 O. L. J. 439=66 Ind. Cas. 222 ; see also A. I. R. 1924 Nag. 191=79 Ind. Cas. 614. Where statement of facts is not disputed in pleadings examination of parties is unnecessary. 8 Lah. L. J. 67=27 P. L. R. 136=92 Ind. Cas. 1006. Admissions by a party under Order X, rule 1, are conclusive against him. A. I. R. 1926 All. 710=49 A. 219=97 Ind. Cas. 176=25 A. L. J. 48 ; but see 101 A. 74=13 C. L. R. 266 (P. C.). A replication filed without special leave of the Court is not a proper substitute for an examination of parties under Order X. A. I. R. 1922 Oudh 30=9 O. L. J. 30=24 O. C. 348=64 Ind. Cas. 771. Plaintiff's refusal to make admissions about matters not directly involved in suit and helpful to defendant is not improper. A. I. R. 1930 Lah. 228=116 Ind. Cas. 717. Where a Court thinks it necessary to clear up the points of controversy further, the proper procedure to be followed is that laid down under Order X, rule 1 ; but on failure of plaintiff to put in a Court a counter written statement as directed by the Court, the Court is not justified in dismissing the suit under Order VIII, r 10, which in terms applies only to a written statement and set-off. A. I. R. 1929 Bom. 413=31 Bom. L. R. 1118=122 Ind. Cas. 423. Where all defendants are confessing judgments, joint statement is legal. A. I. R. 1934 Lah. 540=35 P. L. R. 431.

2. [S. 118.] At the first hearing of the suit, or at any subsequent hearing any party appearing in person or present in Court, or any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied, may be examined orally by the Court ; and the Court may, if it thinks fit, put in the course of such examination questions suggested by either party.

**Scope.**—This rule is intended to ascertain the question of controversy between the parties. 2 A. L. J. 777 ; 15 C. 533=15 I. A. 119. The statement of a person examined on behalf of the party is not necessarily binding on the party. A. I. R. 1925 All. 411=94 Ind. Cas. 1003. Power under this rule is to be used to obtain information on material question and not for superseding ordinary procedure at trial. 134 Ind. Cas. 669=33 Bom. L. R. 1251=1931 M. W. N. 931=8 O. W. N. 936=34 M. L. J. 7=35 C. W. N. 925=1931 A. L. J. 550=A. I. R. 1931 (P. C.) 151 ; see also 94 Ind. Cas. 1003=A. I. R. 1926 All. 411. The statement under this section cannot be treated as evidence. 129 Ind. Cas. 301=31 P. L. R. 913=A. I. R. 1930 Lah. 947.

3. [S. 119.] The substance of the examination shall be reduced to writing by the Judge, and shall form part of the record.

4. [S. 120.] (1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit.

**Scope.**—Personal attendance of parties is required only when material questions are not answered by pleaders. 21 O. C. 252=49 Ind. Cas. 269 ; see also 23 B. 318 ; 5 Bom. L. R. 687 ; 2 W. R. 161. An order passed by Court when party or pleader is absent at an adjourned hearing is really one under Order XVII, rule 2, read with

Order IX, r. 8, though purporting to be passed under Order X, r. 4 (2). 42 Ind. Cas. 945. Where in a suit for rent, defendant pleads discharge but is prepared to withdraw that plea if plaintiff deposed that there was no discharge, the proper procedure is to take defendant's evidence of discharge and draw the natural inference from plaintiff's refusal to appear. Court cannot summon the plaintiff under Order X, rule 4, but can summon under Order XII, rule 1. 24 L. W. 757=98 Ind. Cas. 723. Order IX does not apply to the special set of circumstances contemplated by Order X, rule 4. A. I. R. 1921 Mad. 417=14 L. W. 15=(1921) M. W. N. 395=63 Ind. Cas. 961. Even under Order 10, rule 4, *pardanashin* lady cannot be compelled to attend Court. 1933 A. L. J. 1384=A. I. R. 1933 All. 551. Personal appearance of plaintiff can be compelled only under Order 5, rule 3, and Order 10, rule 4. 145 Ind. Cas. 716=28 N. L. R. 146=A. I. R. 1932 Nag. 135. Where pleader or agent is not refusing or is not unable to answer material questions, Court cannot order personal attendance. 1933 A. L. J. 1318=A. I. R. 1933 All. 517. Under Order 10, rule 4 (2), Court can dismiss suit for default of appearance of party. 138 Ind. Cas. 613=1932 A. L. J. 726=A. I. R. 1932 All. 595; see also A. I. R. 1933 Lah. 922.

## ORDER XI.

### *Discovery and Inspection.*

1. [R. S. C. O. 31, r. 1.] In any suit the plaintiff or defendant by leave of the Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such person is required to answer: Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

**Scope.**—Interrogatories cannot be delivered without the leave of the Court, for the examination of the opposite parties. The words "opposite parties" mean parties between whom there is some right to adjust in the suit. *Shaw v. Smith*, 18 Q. B. D. 193 (198,200); *Molloy v. Kilby*, 15 Ch. D. 162. It may include co-defendants, if there be some dispute between them. *Birchall v. Birch*, (1913) 2 Ch. 375. Where plaintiff and some of the defendants have the same interest in the suit and plaintiff is really fighting the case on their behalf as well as for himself plaintiff cannot administer interrogatories to those defendants. A. I. R. 1921 Mad. 381=30 M. L. T. (H. C.) 26=63 Ind. Cas. 258; see also *Alcoy Ry. Co. v. Green Hill*, (1906) 1 Ch. 19 C. A. The Judge has absolute discretion to issue or refuse interrogatories. *Codd v. Delah*, (1906) W. N. 57; *Muass v. Gus Light*, (1911) 2 K. B. 543; *Knapf v. Harvey*, (1911) 2 K. B. at p. 728. Court will not order the defendant to particulars of his traverse of plaintiff's allegations where the onus of proof is on the plaintiff. A. I. R. 1921 Sind 106=17 S. L. R. 9=80 Ind. Cas. 958. The object of the interrogatories to find out what really is in issue [*Saunders v. Jones*, 7 Ch. D. 435; *Ashley v. Taylor*, 38 L. T. 44 (C. A.)] and to avoid surprise at the trial. *Lyon v. Tweddell*, 13 Ch. D. 375. The facts which will prove a party's case can be put in interrogatories. *Hooton v. Dalby*, (1907) 2 K. B. 18 (21). In a suit on promissory-note, where the plea is want of consideration, application by defendant without letting in evidence to issue interrogatories to plaintiff must be dismissed. 142 Ind. Cas. 17=A. I. R. 1933 Mad. 298. So also interrogatories for discovering other party's evidence cannot be allowed. 142 Ind. Cas. 484=56 C. L. J. 440=A. I. R. 1933 Cal. 151. But interrogatories to discover facts directly in issue as well as facts relevant to those facts are permissible. *Osrarn Lamp Works v. Gabriel Lamp Co.*, (1914) 2 Ch. 129 (C. A.). Facts which destroy other party's case may be put in the interrogatories. *Plymouth Mutual v. Traders' Association*, (1906) 1 K. B. 403 (417). An interrogatory may deal with any fact the existence or non-existence of which is relevant to the existence or non-existence of the facts directly in issue. *Marriot v. Chamberlain*, 17 Q. B. D. 154 (162); *Nash v. Layton*, (1911) 2 Ch. 71 (76, 83); *Kennedy v. Dodson*, (1895) 1 Ch. 334. "The

legitimate use, and the only legitimate use of interrogatories is to obtain from the party interrogated admissions of facts while it is necessary for the party interrogated to prove in order to establish his case ; and if the party interrogated goes further and seeks by his interrogatories to get from the other party matters while it is not incumbent on him to prove, although such matters may indirectly assist his case, the interrogatories ought not to be admitted." *Per A. L. Smith L. J.* in *Kennedy v. Dodson*, (1895) 1 Ch. 334 (341) ; but see *Hooton v. Dalby*, (1907) 2 K. B. at p. 21.

Order XI is applicable to proceedings in probate and a Court on submission of interrogatories direct an enquiry. 43 C. 300=23 C. L. J. 480=43 Ind. Cas. 227 ; see also *Re Holloway* (1887), 12 P. D. 167. Order XI of the present Civil Procedure Code relating to discovery and inspection is the same as Order XXXI of the Rules of the Supreme Court. 41 C. 6=24 Ind. Cas. 765. An interrogatory must not be scandalous. *Kemble v. Hope*, 10 T. L. R. 254.

**By and to what person.**—Discovery by way of interrogatories may be allowed to a plaintiff from a co plaintiff, or to a defendant from a co-defendant, in cases in which there may be rights to be adjusted between them. *Shaw v. Smith*, 50 L. J. Q. B. 174=18 Q. B. D. 193. But discovery cannot be allowed to a defendant from a co-defendant with a view to show that the co-defendant and not the defendant is liable to the plaintiff, as where a defendant, sued for subsidence under the plaintiff's land, proposes to inspect the mines of a co-defendant in adjoining land. *Ibid.* An infant plaintiff or defendant cannot be compelled to answer interrogatories. *Mayor v. Collins*, 59 L. J. Q. B. 199=24 Q. B. D. 361. A guardian *ad litem* is not a party to the action within the meaning of this rule and therefore cannot be compelled to answer interrogatories. 11 Q. B. D. 251.

**Power of High Court.**—Where lower Court declines to re-issue interrogatories, the High Court can interfere under s. 107, Government of India Act of 1919. A. I. R. 1937 Lah. 28.

## 2. [R. S. C. O. 31, r. 2.] On an application for leave to deliver interrogatories, the particular interrogatories proposed to

be submitted. Particular interrogatories to be delivered shall be submitted to the Court.

In deciding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs.

**Scope.**—Under rule 2, the Judge has not any power to settle interrogatories, but he can decide what should be administered. The *dicta* in English cases with regard to the more extensive powers of Courts in matters of probate, seem to imply that the strictest relevancy in the interrogatories may not be required, but the Courts certainly be obliged to exclude anything offensive or improper in the same way as in any other case. 43 C. 300=23 C. L. J. 480=34 Ind. Cas. 227. Interrogatories should be disallowed when they aim at discovering the nature of the opponents' evidence to ascertain what documents the defendant had on the particulars of the documents. 36 Ind. Cas. 883. The mere fact that the Court allows an interrogatory does not amount to a decision that it must be answered. The party interrogated is at liberty to answer it or to raise on objection under rule 6. *Peck v. Ray*, (1894) 3 Ch. 282 (C. A.). Service on pleader of the party interrogated is good. *Re Mulcastar*, 47 L. J. Ch. 609 ; *Little v. Roberts*, 30 L. T. 367. The proper time for allowing interrogatories is after the defence is put in, although the Court is competent to allow interrogatories at an earlier stage. *Mercier v. Cotton*, 1 Q. B. D. 442 ; *In re, A. Debtor*, (1910) 2 K. B. p. 63 ; *Beal v. Pilling*, 38 L. T. 486. A party may deliver interrogatories in order to ascertain the nature of the opponent's case or to support his own case, in order to narrow the points in issue or to avoid proving facts which are admitted. But the procedure of delivering interrogatories in order to prove the contents of documents which have been held inadmissible in evidence is entirely misconceived. A. I. R. 1934 Nag. 181=17 N. L. J. 63=151 Ind. Cas. 104.

3. [R. S. C. O. 31, r. 3.] In adjusting the costs of the suit inquiry shall at the instance of any party be made into the propriety of exhibiting such interrogatories, and Costs of interrogatories. if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry, that such interrogatories have been exhibited unreasonably, vexatiously, or at improper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any event by the party in fault.

4. [R. S. C. O. 31, r. 4.] Interrogatories shall be in Form No. 2 in Appendix C, with such variations as circumstances may require, Form of interrogatories.

5. [R. S. C. O. 31, r. 5.] Where any party to a suit is a corporation or a body of persons, whether incorporated or not, empowered by law to sue or be sued, whether in its own name or in the name of any officer or other person, any opposite party may apply for an order allowing him to deliver interrogatories to any member or officer of such corporation or body, and an order may be made accordingly. Corporations.

**Scope.**—In the case of corporation, the Court is to decide what member or officer is most likely to be competent to answer the interrogatories. *Berkely v. Standard*, (1879) 13 Ch. D. 97. Ordinarily the Secretary of the Corporation is the fit person to be interrogated. *In re, Alexandra Palace Co.*, (1880) 16 Ch. D. 58. The answer to the interrogatories need not be based on the personal knowledge of the member of the corporation but may be based on information. *South Work Water Co. v. Quick*, 3 Q. B. D. 315 (321); *Welsback Incandescent v. New Sunlight*, (1900) 2 Ch. 1. If the Court is satisfied that a proper officer is named the leave will be granted as of course. *In re, Alexandra Palace Co.* 50. L. J. Ch. 7=16 Ch. D. 58. An ordinary member of a company ought not to be examined on interrogatories unless the Judge is satisfied that there is no officer of the company capable of making the discovery, and that the member proposed to be examined has the required information. *Berkeley v. Standard Investment Co.*, 13 Ch. D. 97. Where in an action against a company an application is made under this rule for leave to deliver interrogatories to a member of the company, notice of the application must be served upon the member. *Chaddock v. British South Africa*, (1896) 2 Q. B. 153.

6. [R. S. C. O. 31, r. 6.] Any objection to answering any interrogatory on the ground that it is scandalous or irrelevant or not exhibited *bona fide* for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer. Objections to interrogatories by answer.

**Scope.**—The mere issue of interrogatories does not debar the party interrogated to make objection under this rule. *Peck v. Ray* (1894), 3 Ch. 282. In answer the party interrogated may state that objects to answer the particular interrogatory or interrogatories but must put in the grounds of his objection. *Church v. Perry*, 36 L. T. 513; *Smith v. Brig*, 36 L. T. 471. The Court should adjudicate an objection as to the relevancy of interrogatories. 46 Ind. Cas. 660.

**Scandalous.**—An objection on the ground that interrogatory or information sought is scandalous. But nothing can be scandalous which is relevant. *Fisher v. Owen*, 8 Ch. D. 645 (653); *Kemble v. Hope*. 10 T. L. R. 254. A thing is scandalous, the mere purpose of which is to be abuse or prejudice the opposite party or which is indecent or offensive. *Christie v. Christie*, 8 Ch. 499; *Coyle v. Cuming*, 40 L. T. 455. A person is also not bound to answer an interrogatory if the answer tends to criminate him. *Lee v. Read*, 5 Beav. 381; *Lamb v. Monster*, 10 Q. B. D. 110.

**Irrelevant.**—Irrelevant interrogatories need not be answered. *Parker v. Wells*, 18 Ch. D. 477 (486). "I entertain a strong opinion said" Lord Herschell in *Kernedy v. Dodson*, (1895) 1 Ch. 334 at p. 338, "that interrogatories of this description, unless they are strictly relevant to the question at issue in the action, ought to be rigorously excluded." See also *Re Howel Morgan*, 39 Ch. D. 316; *Allhusen v. Labouchere*, 3 Q. B. D. 654 (661); 23 C. 117; 16 A. L. J. 762=46 Ind. Cas. 660.



**Bonafide**—Interrogatories may become oppressive and may be used for improper purposes. In such a case the Court has discretion to disallow them on the merits of the case. *Heaton v. Gidney*, (1910) 1 K. B. at p. 758. So a party may object to interrogatories which are not put *bona fide* for the purpose of the suit. *Allhusen v. Labouchere*, 3 Q. B. D. 654 (664); *Edmondson v. Brich & Co*, (1905) 2 K. B. 523, 526.

**Not sufficiently material.**—*Vide Parker v. Wells*, 18 Ch. D. 477 (483).

7. [R. S. C. O. 31, r. 7.] Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

**Scope.**—This rule deals with two cases, first, where interrogatories are exhibited which are in themselves unobjectionable, but which, by reason of the circumstances of the case, it would be unreasonable or vexatious to call upon the party interrogated to answer; secondly, where interrogatories are in themselves objectionable by reason of being prolix, oppressive, unnecessary or scandalous. In the first case, all or any of the interrogatories may be set aside by Judge's order; in the second case, all or any may be struck out. *Oppenheim v. Sheffield*, 62 L. J. Q. B. 167=(1893) 1 Q. B. 5. Where interrogatories are unreasonably prolix, it is the duty of the Court to strike them out under this rule. *Grumbrecht v. Parry*, 32 W. R. 558. If the Judge thinks that interrogatories as a whole, or enblock, are vexatious or unreasonable, he may strike out the whole of them without sifting the mass for the purpose of saving those questions which may be reasonable and fit. And he may, if he thinks proper, allow the parties whose interrogatories have been struck out to administer interrogatories again to the opposite party. *Cawley v. Birton*, 32 W. R. 33. If the Judge considers a set of interrogatories to be as a whole prolix, oppressive or unnecessary, he has power to strike them all out, though some of them may be unobjectionable. *Oppenheim v. Sheffield*, (1893) 1 Q. B. 5. Objections to answer to interrogatories must be specific. *Church v. Perry*, 36 L. T. 513. A party who applies to strike interrogatories must, unless they are altogether an abuse of the practice of the Court, specify those to which he objects. *Allhusen v. Labouchere*, 3 Q. B. D. 654=47 L. J. Ch. 819.

8. [R. S. C. O. 31, r. 8.] Interrogatories shall be answered by affidavit to be filed within ten days, or within such other time as the Court may allow.

Affidavit in answer filing.

**Scope.**—The defendants cannot refuse to answer on the ground that they have got no personal knowledge, of the matter interrogated. *Pavitt v. North Metropolitan*, 48 L. T. 730. A party to a cause is not excused from answering interrogatories relevant to the question in issue on the ground that they are as to matters which are not within such party's own knowledge, but are only within the knowledge of his agents or servants, if derived in the ordinary course of their employment; and he is bound to obtain an information from such agents or servants unless he shows that it would be unreasonable to require him to do so, as that, either such agents or servants have left his employment, or it would occasion unreasonable expense, or an unreasonable amount of detail or the like. *Bolkow v. Fisher*, 10 Q. B. D. 161; but see *Rashotham v. Shropshire Union*, 24 Ch. D. 110=53 L. J. Ch. 327.

9. [R. S. C. O. 31, r. 9.] An affidavit in answer to interrogatories shall be in Form No. 3 in Appendix C, with such variations as circumstances may require.

Form of affidavit in answer.

10. [R. S. C. O. 31, r. 10.] No exceptions shall be taken to any affidavit in answer, but the sufficiency or otherwise of any such affidavit objected to as insufficient shall be determined by the Court.

No exception to be taken.

**Scope.**—The duty of the Court, with reference to answers to interrogatories, is regulated by rules 10, 11, and limited to considering the sufficiency or insufficiency of the answers, *i.e.*, whether the party interrogated has answered that which he has no excuse for not answering—and only in the case of insufficiency can it require a

further answer. *Lyell v. Kennedy*, 53 L. J. 937. An embarrassing answer to interrogatories may be dealt with as insufficient. *Ibid*; see also *Lyell v. Kennedy*, 33 W. R. 44.

11. [R. S. C. O. 31, r. 11, S. 127.] Where any person interrogated omits to answer, or answers insufficiently, the party interrogating may apply to the Court for an order requiring him to answer, or to answer further, as the case may be. And an order may be made requiring him to answer or answer further, either by affidavit or by *viva voce* examination, as the Court may direct.

**Scope.**—The terms of Order XI, rule 11, contemplates two orders being made. First an order for the answer to the interrogatories or for the discovery or inspection of the documents within a specified time; and secondly upon the failure to comply with such an order a further order dismissing the suit. An order dismissing the suit should not be made unless the Court is satisfied that the plaintiff is endeavouring to avoid giving a fair and proper discovery. A. I. R. 1925 Cal. 166=50 C.L.J. 397=78 Ind. Cas. 859. Although no time is mentioned in rule 9 within which an order will be made requiring a further answer to interrogatories, the application for such an order must be made within a reasonable time, the Court will have regard for the period (namely six weeks), limited by the former English practice for taking exceptions for insufficiency, and in ordinary cases applications for a further answer should be made. *Lloyd v. Morley*, 5 L. R. Ir. 74. Where document is not formally proved, production of document in compliance with order of discovery cannot be regarded as a production of it, as a piece of evidence in Court. A. I. R. 1921 Lah. 328=4 Lah. L. J. 385. Where objection as to prayer for discovery was not taken in grounds of appeal in lower appellate Court it cannot be taken in second appeal. 37 C. W. N. 758=A. I. R. 1933 Cal. 865. It is open to an assessee to object to answering interrogatories on statements made by him in income-tax proceedings on the ground that they are privileged. A. I. R. 1934 Nag. 181=17 N. L. J. 63=151 Ind. Cas. 104. The order of the lower Court under Order 11, rule 11, asking to make sufficient answers amounts to a case decided and if there has been a material irregularity in allowing interrogatories which are not necessary either for disposing fairly of the suit or for saving costs it is necessary to intervene to prevent injustice being done. *Ibid*. Where in a suit of restitution of conjugal rights by husband, the husband relies upon certain documents, the wife is entitled to inspect those documents before she filed her defence. A. I. R. 1937 Sind 97.

12. [R. S. C. O. 31, r. 12, S. 129.] Any party may, without filing any affidavit, apply to the Court for an order directing any other party to any suit to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the Court may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the suit, or make such order, either generally or limited to certain classes of documents, as may, in its discretion, be thought fit: Provided that discovery shall not be ordered when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

**Scope.**—The words "any party" and "any other party" contemplate opposite party. 134 Ind. Cas. 935=58 C. 1091=A. I. R. 1932 Cal. 72. In administration suit defendants *inter se* are not opposite parties without issues between them. 134 Ind. Cas. 935=58 C. 1091=A. I. R. 1932 Cal. 72. Discovery of title-deeds cannot be ordered on mere filing application. When application is well founded presumption arises from non-production. 135 Ind. Cas. 85=10 Pat. 630=13 P. L. T. 405=A. I. R. 1932 Pat. 5=A. I. R. 1931 Pat. 426. Upon an application for discovery under rule 12, the Judge has power to demand an affidavit by the party applying of his belief that the party from whom discovery is sought has documents in his possession to the discovery of which he is entitled, and it is entirely within the Judge's discretion whether such an affidavit shall be made or not. *Johnson v. Smith*, 36 L. T. 741. This rule is not intended entirely to alter the principles

as by production of documents, but give the Court to a discretion to refuse the discovery of them when there was no reasonable prospect of its being of any use. On an application for an affidavit of documents evidence ought not to be entered into; the Court will form its conclusions from the pleadings, but any other proceedings in the action as *e.g.*, evidence used on a former occasion, may be looked at. *Downing v. Falmouth*, 57 L. J. Ch. 234.

**Who can be compelled to make discovery.**—Where the agent of a principal resident abroad brings an action in his own name, and on a contract made with him as agent the defendant is entitled to discovery to the same extent as if the principal were a party to the action, and to have the action stayed till such discovery is made. *Willis v. Baddeley*, 61 L. J. Q. B. 769=(1892) 2 Q. B. 324. An order for discovery of documents can be made on a party who lives abroad. *The Ema*, 34 L. T. 742. Discovery by way of production of documents may be allowed to a plaintiff from a co-plaintiff in cases in which there may be rights to be adjusted between them respectively. *Saw v. Smith*, 56 L. J. Q. B. 174=18 Q. B. D. 193. Discovery by way of production of documents may be allowed to a defendant from a co-defendant in cases in which there may be rights to be adjusted between them respectively. *Ibid*; *Alcoy v. Greenhill*, 74 L. T. 345; 17 B. 348; *Kennedy v. Wakefield*, 39 L. J. Ch. 827. In a suit by shareholders against company for fraud of directors, the company can be ordered to make discovery of documents. *Stokes v. Grosvenor*, (1837) 2 Q. B. 124.

**At what time.**—A plaintiff will not in general be allowed production from a defendant until he has delivered a statement of claim. *Caspin v. Craddock*, 2 Ch. D. 410=34 L. T. 52; see also *Davies v. Williams*, 13 Ch. D. 554; *Phillips v. Phillips*, 40 L. T. 815. A plaintiff after delivering a statement of claim is not as a general rule, entitled under this rule, to an order for discovery of documents before a statement of defence is delivered, because until that happens it is impossible to say what the matters "in question in action" are. *Honcock v. Guerin*, 4 Ex. D. 3. A defendant may obtain discovery of documents before a statement of defence has been delivered when such discovery is necessary for the purpose of ascertaining what damage the plaintiff has actually suffered with a view to paying money into Court with the defence. *Megaw v. Diormid*, 10 L. R. Ir. 376. The Court has a discretion in ordering discovery, and there is no absolute rule that a defendant should not be ordered to make an affidavit of documents before the delivery of defence. *Edelstone v. Russel*, 57 L. T. 927.

**What documents.**—"The rule as to discovery is the exact contrary to that of production. You must set out every document you have in your possession, whether you are bound to produce them or not" *Per Jessel M. R. in Swainstone v. Lishman*, 45 L. T. 360. The general rule is that a defendant is bound to discover all the facts within his knowledge, and to produce all documents in his possession which are material to the case of the plaintiff. However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to his claim, he is compelled to set forth on oath all he knows, believes or thinks, in relation to the matters in question. *Flight Robinson*, 8 Beav. 22=13 L. J. Ch. 425. A defendant, in an action for the recovery of land of which he is in possession may be compelled by order to make an affidavit of his documents of title, although he may have a right to object to produce them. *New British Mutual Interst v. Pew*, 3 C. P. D. 196. So a party must make an affidavit of all documents which are not privileged or irrelevant to the matter of the action. *Dickinson v. Harrison*, 47 L. J. Ch. 686. Where a party to a suit is required to make an affidavit as to documents in his possession, and alleges in his affidavit as a reason for not producing them that they were in the possession of himself and a third person as joint owners, he is bound to state the nature of the joint ownership. *Bovil v. Cowan*, 39 L. J. Ch. 768=L. R. 5 Ch. 495.

**Affidavit of documents.**—The affidavit must sufficiently describe the documents for the purpose of identification. *Bewicke v. Graham*, 7 Q. B. D. 400. The affidavit of documents required from a party under rule 15 or rule 13 is ordinarily conclusive on the question whether the documents are in his possession or power unless a counter application is made by the opponent. 5 Pat. L. J. 550=1 P. L. T. 668=58 Ind. Cas. 281; *Jones v. Monte Video*, 5 Q. B. D. 556; *Hall v. Truman*, 29 Ch. D. 307. Order of discovery even in cases against corporate bodies can be secured without filing an affidavit by applying to Court for order of discovery against other party for documents in his possession

relating to any matters or question in suit. A. I. R. 1922 All. 1=44 A. 202=20 A. L. J. 1=65 Ind. Cas. 984. Where an affidavit has been made in answer to an order for discovery of documents, a further order will not be granted unless there are facts or admissions showing that documents are withheld. *Welsh Steam v. Gaskell*, 36 L. T. 352. It is not enough for the party applying for further discovery to swear to a belief that documents are in the other party's possession. *Ibid.* The Court will order further affidavit as to documents to be made by a defendant, if it is satisfied from the admissions in the defendant's answer that material documents not mentioned in his affidavit may be in his possession, even although the answer does not in express terms admit the existence of such documents. *Saull v. Browne*, L. R. 17 Eq. 402. Order for production of documents must follow an order as to affidavit of documents. In absence of such order as to affidavit, Court cannot compel defendants on plaintiff's application to produce account books alleged to be with them A. I. R. 1923 Pat. 437=1 Pat. L. R. 233=76 Ind. Cas. 991. Where a party claims privilege against the production of documents on the ground that they support their own title and do not relate to that of his opponent, this affidavit must be taken as conclusive, unless the Court can see from the nature of the case or of the documents, that the party has misunderstood the effect of the documents. 26 Ch. D 724 ; see also *Bulman v. Young*, 49 L. T. 736. But the Court in spite of a party's affidavit to the contrary, may order the production of the document. *Att. Gen. v. Emerson*, 10 Q. B. D. 191. The omission of the words "and never have had" from an affidavit of documents is in itself a sufficient reason for ordering a further and better affidavit. *Wagstaff v. Anderson*, 39 L. T. 332.

**Material document.**—Documents are material to the matters in question in the action within the meaning of Order 31, rule 12, if it is not unreasonable to suppose that they may contain information directly or indirectly enabling the party seeking discovery, either to advance his own cause, or to damage the case of his adversary. *Compagnie v. Peruvian*, 11 Q. B. D. 55. "The documents to be produced are not confined to those which would be evidence either to prove or to disprove any matter in question in the action, it seems to me that every document relates to the matters in question in the action." *Brett L. J.* in *Compagnie Financiere v. Peruvian*, 11 Q. B. D. 62 (63).

**Documents produced.**—A document produced in compliance with an order of discovery becomes an exhibit of the party at whose instance the order for discovery is passed and not of the party who produced it. A. I. R. 1921 Lah. 328=4 Lah. L. J. 385. Where the plaintiff disputes the validity of the votes recorded in a meeting, he is entitled to inspection of the documents concerned. But when such inspection will cause delay which the nature of the case will not permit and when the plaintiffs do not show that the inspection would yield any result in their favour, refusal of inspection is not wrong so as to merit reversal by the superior Court. A. I. R. 1925 Bom. 105=26 Bom. L. R. 907=84 Ind. Cas. 363.

13. [R. S. C. O. 31, r. 13; S. 129, second para.] The affidavit to be made by a party against whom such order as is mentioned in the last preceding rule has been made, shall specify which (if any) of the documents therein mentioned he objects to produce, and it shall be in Form No. 5 in Appendix C, with such variations as circumstances may require.

**Scope.**—Where an order as to affidavit of documents was obtained against defendant who dies and his representatives have been brought on record, a fresh order as to affidavit must be obtained against them. A. I. R. 1925 Bom. 386=27 Bom. L. R. 694=89 Ind. Cas. 215. As regards conclusiveness of an affidavit, *vide* the judgment of *Hamilton L. J.* in *Birmingham, etc., Co. v. L. & N. W. Ry. Co.*, (1913) 3 K. B. at p. 859.

14. [R. S. C. O. 31, r. 14; S. 130.] It shall be lawful for the Court, at any time during the pendency of any suit, to order the production by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right; and the Court may deal with such documents, when produced, in such manner as shall appear just.

**Scope.**—A party to a suit only can be ordered to produce a document. *Starker v. Reynolds*, 22 Q. B. D. 262 (265); *Elder v. Carter*, 6 T. L. R. 283. Production of privileged documents will not be ordered. *O'Rourke v. Derbyshire*, (1920) A. C. 581. The general rule is that every document which is in the possession or power of the parties and which is material to the case and is not privileged can be ordered to be produced in Court. *Anderson v. Bank of British Columbia*, 2 Ch. D. 644 (656); *Jones v. Great Central Ry.*, (1910) A. C. 4. Documents which are protected by profession or legal privilege need not be produced. Confidential communications between solicitor and client need not be produced. *Re Whitworth* (1919), 1 Ch. 320 C. A.; *O'Shea v. Wood*, (1891) P. 286; *Wheeler v. Le Merchant*, 17 Ch. D. 675. Instructions and briefs to counsel or statement of case for his opinion need not be produced. *Mostyn v. West Mostyn*, 26 Ch. D. 678; *Curtis v. Beaney*, (1911) p. 181. A document which solely relates to a party's case is also privileged. *Bewick v. Graham*, 7 Q. B. D. 400. Documents in possession of a party on behalf of another need be produced. *Few v. Guppy*, 13 Beav. 457. Production of a document may be resisted on the ground of public policy. *Hennessy v. Wright*, (1888) 21 Q. B. D. 599; *Asiatic Petroleum Co. v. Anglo Persian Oil Co. Ltd.*, (1916) 1 K. B. 822.

Mere inability to particularise instances of fraud in accounts, should not be a ground for refusing application for inspection of accounts. 137 Ind. Cas. 636=(1932) M. W. N. 93=A. I. R. 1932 Mad. 284. No order can be made under rule 14 against a party unless he has directly or indirectly admitted the document to be in his possession or power. 5 Pat. L. J. 650=1 P. L. T. 668=58 Ind. Cas. 281. An order for production of documents follows an order as to affidavit of documents under Order XI, r. 12. When that order is passed against a party he can say that so long as the opposite party has not established his title to the property in respect of which that order is sought, it is not open to the Court to disclose the documents. A. I. R. 1923 Pat. 337=1923 Pat. 143=1 Pat. L. R. 233=5 P. L. T. 43=76 Ind. Cas. 991. The Court should first determine whether the party who seeks to inspect the documents is entitled to do so and if so, whether he is entitled to the right at that stage of the proceeding. The Court can and must exercise discretion as to whom it is going to permit to conduct on inspection of the documents produced by a party. A. I. R. 1924 Mad. 846=47 Mad. 934=47 M. L. J. 460=20 L. W. 533=80 Ind. Cas. 604. This rule contemplates further orders being passed on document being produced. A. I. R. 1924 Mad. 512=46 M. L. J. 350=19 L. W. 355=77 Ind. Cas. 766. Where the order of the Court is to produce a document under this rule, the non-compliance of the order does not warrant the striking of the defence. A. I. R. 1922 All. 235=44 A. 565=20 A. L. J. 422=67 Ind. Cas. 73; see also 26 A. L. J. 1376=112 Ind. Cas. 285. A Court cannot dismiss a suit under rule 21 for non-compliance with an order by the Court under rule 14 for production of documents. A. I. R. 1929 All. 83=115 Ind. Cas. 464; 1933 M. W. N. 927=A. I. R. 1933 Mad. 870.

15. [R. S. C. O. 31, r. 15; S 131.] Every party to a suit shall be

Inspection of documents referred to in pleadings or affidavits.

entitled at any time to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

**Scope.**—Rules 15—18 refer only to documents mentioned in the affidavits or pleadings. As regards those documents it is proper and just that the opposite party should have the same advantage as if those documents were fully set out in the pleadings or affidavits. *Quiller v. Heatley*, 23 Ch. D. 42; see also A. I. R. 1935 Mad. 234=156 Ind. Cas. 246. Inspection of documents referred to in pleadings incidentally and which are not material cannot be claimed by the opposite party. A. I. R. 1923 Bom. 73=46 B. 866=3 Bom. L. R. 1255=66 Ind. Cas. 8. Document not in the possession or power of the person called upon

to produce it is a good cause for its non-production. 5 Pat. L. J. 550=1 P. L. T. 668=58 Ind. Cas. 281. There is no distinction between documents sued upon and documents relied upon by plaintiff only after the defendant files this written statement. 24 C. W. N. 302=56 Ind. Cas. 457. List of documents is to be deemed part of plaint for granting inspection 135 Ind. Cas. 421=61 M. L. J. 704=34 M. L. W. 654=A. I. R. 1931 Mad. 825; see also 185 P. W. R. 1911. The parties can take *verbatim et literatim* copies of documents of which inspection is allowed. 11 Bom. L. R. 402=2 Ind. Cas. 422.

16. [R. S. C. O. 31, r. 16.] Notice to any party to produce any documents referred to in his pleading or affidavits  
 Notice to produce. shall be in Form No. 7 in Appendix C, with such variations as circumstances may require.

17. [R. S. C. O. 31, r. 17; S. 132.] The party to whom such notice is given shall, within ten days from the receipt of such notice, deliver to the party giving the notice a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of Bankers' books or other books of account or books in constant use for the purposes of any trade or business, at their usual place of custody, and stating which (if any) of the documents he objects to produce, and on what ground. Such notice shall be in Form No. 8 in Appendix C, with such variations as circumstances may require.

Scope—As regards proper place of inspection of documents, *vide* 5 B. 457; *Prestney v. Colchester Corporation*, (1883) 24 Ch. D. 376.

18. [R. S. C. O. 31, r. 18; Ss. 133, 134.] (1) Where the party served with notice under rule 15 omits to give such  
 Order for inspection. notice of a time for inspection or objects to give inspection, or offers inspection elsewhere than at the office of his pleader, the Court may, on the application of the party desiring it, make an order for inspection in such place and in such manner as it may think fit: Provided that the order shall not be made when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

(2) Any application to inspect documents, except such as are referred to in the pleadings, particulars or affidavits of the party against whom the application is made or disclosed in his affidavit of documents, shall be founded upon an affidavit showing of what documents inspection is sought, that the party applying is entitled to inspect them, and that they are in the possession or power of the other party. The Court shall not make such order for inspection of such documents when and so far as the Court shall be of opinion that it is not necessary either for disposing fairly of the suit or for saving costs.

Scope.—The filing of an affidavit of documents under Order XI, rule 13, C. P. Code by one party, does not preclude the other party from making a subsequent application for discovery and inspection under Order XI, r. 18 (2). 38 C. 428. All the requirements of Order XI, rule 18, must be satisfied before an order under that rule can be passed. A. I. R. 1922 All. 235=20 A. L. J. 422=44 A. 565=67 Ind. Cas. 73. Suit cannot be dismissed under rule 21, when order under rule 18 is not obeyed. A. I. R. 1926 Sind 27=20 S. L. R. 309=96 Ind. Cas. 1003. Order of dismissal under r. 21 is to be set aside if made in the absence of denial by the other party if the possession of documents sought to be inspected in affidavit afterwards found improper. A. I. R. 1924 All. 510=46 All. 417=22 A. L. J. 199=80 Ind. Cas. 787. Under Order XI, r. 18 (2) order of inspection can be made not only in respect of document mentioned in the plaint and written statement and the affidavit but also in respect of other documents provided their relevancy is proved or in the former their relevancy is admitted. A. I. R. 1931 All. 221=(1931) A. L. J. 94=130 Ind. Cas. 7. Fact that inspection is sought for before written statement is filed

is no ground for refusing it. 135 Ind. Cas. 745=55 M. 421=6 M. L. J. 704=34 M. W. N. 654=A. I. R. 1932 Mad. 825; 1932 M. W. N. 984=A. I. R. 1932 Mad. 825. It cannot be said that unless the party who has given notice of inspection which is not replied to, takes the further action which is open to him under rule 18, the party who has omitted to reply or give inspection is absolved from penalties of r. 15. There is nothing in rule 18 to suggest that it is pre-requisite to rule 15. 156 Ind. Cas. 246=A. I. R. 1935 Mad. 234. Under rule 18 Court is not a proper place to offer the inspection of documents. *Ibid.*

19. [R. S. C. O. 31, r. 19A.] (1) Where inspection of any business books is applied for, the Court may, if it thinks fit, instead of ordering inspection of the original

Verified copies.  
books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries and such affidavit shall state whether or not there are in the original book any and what erasures, interlineations or alterations: Provided that notwithstanding that such copy has been supplied, the Court may order inspection of the book from which the copy was made.

(2) Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court to inspect the document, for the purpose of deciding as to the validity of the claim of privilege.

(3) The Court may on the application of any party to a suit at any time, and whether an affidavit of documents shall or shall not have already been ordered or made, make an order requiring any other party to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and, if not then in his possession when he parted with the same and what has become thereof. Such application shall be made on an affidavit stating that in the belief of the deponent the party against whom the application is made has, or has at sometime had, in his possession or power the document or documents specified in the application, and that they relate to the matters in question in the suit, or to some of them.

20. [R. S. C. O. 31, r. 20; S. 135.] Where the party from whom discovery

Premature discovery.  
of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute, in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection.

Notes.—Where the information required is necessarily within the opponent's knowledge, and the Court is satisfied that no unfair attempt to fish out a case is being made then discovery may precede particulars even where the object, the action is to reopen settled accounts between principal and agent. A. I. R. 1935 Mad. 288=68 M. L. J. 241=41 L. W. 275.

21. [R. S. C. O. 31, r. 21; S. 136.] Where any party fails to comply

Non-compliance with order with any order to answer interrogatories, for discovery. or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant to have his defence, if any, struck out and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made accordingly.

Scope.—The Court should not exercise the powers given to it under this rule except in extreme cases. 5 C. 707=5 C. L. R. 509; A. W. N. 1897, 140; see also A. I. R. 1935 Rang. 310=158 Ind. Cas. 613. The power to dismiss plaint under this rule is optional and not obligatory. *Hartley v. Owen*, 34 L. T. 752; *Kennedy v.*

*Lyell*, W. N. (1882) 137. The powers conferred under this section should not be exercised in dismissing the plaintiffs unless the omission or neglect to comply is not culpable one on the plaintiff's part. *Cardwell v. Tamlinson*, 54 L. J. Ch. 957; *Wilson v. Raffalovitch*, 7 Q. B. D. 561. So also the power of striking out the defence should not be exercised lightly. *Twycroft v. Grant*, W. N. (1875) 201; *Haigh v. Haigh*, 31 Ch. D. 478. A Court has no power to strike out the defence of a defendant of its own motion under rule 21. 84 P. L. R. 1910=8 Ind. Cas. 245. If there is obstinacy or contumacy on the part of the defendants or a wilful attempt to disregard the order of the Court, an order under s. 136 of the Civil Procedure Code is appropriate. 7 C. L. J. 295. A party to a suit failing to comply with an order for production or inspection of documents can be dealt with only in the manner prescribed by Order XI, rule 21 and is not punishable under s. 175 or any other section of the Penal Code. 15 P. W. R. 191 O.=5 Ind. Cas. 842. Defendant failing to comply with order for discovery of documents should not be shut out from producing further evidence. 121 Ind. Cas. 337=A. I. R. 1931 Pat. 114. An order to strike out defence under r. 21 should be made only if the default is wilful and that too as the last resort. A. I. R. 1929 Lah. 750=11 Lah. 209=121 Ind. Cas. 421; 65 Ind. Cas. 661. Wilful means act done deliberately and intentionally so that the mind of the party concerned is with the act. A. I. R. 1929 Lah. 750. Negligence does not amount to wilful default and in such cases an order under this rule should not be passed. A. I. R. 1929 All. 750. It is only when an order under rule 18 has been made and not complied with that the Court can dismiss a suit under rule 21. A. I. R. 1926 Sind. 272=20 S. L. R. 309=96 Ind. Cas. 1003. Order under r. 21 can be passed only when there is previous order under r. 11 and is not complied with. A. I. R. 1926 All. 553=24 A. L. J. 589=99 Ind. Cas. 16. Opportunity should always be given to the defendant disobeying Court's order to show cause why his defence should not be struck out. A. I. R. 1925 Bom. 386=27 Bom. L. R. 691=89 Ind. Cas. 215; see also 67 Ind. Cas. 73=44 A. 565=A. I. R. 1922 A. 235=20 A. L. J. 422. Suit should be dismissed under rule 21 for non-compliance with order under the same rule only after the Court is satisfied that the plaintiff is avoiding fair discovery. A. I. R. 1925 Cal. 66=50 C. L. J. 397=78 Ind. Cas. 859. The proper remedy for the party seeking the discovery, the order respecting which has not been complied with by the other party, is to apply stay-proceedings or to dismiss the suit. 4 P. L. J. 394=48 Ind. Cas. 711. This rule which speaks of only interrogatories or inspection and does not apply to production. A. I. R. 1924 Mad. 582=46 M. L. J. 350=19 L. W. 355=(1924) M. W. N. 340=77 Ind. Cas. 776. Non-compliance with the order of the Court amounts to contempt for which he may be dealt with and the party continues in contempt till the order is obeyed. A. I. R. 1929 Cal. 117=55 C. 1110=115 Ind. Cas. 189. Order 11, rule 21, is part of the rules of the High Court, unless the High Court had made a rule of itself expressly or by implication abrogating it. 39 C. W. N. 1029.

**Appeal.**—Order of dismissal of a suit under Order 11, rule 21, by a Court without jurisdiction is a decree and hence appealable. A. I. R. 1927 Cal. 158=98 Ind. Cas. 70; A. I. R. 1925 Rang. 218=3 Rang. 63=88 Ind. Cas. 751. An appeal lies from an order refusing to strike out defence under Order XI, rule 21. A. I. R. 1930 Cal. 426=34 C. W. N. 220=126 Ind. Cas. 781. An appeal is competent against an order dismissing a suit under rule 21. 137 Ind. Cas. 842=1932 M.W.N. 301=A. I. R. 1932 Mad. 316.

**Review.**—An order of dismissal purporting to be made under Order XI, rule 21, is a decree and hence a review lies from it. A. I. R. 1925 Rang. 218=88 Ind. Cas. 761. Court cannot review its order under s. 151 passed under Order XI, rule 21, since such an order is appealable. A. I. R. 1927 Cal. 158=98 Ind. Cas. 70; but see 34 Bom. L. R. 714.

**22. [R. S. C. O. 31, r. 24.]** Any party may, at the trial of a suit, use

in evidence any one or more of the answers or  
 any part of an answer of the opposite party to  
 interrogatories without putting in the others or  
 the whole of such answer: Provided always that in such case the Court may  
 look at the whole of the answers, and if it shall be of opinion that any others  
 of them are so connected with those put in that the last mentioned answers  
 ought not to be used without them, it may direct them to be put in.



**Scope.**—Under Order XI, rule 22, C. P. Code, the answer or portions of the answers obtained to interrogatories served in a case are admissible as against the party answering them, though great caution should be exercised in using them as evidence. 39 Ind. Cas. 893 ; *Nagh v. Layton*, (1911) 2 Ch. 71.

23. [R. S. C. O. 31, r. 29.] This Order shall apply to minor plaintiffs and defendants, and to the next friends and guardians for the suit of person under disability.

Order to apply to minors.

## ORDER XII.

### *Admissions.*

1. [R. S. C. O. 32, r. 1.] Any party to a suit may give notice, by his pleading, or otherwise in writing, that he admits the truth of the whole or any part of the case of any other party.

Notice of admission of case.

**Scope.**—Court is not bound by the admission made by the party on a pure question of law. 76 Ind. Cas. 255=A. I. R. 1923 Nag. 101=18 N. L. R. 200. Pleadings include a plaint and hence in construing admission therein, Court ought to look to the pleadings as a whole. A. I. R. 1924 Nag. 129=78 Ind. Cas. 542 ; see also 71 Ind. Cas. 270 ; 41 M. L. J. 525. An admission made for the purpose of one trial may not be binding on a new trial. *Dawson v. G. C. Rail Co.*, 88 L. J. K. B. 1177. Leave may be given to withdraw admission on terms. *Hollis v. Burton*, (1892) 3 Ch. 226.

2. [R. S. C. O. 32, r. 2 ; S. 128.] Either party may call upon the other party to admit any document, saving all just exceptions ; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs ; and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

3. [R. S. C. O. 32, r. 3.] A notice to admit documents shall be in Form No. 9 in Appendix C, with such variations as circumstances may require.

Form of notice.

4. [R. S. C. O. 32, r. 4.] Any party may, by notice in writing, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs : Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice : Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

Notice to admit facts.

5. [R. S. C. O. 32, r. 5.] A notice to admit facts shall be in Form No. 10 in Appendix C, and admissions of facts shall be in Form No. 11 in Appendix C, with such variations as circumstances may require.

Form of admissions.

6. [R. S. C. O. 32, r. 6.] Any party may, at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to,

Judgment on admissions.

without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just.

*N. B.*—For local amendments in Madras, Patna and Rangoon.—*Vide infra.*

**Scope.**—The power to give judgment on admission is discretionary. *Mellor v. Sidebottom*, 5 Ch. D. 342; *Re Wright*, (1895) 2 Ch. 747; 132 Ind. Cas. 796=8 O.W. N. 762=A. I. R. 1931 Oudh 321. No waiver is implied if party does not apply under this rule. *Tildesley v. Harper*, 7 Ch. D. 403. In order to bar a judgment on an admission it must be clear and unequivocal. *Chilton v. London Cor.*, 7 Ch. D. 735; *Hughes v. London*, 8 T. L. R. 81; A. I. R. 1927 Sind 25=97 Ind. Cas. 623; A. I. R. 1924 Cal. 1920=82 Ind. Cas. 348=27 C. W. N. 783; 51 Ind. Cas. 836=23 C. W. N. 1017; 145 Ind. Cas. 705=34 P. L. R. 854=A. I. R. 1933 Lah. 403. The Court is not bound to pass a judgment upon an admission. A. I. R. 1929 Lah. 569=21 Lah. L. J. 207=116 Ind. Cas. 330; A. I. R. 1924 Cal. 190=82 Ind. Cas. 348=17 C. W. N. 283; A. I. R. 1924 Rang. 144=1 Rang. 580=77 Ind. Cas. 382. This rule applies to admission of facts and not purely of law. A. I. R. 1929 Lah. 569=11 Lah. L. J. 207=116 Ind. Cas. 330. Plaintiff is entitled to the decree in the strength of defendant's admissions and even in his absence the suit should not be dismissed. A. I. R. 1929 Lah. 830=31 P. L. R. 441=122 Ind. Cas. 465. The object of the rule is to get a speedy judgment. The rule is wide enough to afford a relief not only in cases of admission made in the pleadings but also made otherwise. A. I. R. 1926 Sind 119=20 S. L. R. 216=92 Ind. Cas. 562. Under O. XII, rule 6, admission holds good even in respect of a portion and the party is entitled to judgment thereon to the extent of the admission at the discretion of the Court. 45 C. 138=22 C. W. N. 204=28 C. L. J. 498=44 Ind. Cas. 233.

**Appeal.**—*Vide* 23 C. W. N. 1017=54 Ind. Cas. 836.

7. [R. S. C. O. 32, r. 7.] An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or acts, shall be sufficient evidence of such admissions, if evidence thereof is required.

8. [R. S. C. O. 32, r. 8.] Notice to produce documents shall be in Form No. 12 in Appendix C, with such variations as circumstances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served.

9. [R. S. C. O. 32, r. 9.] If a notice to admit or produce specified documents which are not necessary, the costs occasioned thereby shall be borne by the party giving such notice.

### ORDER XIII.

#### *Production, Impounding and Return of Documents.*

1. [Ss. 138, 140.] (1) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced: Provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs.

*N. B.*—For local amendments in Oudh, Patna and Rangoon.—*Vide infra.*

**Scope.**—This rule has been enacted with the object of preventing fraud by the late production of suspicious documents. It cannot therefore be so construed as to shut

out formal evidence beyond suspicion such as certified copies of public documents like records of Government, 22 B. 173; see also 23 W. R. 29. The object of this rule is not to penalize parties for not producing documents in time. Main object of Order XIII, rule 1, is to prevent parties from manufacturing evidence during trial to meet unexpected exigencies. Unless there is good ground to believe that the document produced has been manufactured then Court exercises its discretion wrongly in rejecting a document on the ground of delay. A. I. R. 1928 Pat. 537=110 Ind. Cas. 821; see also A. I. R. 1928 Mad. 516=51 M. 472=27 L. W. 520=55 M. L. J. 34=110 Ind. Cas. 16; A. I. R. 1928 Pat. 794=114 Ind. Cas. 194. This rule does not bar the Court from allowing at its discretion documents produced after first hearing. A.I.R. 1928 Pat. 209=9 P.L.T. 317=106 Ind. Cas. 272; see also 45 C. 878=35 M.L.J. 422=16 A. L. J. 800=28 C. L. J. 409=23 C. W. N. 50=20 Bom. L. R. 1022=45 I. A. 73 (P.C.)=47 Ind. Cas. 513; 13 Ind. Cas. 678=15 C. L. J. 621. In the absence of good cause shown from non-production there is no discretion to receive evidence at a later stage. A. I. R. 1924 Pat. 517=2 P. L. R. 1 Civ.=78 Ind. Cas. 489; see also A. I. R. 1923 Oudh 59=25 O. C. 286=70 Ind. Cas. 278; A. I. R. 1926 Mad. 345=23 L. W. 69=(1926) M. W. N. 156=93 Ind. Cas. 16. Trial Court's discretion in allowing documents under Order XIII, rule 2, after the date of first hearing is final and not subject to revision or appeal. A. I. R. 1926 Mad. 317=23 L. W. 69=93 Ind. Cas. 16; A. I. R. 1926 Cal. 1=42 C. L. J. 280=93 Ind. Cas. 385.

First hearing means day on which case is actually gone into and not day to which it is adjourned. It is enough if documents are filed before the former date. 50 Ind. Cas. 296. First hearing means the day on which issues are framed. A.I.R. 1926 Mad. 347=23 L.W. 69=(1926) M.W.N. 156=93 Ind. Cas. 16. All relevant evidence should be admitted at any stage of the proceeding giving due weight to the circumstances under which it is produced and giving the other party fair opportunity of meeting it. A. I. R. 1927 Nag. 269=10 N. L. J. 129. Documents mentioned in the list must be produced at first hearing. A. I. R. 1922 Pat. 569=4 P. L. T. 322=77 Ind. Cas. 848. Unsuspicious documents filed at a late stage should not be rejected. A. I. R. 1924 Pat. 208=72 Ind. Cas. 397. Where *zemindari* papers on loose sheets are filed a year after settlement of issues, they should not be admitted. 135 Ind. Cas. 290=10 Pat. 388=13 P. L. T. 331=A. I. R. 1931 Pat. 275; see also 133 Ind. Cas. 371=34 M. L. W. 528=1931 M. W. N. 310=A. I. R. 1931 Mad. 512. Proper discretion in rejecting the document should not be interfered in appeal. 34 P. L. R. 736=A. I. R. 1931 Lah. 892. Evidence sought to be produced at an abnormally late stage which could have been produced at proper time should be excluded as being vexatious. A. I. R. 1928 Nag. 223=109 Ind. Cas. 195. Production of document can also be ordered under s. 165 of the Evidence Act. A. I. R. 1923 Oudh 59=25 O. C. 286=70 Ind. Cas. 278. Inadmissibility of the document must be pleaded at the first hearing. A. I. R. 1928 Lah. 428=10 Lah. L. J. 370=109 Ind. Cas. 728.

## 2. [S. 139.] No documentary evidence in the possession or power of any

party which should have been but has not been produced in accordance with the requirements of rule 1 shall be received at any subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof; and the Court receiving any such evidence shall record the reasons for so doing.

*N. B.*—For local amendments in Oudh, Patna and Rangoon.—*Vide infra*.

**Scope.**—Late production of document should be discouraged. 104 Ind. Cas. 104=13 P. L. T. 545=A. I. R. 1932 Pat. 332. Document not produced in time cannot be received. A. I. R. 1923 Oudh 59=25 O. C. 286=70 Ind. Cas. 278. This rule is not applicable to documents which a party seeks to produce through witnesses in whose possession they are. (1930) M. W. N. 511. This rule is applicable to private documents as well as to documents about the genuineness of which there can be no doubt. But production at late stage by itself is insufficient for rejecting document. A. I. R. 1930 Pat. 603=129 Ind. Cas. 82; see also A. I. R. 1929 Pat. 324=10 P.L.T. 356=120 Ind. Cas. 291; A. I. R. 1929 P. C. 99=(1929) A. L. J. 246=49 C. L. J. 327=33 C. W. N. 463=56 M. L. J. 562=29 L. W. 674=10 P. L. T. 301=31 Bom. L. R. 731=56 I.A. 119=56C. 1003 (P.C.)=114 Ind.Cas. 561. This rule is framed to prevent fraud by late production of suspicious documents. The Court may, if it is satisfied

as to genuineness of document, admit it. A. I. R. 1928 Rang. 196=6 Rang. 337=111 Ind. Cas. 472 ; see also A.I.R. 1929 P. C. 99=(1929) A. L. J. 246=49 C. L. J. 327=33 C. W. N. 493=56 C. 1003 (P.C.)=114 Ind. Cas. 561. It is incomplete discretion of Court to admit the documents although filed late, A. I. R. 1927 Pat. 117=8 P. L. T. 255=98 Ind. Cas. 968. It is in the discretion of the Court to admit documents not produced in evidence in first appeal at the re-hearing obtained on a review. A. I. R. 1928 Cal. 416=108 Ind. Cas. 246. Discretion of trial Court receiving documentary evidence at late stage must not be lightly interfered with by appellate Court. A. I. R. 1928 Pat. 555=7 Pat. 589=110 Ind. Cas. 536. Once where document produced at late stage was refused to be admitted by trial Court, neither the lower appellate Court nor the High Court would interfere with the discretion of the trial Court. A. I. R. 1933 Rang. 174. When the Judge waives production of documents at the earliest opportunity, it is illogical for the Judge to refuse permission to produce the books at a later stage. 152 Ind. Cas. 655=15 P. L. T 461=A. I. R. 1934 Pat. 526.

**3. [S 140.]** The Court may at any stage of the suit reject any document which it considers irrelevant or otherwise inadmissible, recording the grounds of such rejection.

**Scope.**—Where documents were put on record but not admitted or endorsed under rule 4 as result of judicial determination, the Court can reject them under this rule, on the ground of insufficiency of stamp. 143 Ind. Cas. 534=34 P. L. R. 417=A. I. R. 1933 Lah. 271 ; see also 16 Ind. Cas 834 ; 1929 Mad. 522. This rule is subject to s. 36 of the Stamp Act. A. I. R. 1937 Mad. 431.

**4. [S. 141.]** (1) Subject to the provisions of the next following sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely :—

- (a) the number and title of the suit,
  - (b) the name of the person producing the document,
  - (c) the date on which it was produced, and
  - (d) a statement of its having been so admitted ;
- and the endorsement shall be signed or initialled by the Judge.

(2) Where a document so admitted is an entry in a book, account or record, and a copy thereof has been substituted for the original under the next following rule, the particulars aforesaid shall be endorsed on the copy and the endorsement thereon shall be signed or initialled by the Judge.

**N. B.**—For local amendments in Oudh and Rangoon.—*Vide infra.*

**Scope.**—Judge should endorse statement with his own hand that a document is passed or admitted by the person against whom it is used and a document not so endorsed will not be read or allowed to be used in evidence. 38 A. 627=31 M. L. J. 607=14 A. L. J. 1248=19 O. C. 192=18 Bom. L. R. 1037=21 C. W. N. 130=25 C. L. J. 363=10 Bur. L. T. 140=43 I. A. 12 (P. C.)=36 Ind. Cas. 104 ; 43 Ind. Cas. 525 ; 79 Ind. Cas. 74=A. I. R. 1924 Lah. 548=5 Lah. 227. The provisions of this rule must be complied with strictly. Endorsement should bear name of person tendering the document in evidence and the date of such tender. Documents do not *ipso facto* become evidence in the case without any formal proof merely by stamping them with date of filing. A. I. R. 1927 Lah. 115=8 Lah. 1=28 P. L. R. 455=105 Ind. Cas. 721 ; see also A. I. R. 1928 Lah. 142=9 Lah. 4=29 P. L. R. 331. Documents not endorsed as admitted by trial Court cannot be read or allowed to be used as evidence in the case. 27 P. L. R. 544=8 Lah. L. J. 492=96 Ind. Cas. 993. Where the trial Court omits to comply with requirements of Order XIII, rules 4 and 5 and it is not clear what documents are admitted in evidence and what taken into consideration to come to decision the case should be remanded for proper trial although there is no objection to the procedure in grounds of appeal. A. I. R. 1928 Lah. 142=9 Lah. 4=29 P. L. R. 331=110 Ind. Cas. 832. It does not amount initialing by the Judge where a third person places his initials by rubber-stamp. A. I. R. 1929 Mad. 522=56 M. L. J. 633=29 L. W. 633=120 Ind. Cas. 879. A document endorsed without considering

its admissibility cannot be deemed to be admitted in evidence, and can be rejected inspite of such endorsement. A. I. R. 1929 Mad. 522=56 M. L. J. 633=29 L. W. 633=120 Ind. Cas. 879. Where a document is produced in Court and is initialled by the Judge, it should be made clear by him whether he is admitting it in evidence or only making it for identification. 1936 A. M. L. J. 22. Non-compliance with the provision of this rule does not make it inadmissible in evidence. 161 Ind. Cas. 164. Where document was produced behind the back of opponent on a day not set down for hearing the case and Court was induced to endorse requirements of Order XIII, r. 4 on it on that they, the opponent can call for further proof of document. A. I. R. 1927 Lah. 679=9 Lah. L. J. 347=104 Ind. Cas. 146; see also A. I. R. 1928 Lah. 432=6 Lah. 224=30 P. L. R. 154. Where document duly proved was received and endorsed by Commissioner appointed to take evidence and the Court received the same without endorsement party not objecting,—the document becomes part of record and is evidence. A. I. R. 1929 Rang. 211=7 Rang. 164=118 Ind. Cas. 122. The act of Judge sending for records of case at instance of party and keeping documents with him does not amount to their admission as evidence, the documents must be endorsed as prescribed by Order XIII, r. 4. 31 P. L. R. 250. Where documents produced by party are referred to in arguments and made use of in judgment, the mere fact that they are not marked as exhibits is mere irregularity. A. I. R. 1933 Sind 379. The practice of putting seal on documents immediately after production and thereby exhibiting them is not proper. 132 Ind. Cas. 481=13 Lah. 132=32 P. L. R. 482=A. I. R. 1931 Lah. 546. Where document is admitted in evidence, the admission cannot be questioned at any stage of same suit on ground of insufficiency of stamp. Court admitting document cannot review its own order of admission. A. I. R. 1933 All. 821.

**5. [S. 141A.]** (1) Save in so far as is otherwise provided by the Bankers' Books Evidence Act, 1891,\* where a document

Endorsements on copies of admitted entries in books, accounts and records,

admitted in evidence in the suit is an entry in a letter-book or a shop book or other account in current use, the party on whose behalf the book or account is produced may furnish a copy of the entry.

(2) Where such a document is an entry in a public record produced from a public office or by a public officer, or an entry in a book or account belonging to a person other than a party on whose behalf the book or account is produced, the Court may require a copy of the entry to be furnished—

(a) where the record, book or account is produced on behalf of a party, then by that party, or

(b) where the record, book or account is produced in obedience to an order of the Court acting of its own motion, then by either or any party.

(3) Where a copy of an entry is furnished under the foregoing provisions of this rule, the Court shall, after causing the copy to be examined, compared and certified in manner mentioned in rule 17 or Order VII, mark the entry and cause the book, account or record in which it occurs to be returned to the person producing it.

**Scope.**—A copy or extract from an entry in an account book, filed under rules 5 and 7, does not require to be stamped. 4 Bom. L. R. 223=26 B. 522.

**6. [S. 142.]** Where a document relied on as evidence by either party is

Endorsements on documents rejected as inadmissible in evidence.

considered by the Court to be inadmissible in evidence, there shall be endorsed thereon the particulars mentioned in clauses (a), (b) and (c) of rule 4, sub-rule (1), together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge.

*N. B.*—For local amendments in Rangoon.—*Vide infra.*

7. [S. 142A.] (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

Recording of admitted and return of rejected documents.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them.

*N. B.*—For local amendments in Madras and Rangoon.—*Vide infra*.

**Notes.**—This rule shows that the documents must be either placed on the record or return to the person producing it. There is no alternative. It is highly desirable and even necessary for the ends of justice, that a disputed document should be placed on the record and should not be returned to the person producing it. A. I. R. 1936 Oudh 298=1936 O. W. N. 619=162 Ind. Cas. 527.

8. [S. 143.] Notwithstanding anything contained in rule 5 or rule 7 of this Order or in rule 17 of Order VII, the Court may, if it sees sufficient cause, direct any document or book produced before it in any suit to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as the Court thinks fit.

9. [S. 144.] (1) Any person, whether a party to the suit or not, desirous of receiving back any document produced by him in the suit and placed on the record shall, unless the document is impounded under rule 8, be entitled to receive back the same,—

Return of admitted documents.

(a) where the suit is one in which an appeal is not allowed, when the suit has been disposed of ;

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been preferred or, if an appeal has been preferred, when the appeal has been disposed of :

Provided that a document may be returned at any time earlier than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original if required to do so :

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a receipt shall be given by the person receiving it.

*N. B.*—For local amendments in Bombay, C. P., Lahore, Madras and Patna.—*Vide infra*.

**Scope.**—Proceedings for return of documents are ministerial and there cannot arise question making compulsory the taking of evidence on oath. 24 C. L. J. 202=26 C. W. N. 660=71 Ind. Cas. 666.

10. [S. 137.] (1) The Court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records or from any other Court, the record of any other suit or proceeding, and inspect the same.

Court may send for papers from its own records or from other Courts.

(2) Every application made under this rule shall (unless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant cannot without unreasonable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law of evidence would be inadmissible in this suit.

*N. B.*—For local amendments in Allahabad and Rangoon.—*Vide infra*.

**Scoope.**—Order XIII, rule 10, only gives authority to Court to send for records of another case for inspection. It does not make the whole record evidence in the case. A. I. R. 1929 Lah. 78=111 Ind. Cas. 361. Mere summoning by Court of record containing documents relied on by party will not absolve that party from placing the document by formal admission or proof upon record of trial for which it is required as evidence. 131 Ind. Cas. 374=31 P. L. R. 926=A. I. R. 1931 Lah. 119. If it is necessary to produce the original for technical proof an application must be made in strict accordance with rule 10, Order XIII, specifying the documents required. Unless affidavit satisfies the Court that copies of the documents cannot be produced without unreasonable delay or expense or that the production of the original is necessary application for summoning record should be rejected. A. I. R. 1931 Lah. 119=31 P. L. R. 926=12 Lah. L. J. 290=131 Ind. Cas. 374. The provisions of this rule must be strictly complied with. A. W. N. 1894, 3. The Court need only send for the papers specifically mentioned in an application under s. 138. W. R. 1864, 272.

The Court should send for documents filed in another Court. 6 W. R. 79. Omission to send for the document is no ground for setting aside the decision of the lower Court if the party is not prejudiced thereby. 10 C. L. J. 27. This rule is intended to arm the Court with a power of initiation in getting at the truth. But the act of sending for a document under section 165, Evidence Act, or for a record under Order XIII, rule 10, does not *ipso facto* make such document or record evidence in the case. If the Court finds in the document or record so sent for relevant evidence, or a guide to relevant evidence, to be found somewhere else, proceedings must be adopted, if such evidence may be properly admitted at that stage, to have it brought into the trial according to the provisions of law. 18 Ind. Cas. 857=9 N. L. R. 11. Where a Court summarily rejects application under this section a case may be remanded by the higher Court. 43 Ind. Cas. 57; see also 11 C. W. N. 112.

11. [S. 145.] The provisions herein contained as to documents shall, so far as may be, apply to all other material objects producible as evidence.  
Provisions as to documents applied to material objects.

*N. B.*—For insertion of additional rules in Allahabad.—*Vide infra*.

#### ORDER XIV.

##### *Settlements of Issues and Determination of Suit on Issues of Law or on Issues agreed upon.*

1. [S. 146.] (1) Issues arise when material proposition of fact or law is affirmed by the one party and denied by the other.  
Framing of issues.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds : (a) issues of fact, (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

**Scope.**—Where issues are drafted by counsel, and merely signed by Judge knowing nothing of the case are worse than useless. A. I. R. 1930 Mad. 78=57 M. L. J. 609=30 L. W. 914=123 Ind. Cas. 15. Framing of issues on question not disputed in pleadings is not justified. (1919) Pat. 393=51 Ind. Cas. 981. Where there is no averment in plaint and no denial in pleading, no issues arise and there is no error in not framing an issue not arising on pleadings. 2 Lah. L. J. 188=68 Ind. Cas. 106; 53 Ind. Cas. 975; 47 Ind. Cas. 589. Proper issues arising from pleadings must be framed, party cannot be expected to produce evidence respecting points not covered by the issues. 60 Ind. Cas. 751. Court must frame proper issues on questions purely of law. 35 M. L. J. 372=47 Ind. Cas. 589. Unless the issues are framed carefully to cover only the points of difference between the parties and to cover each point it is difficult to decide case properly. A. I. R. 1924 Nag. 156=78 Ind. Cas. 1015. The Court should not raise facing points not raised by the parties themselves but should limit themselves to the dispute between them. A. I. R. 1923 All. 167=77 Ind. Cas. 913. Courts are not bound to raise an issue which the plaintiff himself never put forward. Where the parties appear to have known what the question between them was, the defect in the form of issues is immaterial. A. I. R. 1921 Sind 159=16 S. L. R. 207=83 Ind. Cas. 350. Burden of proof is fixed when issues are framed and cannot be transferred from side to side. A. I. R. 1933 Rang. 174. Where the parties have adduced evidence on a question and discussed it before the Court which decides it as if there was an issue about it, the decree need not be set aside on appeal merely on the ground that no such issue was framed. A. I. R. 1926 Bom. 384=28 Bom. L. R. 743=96 Ind. Cas. 827. Under Order 14, rule 1, issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other. Such affirmation or denial must be contained in the pleadings as defined in Order 6, rule 1. Where there is no written statement the only issues would be that arising out of the plaint which allegations are put in issue when not admitted. A. I. R. 1936 Nag. 177. The Court while striking issue regarding limitation should first ascertain what article the parties consider to be applicable to the suit as framed. If the application of a particular article raises a question of fact, an issue should be struck on those facts; and if the facts are not in dispute, it may be possible to decide the question on purely legal arguments in the initial stages of the case without putting the parties to the expense of the trial. A. I. R. 1935 Lah. 982.

**Clause (5).**—The words "first hearing of the suit" in Order 13, rule 1, are obviously different from the words "the first hearing of the suit" under Order 14, rule 1, clause 5, because parties have not to produce their documents till issues are framed. "First hearing" would clearly extend at least up to the period of the "first hearing" of the suit referred to in Order 13, rule 1. Hence it cannot be said that the powers conferred by Order 14, rule 1(5) only extend to the first discussion of issues and not to any subsequent ones which intervene between 'the first hearing of the suit' as meant by Order 14, rule 1, clause 5 and the first hearing as meant by Order 13, rule (1). A. I. R. 1935 Mad. 261.

2. [S. 146, sixth para.] Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issue of law have been determined.

**N. B.**—For local amendment in Madras.—*Vide infra*.

**Scope.**—This rule gives Court power, where issues of fact and of law arise in same suit, to postpone settlement of issues of fact until after issues of law have been determined, if Court is of opinion that case or any part of it may be disposed of on issue of law at first. There is no such power to separate issues of fact. A plaintiff is entitled to a trial of the issues of fact which he raised and the Court has no authority to refuse to try these issues if the suit is properly framed. A. I. R. 1925 Pat. 674=7 P. L. T. 82=1925 Pat. 294=89 Ind. Cas. 814; see also A. I. R. 1927 Pat. 467=6 P. L. T. 729=2 P. L. R. 303=85 Ind. Cas. 29. Where number of issues are framed, and Court tries some of them first postponing the trial of others, order is not proper. A. I. R. 1921 Pat. 323=2 P. L. T. 154=60 Ind. Cas. 528 (20 C. L. J. 426 foll). Non-inclusion of all the issues in the preliminary trial does not render the



order for hearing on certain preliminary issues perverse or such as is likely to cause injury, when those issues would any how be actually tried. The Court can post a case for trial on preliminary issues of law even though the issue of law and fact had been settled long before. A. I. R. 1922 Mad. 321=15 M. L. W. 667=1922 M. W. N. 521=68 Ind. Cas. 167 ; see also A. I. R. 1923 Bom. 249=25 Bom. L. R. 164=47 B. 509=72 Ind. Cas. 266. As regards the meaning of preliminary issue, *vide* 72 Ind. Cas. 409=4 P. L. T. 202=1 P. L. R. 332=72 Ind. Cas. 409. Trial of some issues may however be postponed, although preliminary issues of fact cannot be framed. 137 Ind. Cas. 362=34 Bom. L. R. 6=57 B. 224=A. I. R. 1932 Bom. 128. As a general rule subordinate Court ought not to dismiss action on preliminary issue. 136 Ind. Cas. 497=33 Bom. L. R. 1291=A. I. R. 1932 Bom. 1. Order in which issues are to be tried is to be decided by trial Court and the High Court will not interfere in revision. 1933 A. L. J. 784=A. I. R. 1933 All. 749. Where there are issues of law and fact it is obligatory in Court to consider whether case can be disposed of on legal issue alone. 1933 A. L. J. 707=A. I. R. 1933 All. 753. Where application is made after date fixed for first hearing for trial of some of the issues, as issues of law without taking evidence, this rule or Order 15, rule 3, has no application. 145 Ind. Cas. 446=57 C. L. J. 127=A. I. R. 1933 Cal. 559. Where once jurisdiction is vested in a Court, it is not taken away afterwards although it is found that the portion of the property being situated within the local limits of the Court which gave it jurisdiction does not belong to the plaintiff as alleged in the plaint unless the inclusion of that portion is not a *bona fide* one. The trial of an issue as to whether the portion belongs to the plaintiff as alleged as a preliminary point is quite unnecessary and is not warranted by law. Such preliminary point does not raise a question of only and therefore this rule does not apply. 124 Ind. Cas. 703=A. I. R. 1930 Nag. 189=26 N. L. R. 103. In deciding the question as to whether the Court should grant or refuse a prayer to try a preliminary issue on a point of law, some harmony is to be observed between the general principle that it is undesirable to try cases piece-meal and the specific and wholesome provisions of Order 14, rule 2, which is for the purpose of preventing the injustice of a party being able to force his opponent to go at great length into evidence when the single decision on a point of law might render the investigation of the facts unnecessary. A. I. R. 1936 Pat. 250 ; see also 18 N. L. J. 339. Rule 2 is mandatory, the only thing left open to the Court is to form and express an opinion of whether the case can be disposed of on the issue of law, but the opinion even if expressed must be expressed upon some reasonable materials. A. I. R. 1936 Pat. 250.

**8. [S. 147.]** The Court may frame the  
Materials from which issues issues from all or any of the following  
may be framed. materials :—

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties ;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit ;

(c) the contents of documents produced by either party.

**Scope.**—Court should settle the issues on pleadings and after hearing the pleaders. 51 Ind. Cas. 1007. Issues can be framed from other materials than the pleadings as contained in the plaint. 3 U. P. L. R. (P. R.) 94 ; see also A. I. R. 1925 Cal. 1157=87 Ind. Cas. 575. Court has first to frame necessary issue but the parties are entitled to be heard. A. I. R. 1925 Mad. 169=78 Ind. Cas. 1.

**4. [S. 148.]** Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in the suit, it may adjourn the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

Court may examine witnesses or documents before framing issues.

5. [S. 149.] (1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may, also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

**Scope.**—Trial Judge is competent to frame a special issue after taking evidence and hearing arguments. A. I. R. 1922 Pat. 514=2 Pat. 52=4 Pat. L. T. 239=63 Ind. Cas. 383. The Court in its discretion can amend or alter an issue at any time before the passing of the decree. 1928 M. W. N. 836=113 Ind. Cas. 313; see also A. I. R. 1930 Nag. 225=27 N. L. R. 75=124 Ind. Cas. 609; 91 Ind. Cas. 426=A. I. R. 1926 Bom. 33=27 Bom. L. R. 1318; A. I. R. 1930 Cal. 534=57 C. 39=127 Ind. Cas. 777; 137 Ind. Cas. 274=1932 M. W. N. 494=35 M. L. W. 279=62 M. L. J. 154=A. I. R. 1932 Mad. 583. In case of definite pleadings and a definite issue on those pleadings the finding must be confined to matters raised in the issue. A. I. R. 1928 Nag. 179=107 Ind. Cas. 514. Although a Court has power under Order XIV. r. 5 of the Code to add any issue before judgment is pronounced, yet in exercising that power it ought not to allow a new plea to be put forward and add an issue shortly before pronouncing judgment. 10 Ind. Cas. 230.

6. [S. 150.] Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

**Scope.**—In an ordinary suit, the duty of settling the issues between the parties for trial is placed upon the Court. This rule simply enables the parties themselves, by mutual agreement to settle the issues that are to be tried, but this rule does not place the Court on a higher footing as to finality in respect of proceedings held for the trial of these issues. A. W. N. 1886, 233.

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

7. [S. 151.] Where the Court is satisfied, after making such inquiry as it deems proper,—

(a) that the agreement was duly executed by the parties,

(b) that they have a substantial interest in the decision of such question as aforesaid, and

(c) that the same is fit to be tried and decided, it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court;

and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and upon the judgment so pronounced a decree shall follow.

## ORDER XV.

*Disposal of the Suit at the first Hearing.*

1. [S. 152.] Where at the first hearing of a suit it appears that the parties are not at issue on any question of law or of fact, the Court may at once pronounce judgment.

*N. B.*—For local amendment in Madras—*Vide infra*.

2. [S. 153.] Where there are more defendants than one, and any one of the defendants is not at issue with the plaintiff on any question of law or of fact, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants.

*N. B.*—For local amendment in Madras—*Vide infra*.

3. [S. 154.] (1) Where the parties are at issue on some question of law or of fact, and issues have been framed by the Court as hereinbefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the issues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit :

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

- (2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the suit, and shall fix a day for the production of such further evidence, or for such further argument as the case requires.

**Scope.**—Application of Order XV, r. 3(1), is not confined to first hearing. A. I. R. 1922 Mad. 321=15 L. W. 667=(1922) M. W. N. 521=68 Ind. Cas. 267. Court has power at its discretion to try issues of law first. A. I. R. 1921 Pat. 467=6 P. L. T. 729=2 Pat. L. R. 393 Civ.=85 Ind. Cas. 29. Court cannot shut out evidence on issue involving question of arbitrator's jurisdiction. A. I. R. 1926 Lah. 125=7 Lah. 42=7 Lah. L. J. 611=27 P. L. R. 287=92 Ind. Cas. 712. In appealable case the Court should so far as may be practicable, renounce its opinion on all the important points. A. I. R. 1930 Cal. 787=53 C. L. J. 91=58 C. 474=34 C. W. N. 1129. When application is made after date fixed for first hearing for trial of some of the issues as issues of law without taking evidence, Order 14, rule 2 or Order 15, rule 3, has no application. 145 Ind. Cas. 446=57 C. L. J. 1127=A. I. R. 1933 Cal. 559. When the issues are framed and the plaintiff and defendants are ready and willing to proceed the sitting Judge has power, under this rule to proceed to the hearing and final disposal of the case. 1 Ind. Jur. O. S. 14. It is not competent for the Court to act under this rule and dispose of the case at the first hearing, when the plaintiff's pleader has appeared and objected to the adoption of such procedure. 16 M. 198.

4. [S. 155.] Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

**Scope.**—A suit, in which further evidence is required, must be adjourned by the Court under this rule (although it has been posted for final disposal), unless it is satisfied that the plaintiff had, without sufficient cause, failed to produce his evidence. 7 W. R. 84 ; see also 1 N. W. P. 147 ; A. W. N. 1887, 105. The great object of

the C. P. Code in fixing a day for hearing of a case is that the parties may be confronted together. 15 W. R. 150. But where conditional order of adjournment for production of evidence is made in suit fixed for final disposal and the condition is not fulfilled, Court cannot dismiss the suit for want of prosecution. If it is so dismissed, an appeal lies from the order which amounts to a decree. A. I. R. 1929 All. 543=117 Ind. Cas. 105.

## ORDER XVI.

### *Summoning and Attendance of Witnesses.*

1. [S. 159.] At any time after the suit is instituted, the parties may obtain, on application to the Court or, to such officer as it appoints in this behalf, summonses to persons whose attendance is required, either to give evidence or to produce documents.

*N. B.*—For local amendments, in Allahabad, Bombay, Lahore, Patna, Rangoon Sind, Oudh, and Peshawar.—*Vide infra.*

**Scope.**—A Court is not given discretion under this rule to refuse an application for issue of summonses to witnesses. 13 C. P. L. R. 152; 5 N. L. R. 181; 132 Ind. Cas. 579=32 P. L. R. 34=A. I. R. 1931 Lah. 135. But the Court has inherent power under s. 151, to prevent abuse of its process, and refuse to issue summonses; where it is convinced that a vexatious desire to obstruct the course of justice is the governing motive of the party applying for summonses. 5 N. L. R. 181. Court must in all cases issue summonses on application by either party at any time after institution of suit. A. I. R. 1931 Lah. 135=32 P. L. R. 34; see also A. I. R. 1927 Lah. 281=9 Lah. L. J. 154=28 P. L. R. 173=108 Ind. Cas. 541; 60 Ind. Cas. 656; 63 Ind. Cas. 736; A. I. R. 1924 Lah. 617=75 Ind. Cas. 866. The Court cannot refuse an application for summonses. Filing of application at a late stage is no ground for refusing it though the Court may when the case is heard, refuse to adjourn the hearing. A. I. R. 1926 Cal. 364=87 Ind. Cas. 355; see also A. I. R. 1923 Nag. 58=68 Ind. Cas. 272; A. I. R. 1925 Lah. 67=79 Ind. Cas. 143; A. I. R. 1924 Pat. 36=4 P. L. T. 545=89 Ind. Cas. 1028; A. I. R. 1925 Lah. 572=26 P. L. R. 181=86 Ind. Cas. 1012; A. I. R. 1929 All. 449=51 A. 341=113 Ind. Cas. 266; A. I. R. 1931 Lah. 135=32 P. L. R. 34; A. I. R. 1929 Cal. 459=49 C. L. J. 546=122 Ind. Cas. 552; A. I. R. 1929 Pat. 622=122 Ind. Cas. 536; 114 Ind. Cas. 439; A. I. R. 1926 Pat. 545=7 P. L. T. 775=96 Ind. Cas. 448=17 Lah. 775.

Where the plaintiff applies for summonses to witnesses eleven days prior to the date fixed for hearing and the Court dismisses the application, the dismissal is wrong. A. I. R. 1925 Bom. 368=27 Bom. L. R. 471=87 Ind. Cas. 702. When Court refuses to summon witnesses and decides the suit on evidence of parties, if the refusal has injuriously affected the decision of the case, the decision can be set aside in appeal. A. I. R. 1929 Pat. 622=122 Ind. Cas. 535. Where certain witnesses are absent on the date of hearing owing to non-service of summonses upon them without fault of a party the Court ought to issue fresh summonses. A. I. R. 1926 Lah. 26=26 P. L. R. 630=90 Ind. Cas. 1030. Non-service of summons is not sufficient to constitute fraud, but the non-service taken together with other circumstances may constitute fraud. A. I. R. 1926 Cal. 1=42 C. L. J. 280=93 Ind. Cas. 385. So long as the application for issue of summonses is made after the institution of the suit and before its final disposal the Court is bound to issue summons except where the application is not made *bona fide*, and in such a case the Court acts in the exercise of its inherent power to prevent the abuse of its own process. A. I. R. 1924 Cal. 971=39 C. L. J. 598=84 Ind. Cas. 9. A witness can produce at the hearing documents which are not referred to in the summons and these documents are admissible in evidence on behalf of the party calling the witnesses. A. I. R. 1925 Cal. 1149=88 Ind. Cas. 498.

2. [S. 160.] (1) The party applying for a summons shall, before the summons is granted and within a period to be fixed, pay into Court such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend and for one day's attendance.

(2) In determining the amount payable under this rule, the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case.

(3) Where the Court is subordinate to a High Court, regard shall be had in fixing the scale of such expenses, to any rules made in that behalf.

*N. B.*—For local amendments in Allahabad, Bombay, Burma, Calcutta, C. P. Lahore, Patna and Rangoon.—*Vide infra.*

**Scope**—Government servants and persons in Municipality or private service, cited as witnesses in civil suits, cannot claim as part of their expenses the payment of the salary which they would earn in their ordinary employment for the time which they spend in attending Court. 38 C. L. J. 149=76 Ind. Cas. 353. A pleader was merely called to give evidence as to what had occurred in a previous suit in which he has been engaged as a pleader: *Held*, that no special fees could be paid to ordinary witnesses. A. I. R. 1922 Bom. 116=46 B. 89=23 Bom. L. R. 898=64 Ind. Cas. 78.

**Tender of expenses to witness.** 3. [S. 161.] The sum so paid into Court shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

*N. B.*—For local amendments in Bombay, Calcutta, C. P., Lahore and Patna,—*Vide infra.*

4. [S. 162] (1) Where it appears to the Court or to such officer as it appoints in this behalf that the sum paid into Court is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and, in case of default in payment, may order such sum to be levied by attachment and sale of the movable property of the party obtaining the summons; or the Court may discharge the person summoned, without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

(2) Where it is necessary to detain the person summoned for a longer period than one day, the Court may, from time to time, order the party at whose instance he was summoned to pay into Court such sum as is sufficient to defray the expenses of his detention for such further period, and, in default of such deposit being made, may order such sum to be levied by attachment and sale of the movable property of such party; or the Court may discharge the person summoned without requiring him to give evidence; or may both order such levy and discharge such person as aforesaid.

*N. B.*—For local amendments and insertion of additional rules in Calcutta, C. P., Lahore, Madras and Rangoon.—*Vide infra.*

**Scope.**—In default in payment of the expenses of a witness, Court can order the same to be levied by attachment and the sale of only the movable property of the party obtaining the summons and the immovable property of the debtor cannot be put up to sale. A. I. R. 1921 Cal. 430=26 C. W. N. 877=70 Ind. Cas. 123.

5. [S. 163.] Every summons for the attendance of a person to give evidence or to produce a document shall specify the time and place at which he is required to attend, and also whether his attendance is required for the purpose of giving evidence or to produce a document, or for both purposes; and any particular document, which

the person summoned is called on to produce, shall be described in the summons with reasonable accuracy.

6. [S. 164.] Any person may be summoned to produce a document, without being summoned to give evidence ; and any person summoned merely to produce a document shall be deemed to have complied with the summons if he causes such document to be produced instead of attending personally to produce the same.

Power to require persons present in Court to give evidence or to produce document. 7. [S. 165.] Any person present in Court may be required by the Court to give evidence or to produce any document then and there in his possession or power.

*N. B.*—For insertion of rule 7 A. in Calcutta.—*Vide infra.*

8. [S. 166.] Every summons under this Order shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in order V as to proof of service shall apply in the case of all summonses served under this rule.

*N. B.*—For local amendments in Allahabad, Calcutta, Oudh, Patna and Rangoon.—*Vide infra.*

9. [S. 167.] Service shall in all cases be made a sufficient time before the time specified in the summons for the attendance of the person summoned, to allow him a reasonable time for preparation and for travelling to the place at which his attendance is required.

*N. B.*—For local amendment in Rangoon.—*Vide infra.*

10. [S. 168.] (1) Where a person to whom a summons has been issued either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the Court shall, if the certificate of the serving-officer has not been verified by affidavit, and may, if it has been so verified, examine the serving-officer on oath, or cause him to be so examined by another Court touching the service or non-service of the summons.

(2) Where the Court sees reasons to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein ; and a copy of such proclamation shall be affixed on the outer-door or other conspicuous part of the house in which he ordinarily resides.

(3) In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12 :

Provided that no Court of Small Causes shall make an order for the attachment of immovable property.

**Scope.**—The Court can issue proclamation only on being satisfied that the evidence of the witness or the production of the document is material and that he has failed without lawful excuse to attend or produce the document. A. I. R. 1929 All. 850 = (1929) A. L. J. 1216 = 123 Ind. Cas. 97 ; 13 W. R. 416 A Court, after issue of a warrant for arrest of a witness, for failure to produce a document, has no power to order an attachment of his property. 29 M. L. T. 95 = 61 Ind. Cas.

967. In the absence of an application by a party the Court is not bound to compel attendance of a witness 57 Ind. Cas. 311. Issue of a proclamation or order of attachment of property is not condition precedent to the imposition of a fine on defaulting witness. A. I. R. 1925 Mad. 1247=48 M. 941=49 M. L. J. 438=22 L. W. 332=(1925) M. W. N. 767=90 Ind. Cas. 991. Court cannot issue warrants without complying with the terms of Order XVI, r. 10. 39 Ind. Cas. 592=18 P. W. R. 1917. Section 32 vests the Court with power to impose fine for failing to comply with a summons. The jurisdiction to impose fine can only be exercised in the manner laid down by Order XVI. A. I. R. 1929 A. 850=(1929) A. L. J. 1216=121 Ind. Cas. 97. Certain witnesses of the plaintiff who are duly served did not appear on the date of hearing and after the Court offered to issue warrants for them, the Court declined to put in process-fee for warrants but offered to bring the witnesses with him on the next date : *Held* that the Court was not legally in error in not allowing the plaintiff to bring his own witnesses. 101 Ind. Cas. 257=A. I. R. 1927 Lah. 424. No order under Order XVI, rule 12, can be made until procedure in r. 10 is followed where the rule applies. 20 C. W. N. 511=33 Ind. Cas. 968.

If witness appears, attachment may be withdrawn. 11. [S. 169.] Where, at any time after the attachment of his property, such person appears and satisfies the Court,—

(a) that he did not, without lawful excuse, fail to comply with the summons or intentionally avoid service, and,

(b) where he has failed to attend at the time and place named in a proclamation issued under the last preceding rule, that he had no notice of such proclamation in time to attend,

the Court shall direct that the property be released from attachment, and shall make such order as to the costs of the attachment as it thinks fit.

**Scope.**—Order XVI, rule 11, applies to a case where the person satisfied the Court that he has not intentionally failed to carry out the order. Rule 12 applies to the alternative case of a person failing to satisfy the Court whether he appears in order to offer an explanation or not. In either case whether the facts are those contemplated in rule 11 or rule 12 the Court can only proceed after attachment of the property. 31 C. L. J. 363=55 Ind. Cas. 425.

12. [S. 170.] The Court may, where such person does not appear, or appears

Procedure if witness fails to appear. but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10 to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any :

Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.

**Scope.**—An order under rule 12 can only be made if proclamation has been issued or a warrant for arrest issued or an order for attachment is passed. If neither of these conditions are satisfied the Court has no jurisdiction to impose under rule 12. A. I. R. 1929 All. 850=(1929) A. L. J. 1216=123 Ind. Cas. 97. Attachment of property is not condition precedent to the imposition of fine under rule 12. A. I. R. 1928 Lah. 979=115 Ind. Cas. 472. Such person, is the person referred to throughout the two preceding rules and cannot be fined unless and until there has been proclamation which he has disobeyed. A. I. R. 1928 Lah. 473=110 Ind. Cas. 853. Such person means a person to whom a summons has been issued and who fails to attend under rule 10 (1). A. I. R. 1925 Mad. 1247=48 M. 941=22 L. W. 332=(1925) M. W. N. 767=49 M. L. T. 438=90 Ind. Cas. 991. If a person refuses to accept a summons but attends the Court on date fixed, r. 10 does not apply. A. I. R. 1928 Lah. 469=29 Cr. L. J. 704=110 Ind. Cas. 336. Where the witness appears, but cannot produce the document, it is illegal to impose a fine upon him. 29 M. L. T. 95=61 Ind. Cas. 967. Until after attachment of property a fine cannot be imposed for non-production of document in obedience

to summons. 57 Ind. Cas. 302 ; but see also A. I. R. 1928 Lah. 469=29 Cr. L. J. 704=110 Ind. Cas. 336. After an order for attachment of property if the person concerned fails to attend in obedience to a warrant, the Court may impose upon him a fine under Order XVI, r. 12. 31 C. L. J. 363=55 Ind. Cas. 425. The law punishes a refractory witness who without lawful excuse fails to comply with the summons. Where a witness missing a train sends a telegram, no fine should be imposed. A. I. R. 1928 Lah. 979=115 Ind. Cas. 472. Where the witness or a party is present and the Court directs him by word of mouth to produce a document, and there cannot be the slightest mistake as to the witness or the party having received information of such direction and fails to produce the document he can be fined without going through the cumbrous procedure of issuing summons, followed by proclamation and attachment of his property to make him understand Court's discretion. A. I. R. 1929 All. 99=116 Ind. Cas. 483.

13. [New.] The provisions with regard to the attachment and sale of property in the execution of a decree shall, so far as they are applicable, be deemed to apply to any attachment and sale under this Order as if the person whose property is so attached was a judgment-debtor.

14. [S. 171.] Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person other than a party to the suit and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce, such document.

**Scope.**—Where lawyer present all through, he should not be examined as Court witness. 145 Ind. Cas. 1=14 P. L. T. (Sup) 1=12 Pat. 359=A. I. R. 1922 Pat. 306. Where a Court desires to have the evidence of a particular witness, whom the defendant does not desire to call, the Court is not justified in insisting on the defendant paying the amount necessary to secure the attendance of the witness, and, on defendant's refusal to do so, declining to issue summons for the attendance of his witnesses. In such a case the correct procedure is to take action under Order 16, rule 14. 159 P. L. R. 1911 ; see also L. B. R. (1893-1900), 658 ; 2 Ind. Cas. 347=5 L. B. R. 1.

15. [S. 172.] Subject as last aforesaid, whoever is summoned to appear and give evidence in a suit shall attend at the time and place named in the summons for that purpose, and whoever is summoned to produce a document shall either attend to produce it, or cause it to be produced, at such time and place.

**Scope.**—Where a summons was issued calling upon the chief officer of the Karachi Municipality to cause the production of certain entries from his records, which were not specified, and where the chief officer caused a search to be made and claimed a search-fee : *Held*, that there was no provision, under which the search-fee could be claimed from the party who caused the summons to be issued. A witness is bound to produce documents duly specified when summoned by Court, but he is not bound to produce documents not duly specified. He might apply for the specification of the documents. 5 S. L. R. 44.

16. [S. 173.] (1) A person so summoned and attending shall, unless the Court otherwise directs, attend at each hearing until the suit has been disposed of.

(2) On the application of either party and the payment through the Court of all necessary expenses (if any), the Court may require any person so summoned and attending to furnish security to attend at the next or any other hearing or until the suit is disposed of and, in default of his furnishing such security, may order him to be detained in the civil prison.



**Notes.**—Where a Court adjourns a case but omits to bind the witness to be present at the adjourned date, and the witness does not, in consequence, attend the Court should give the parties a reasonable opportunity to summon their witness and to enforce his attendance and to grant another adjournment for the purpose. 16 Ind. Cas 986.

17. [Ss. 174-175.] The provisions of rules 10 to 13 shall, so far as they are applicable, be deemed to apply to any person who having attended in compliance with a summons departs, without lawful excuse, in contravention of rule 16.

**Scope.**—Where a witness went out of British India in order to avoid having to give evidence, the contempt is gross and for such a contempt proceedings under Order XVI, rule 17, C. P. Code, are inadequate and a Judge of the High Court is neither bound nor ought, in such a case to proceed under s. 480 or s. 476, Cr. P. Code. A. I. R. 1926 Rang. 188=4 Rang. 257=27 Cr. L. J. 1241.

18. [Ss. 174, fifth para.] Where any person arrested under a warrant is brought before the Court in custody and cannot, owing to the absence of the parties or any of them, give the evidence or produce the document which he has been summoned to give or produce, the Court may require him to give reasonable bail or other security for his appearance at such time and place as it thinks fit, and, on such bail or security being given may release him, and, in default of his giving such bail or security, may order him to be detained in the civil prison.

19. [S. 176.] No one shall be ordered to attend in person to give evidence unless he resides—  
No witness to be ordered to attend in person unless resident within certain limits.

(a) within the local limits of the Court's ordinary original jurisdiction, or  
(b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court-house.

**Scope.**—This rule does not apply to a case where a party to a suit desires to give evidence of his own motion in his own favour. A. I. R. 1922 Cal. 42=35 C. L. J. 78=68 Ind. Cas. 9; see also A. I. R. 1924 Mad. 541=46 M. L. J. 131=34 M. L. T. 314=(1924) M. W. N. 191=78 Ind. Cas. 407. This rule has no application to the persons summoned under s. 36 of the Presidency Towns Insolvency Act. A. I. R. 1923 Cal. 427=27 C. W. N. 370=82 Ind. Cas. 76. Ordinarily in the case of a witness not under the control of the party asking for the commission, and residing beyond 200 miles a commission should issue as a matter of right, unless the Court is satisfied that a party is merely abusing its authority to issue process. A. I. R. 1923 Mad. 321=44 M. L. J. 202=17 L. W. 251=(1923) M. W. N. 157=46 M. 574=71 Ind. Cas. 530. Where a plaintiff is not residing within Court's jurisdiction nor within 200 miles from the Court-house, he cannot be compelled to appear in person as defendant's witness but should be examined on commission. 140 Ind. Cas. 716=28 N. L. R. 146=A. I. R. 1932 Nag. 135.

20. [S. 177.] Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

**Scope.**—Under the Code of Civil Procedure, a defendant who, *bona fide* and for a substantial reason requires the evidence of the plaintiff to be taken, ought not in ordinary circumstances to have a decree against him until that evidence has been

given. 24 W. R. 72. Where a document is produced but refused to be exhibited, the Court cannot dismiss the suit. 28 C. L. J. 24=46 Ind. Cas. 879.

21. [S. 178.] Where any party to a suit is required to give evidence or to produce a document, the provisions as to Rules as to witnesses to apply to parties summoned. witnesses shall apply to him so far as they are applicable.

*N. B.*—For local amendments and insertion of new rules in Allahabad and Calcutta.—*Vide infra*.

**Scope.**—It is one of the artifices of a weak and somewhat paltry kind of advocacy for each litigant to cause his opponent to be summoned as a witness with the design that each party shall be bound to produce the opponent so summoned as a witness, and this give the counsel for each litigant the opportunity of cross-examining his own client. It is a practice which all judicial tribunals ought to set themselves to render as abortive as it is objectionable. 1 Ind. Cas. 128=13 C. W. N. 320=5 M. L. T. 58=9 C. L. J. 172=13 C. W. N. 370=11 Bom. L. R. 196=31 A. 116=19 M. L. J. 186 (P.C.); see also 5 Ind. Cas. 249=14 C. W. N. 285=12 Bom. L. R. 244. This rule applies only to the case where a party to a suit has been called to give evidence by other party. The Court has no power under the C. P. Code to order the travelling expenses of a party who has given evidence in support of his own case. A. I. R. 1935 Mad. 244=68 M. L. J. 203=1935 M. W. N. 113=41 L. W. 244.

## ORDER XVII.

### *Adjournments.*

1. [S. 156.] (1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or to any of them, and may from time to time adjourn the hearing of the suit.

(2) In every such case the Court shall fix a day for the further hearing of the suit, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment :

Provided that when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded.

*N. B.*—For local amendments in Allahabad and Lahore.—*Vide infra*.

**Scope.**—The granting of adjournment is optional with the Court. 24 Ind. Cas. 206; see also 10 Ind. Cas. 748. Discretion of the trial Court should not ordinarily be interfered with in appeal. Appeal does not lie from an order granting or refusing adjournment. 45 Ind. Cas. 898. Adjournment ought to be given in cases where delay in service of summons is due to vacation. 85 Ind. Cas. 890. Granting of an adjournment is in the discretion of the trial Court and not in that of an Appellate Court and still less in that of a Court of second appeal. A. I. R. 1922 Nag. 81=66 Ind. Cas. 850. Adjournment cannot be granted unless due zeal and diligence is shown. A. I. R. 1923 Lah. 584=4 Lah. 258=5 Lah. L. J. 438=37 Ind. Cas. 523; 37 Ind. Cas. 266. Party cannot insist on adjournment as of right due to non-compliance with a provision of law. It is within the discretion of the Court. Court may grant an adjournment or else it may dismiss the suit. A. I. R. 1921 Pat. 1=5 Pat. L. J. 350=1 Pat. L. J. 666=57 Ind. Cas. 250. There is difference between the hearing of the suit and hearing of evidence. 27 C. L. J. 119=46 Ind. Cas. 246. Adjournment to allow to produce further evidence, cannot be granted after the parties had closed their evidence. 36 Ind. Cas. 76. In case of pending suits, the date of the adjourned hearing must be communicated to the parties or to their legal representatives or at least to such of them as were present at the adjournment of the suit. A. I. R. 1923 Nag. 20=20 A. L. J. 912=77 Ind. Cas. 91. Liberal construction should be put upon provisions of Order XVII. A. I. R. 1924 Nag. 298=79 Ind. Cas. 123. The grant

of postponement to a defendant is in the discretion of the Court and will be exercised upon considerations of the materials placed empowered by him to act on his behalf. But it is improper, for the Court to take action on letters written by third parties, and adjourn the suit indefinitely without hearing the plaintiff and behind his back. 15 Pat. 561=162 Ind. Cas. 568=17 Pat. L. T. 329=A. I. R. 1936 Pat. 472 (S.B.).

Adjournment should be applied for at the earliest possible opportunity. A. I. R. 1925 Nag. 236=83 Ind. Cas. 257. Where non-appearance of the witnesses was not due to the party's fault the party concerned should be granted another opportunity to prove his case. A. I. R. 1925 Oudh 304=84 Ind. Cas. 173; see also A. I. R. 1923 All. 218=45 A. 407=21 A. L. J. 348=67 Ind. Cas. 668=74 Ind. Cas. 571. Date of payment of process-fee must be fixed by Court before adjournment is granted. A. I. R. 1924 Nag. 298=79 Ind. Cas. 123. Where defendants are granted adjournment on condition of paying costs, the Court may strike off the defence and proceed *ex parte* if no costs are paid. A. I. R. 1925 All. 280=47 A. 538=23 A. L. J. 212=86 Ind. Cas. 862. But sufficient time should always be given for producing the money. A. I. R. 1925 Cal. 570=78 Ind. Cas. 125. That the Court can be kept otherwise busy is no ground for granting of an adjournment. A. I. R. 1924 Cal. 774=51 C. 70=40 C. L. J. 163=79 Ind. Cas. 745. The trial Court has discretion to allow a party to produce a witness for giving rebuttal evidence and to give adjournments for the purpose. A. I. R. 1926 Nag. 486=96 Ind. Cas. 1905. Propriety of order refusing adjournment can be questioned in appeal from *ex parte* decree. A. I. R. 1925 Pat. 534=7 P. L. T. 381=91 Ind. Cas. 167. In cases of adjournment the principle on which a Court should award costs is that it should order the payment of a sum commensurate with the costs, which in the opinion of the Court, the party ready to proceed, will have to incur owing to the adjournment. A. I. R. 1930 Oudh 171=4 Luck. 529=121 Ind. Cas. 894. When late in the day, the defendant applied for adjournment at a time when, even if the case had gone on the Court could not be proceeded very far with the defence case, the Court shall exercise its discretion in allowing an adjournment. A. I. R. 1929 Rang. 215=124 Ind. Cas. 880. The Court is not bound to intimate the absent party of the adjourned date. A. I. R. 1930 Mad. 113 (S.B.)=58 M. L. J. 10=31 L. W. 78=122 Ind. Cas. 449. Where on several occasions plaintiff was ready with his witnesses but the Court adjourned the suit for want of time the Court should grant adjournment of the plaintiff's prayer. A. I. R. 1926 Mad. 944=(1926) M. W. N. 624=24 L. W. 443=97 Ind. Cas. 895. Refusal to postpone the hearing for an hour or to give time to a party to appear is not proper. A. I. R. 1928 Nag. 165=11 N. L. J. 78=108 Ind. Cas. 879. Where the Court has fixed a case on a holiday, it should not be taken up on the next day. A. I. R. 1929 Pat. 609=10 P. L. T. 589=120 Ind. Cas. 334. Unless a party ordered to pay costs, does pay before date of next hearing, he would have no right to be heard. A. I. R. 1928 Mad. 786=111 Ind. Cas. 168. Even where the plaintiff is allowed to sue as a pauper, an order making payment of the costs of the adjournment a condition of allowing time for amendment of the plaint is not justified. A. I. R. 1928 Rang. 306=6 Rang. 561=114 Ind. Cas. 677. Adjournment cannot be granted because a compromise was suggested but fell through. A. I. R. 1928 Mad. 401=106 Ind. Cas. 375. Whether a plaintiff has sufficient cause for not producing his evidence on a due date is a question of fact, depending on the discretion of the Court concerned. A. I. R. 1927 Lah. 879=100 Ind. Cas. 301; see also A. I. R. 1929 Lah. 620=117 Ind. Cas. 89; A. I. R. 1928 Cal. 102=105 Ind. Cas. 851; 107 Ind. Cas. 578=A. I. R. 1928 All. 355; 140 Ind. Cas. 469=33 P. L. R. 770=13 Lah. 458=A. I. R. 1932 Lah. 591. Laches in paying process-fees may be ground for refusing adjournment but not for refusing process. 146 Ind. Cas. 334=A. I. R. 1933 Nag. 336=16 N. L. J. 208. Where witness has been served but is absent as wrong date is given in process, it is good ground for adjournment. 146 Ind. Cas. 334=16 N. L. J. 208=A. I. R. 1933 Nag. 336. Where defendant took steps to summon necessary and important witnesses but witnesses did not appear, adjournment should be given for production of such witnesses. 141 Ind. Cas. 379=34 P. L. R. 505=A. I. R. 1933 Lah. 176. Court has inherent power to dismiss execution application for default. 143 Ind. Cas. 1=37 M. L. W. 607=1933 M. W. N. 566=64 M. L. J. 664=56 Mad. 490=A. I. R. 1933 Mad. 418 (F. B.).

2. [S. 157.] Where, on any day to which the hearing of the suit is ad-

Procedure if parties fail to appear, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in

one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

*N. B.*—For local amendments in Allahabad and Oudh.—*Vide infra.*

**Soope.**—Order 17, rule 2, applies to a case where the date on which the decree is passed is one to which the hearing of the suit has been adjourned and a party fails to appear. It does not apply to a case where the suit comes up for disposal on the date which is the date for the first hearing. A. I. R. 1937 All. 347. Under rule 2 it is in the discretion of the Court to proceed in each case under Order IX and not obligatory. If a plaintiff is absent and had at earlier hearing made out a definite case the suit in such cases should not be adjourned and not dismissed for default which order would be improper. A. I. R. 1929 Pat. 248=120 Ind. Cas. 625. Rules 2 and 3 are mutually exclusive. Rule 2 gives the procedure to be followed in the absence of a party or parties. Rule 3 gives the procedure to be followed where the parties are present but fail to produce evidence. A. I. R. 1930 Nag. 152=127 Ind. Cas. 351; see also A. I. R. 1928 Pat. 167=7 Pat. 236=107 Ind. Cas. 824; A. I. R. 1929 All. 543=117 Ind. Cas. 105. Where the evidence is closed the Court should always try the case on merits and not dismiss it for default under rule 2. 128 Ind. Cas. 889=A. I. R. 1931 Bom. 111=32 Bom. L. R. 1430. Where an *ex parte* decree is passed under Order XVII, rule 2, the defendant can apply under Order IX, rule 13. A. I. R. 1930 Rang. 270=8 Rang. 168=125 Ind. Cas. 358. Where pleader appears and states that he has no instructions, and no witness was summoned for the day, the proper order is passed on dismissal under rule 2 and not under rule 3. 117 Ind. Cas. 73; A. I. R. 1928 Rang. 191=6 Rang. 323=114 Ind. Cas. 299; see also A. I. R. 1927 Rang. 46=56 Rang. 448=99 Ind. Cas. 717; see also 124 Ind. Cas. 402=Ind. Rul. (1930) All. 498; see also 1928 M. W. N. 162=27 L. W. 347=54 M. L. J. 351=108 Ind. Cas. 897; 111 Ind. Cas. 150=A. I. R. 1928 All. 760; A. I. R. 1926 Mad. 971=51 M. L. J. 209=1926 M. W. N. 616=97 Ind. Cas. 517; A. I. R. 1924 Bom. 139=25 Bom. L. R. 1222=82 Ind. Cas. 124. When a pleader is asked to admit the genuineness of certain documents then and there, he is entitled to consult his client, and the Court simply because the pleader wants a short adjournment to receive proper instructions, should not be burdened with costs. A. I. R. 1936 Lah. 705=38 P. L. R. 896. Where a case is adjourned and neither defendants nor their vakil having no instructions beyond applying for an adjournment appears on their behalf and a decree is passed, the decree is *ex parte* as the Code contemplates only a pleader duly instructed and able to answer all material questions. A. I. R. 1936 Mad. 625=70 M. L. J. 688=1936 M. W. N. 589=43 L. W. 738.

When on a date fixed for its own motion by the Court, the defendant on whom lay the burden of proof was absent, the Court decided the case on merits, it was held that the case should not have been tried on merits and the order must be held to be one under Order XVII, rule 2. A. I. R. 1929 Rang. 73=6 Rang. 766=115 Ind. Cas. 668. The last of party's appearance when he is represented by a pleader is whether he is in possession of necessary facts and if he is duly instructed and whether he follows these instructions. But where it appeared that upto same stage of the hearing at least, the pleader fully represented his client, it must be shown that he did or omitted to do something which negative the ordinary inference that he continued, as to represent his client, A. I. R. 1928 Mad. 831=110 Ind. Cas. 577; A. I. R. 1928 Mad. 831=110 Ind. Cas. 377. Where the suit was dismissed for non-payment of damages for omission to get summons served, the order lies under Order XVII, rule 2, and this could be re-admitted by the Court. A. I. R. 1927 All=464=100 Ind. Cas. 691. For the purpose of rule 2, defendant's absence cannot be treated as plaintiff's absence even when there is similarity of interests unless he is transferred as a plaintiff. A. I. R. 1925 Mad. 227=25 L. W. 57=38 M. L. T. 194=98 Ind. Cas. 501. Where after the evidence is closed, time is extended for argument and the party fails to appear the Court is not bound to act under s. 2 and may decide the case on merits. A. I. R. 1924 Lah. 545=5 Lah. 218=78 Ind. Cas. 453. There can be no dismissal of a suit after the decree is passed unless the decree is set aside on appeal, and the parties acquire rights and incur liabilities from the moment the decree is passed which are fixed till the varying or setting aside of the decree. A. I. R. 1924 P. C. 198=35 M. L. T. 143=47 M. L. J. 441=20 M. L. W. 491=51 I. A. 321=22 A. L. J. 990=26 Bom. L. R. 1129=40 C. L. J. 449=29 C. W. N. 391=81 Ind. Cas. 747. The suit cannot be dismissed for plaintiff's absence at whose instance it stood adjourned for the appointment of guardian of minor defendant. A. I. R. 1924 Pat. 714=5 P. L. T. 424=1924 Pat. 215=78 Ind. Cas. 224. The Court should proceed under Order XI.

r. 8, and not under Order XVII, r. 3, for plaintiff's non-appearance at the adjourned date before the hearing of the suit has commenced. A. I. R. 1923 Bom. 27=46 B. 1026=24 Bpm. L. R. 775=68 Ind. Cas. 513; see also 48 P. R. 1919=66 P. L. R. 1918=169 P. W. R. 1918=47 Ind. Cas. 596. The Court should enquire into the merits of an application for restoration and not impose on plaintiff's terms dictated by the defendant. A. I. R. 1924 Oudh 389=27 O. C. 103=11 O. L. J. 412=78 Ind. Cas. 157. Dismissal of a suit where plaintiff's pleader appeared only for securing the adjournment which was refused but was without further instructions, is one under rule 2, Order XVII, and not under rule 3. A. I. R. 1923 Pat 530=1 Pat. L. R. 281=74 Ind. Cas. 693; A. I. R. 1923 All. 153=20 A. L. J. 97=70 Ind. Cas. 942; 65 Ind. Cas. 775=2 A. L. J. 123; A. I. R. 1923 All. 551=21 A. L. J. 495=45 A. 618=75 Ind. Cas. 387; A. I. R. 1922 Pat. 485=69 Ind. Cas. 837=1 Pat. 188; but see also 73 Ind. Cas. 932=A. I. R. 1924 Mad. 43=18 L. W. 209=(1913) M. W. N. 802=73 Ind. Cas. 982. Refusal to direct the Receiver to provide funds to defend the action which resulted in the passing of an *ex parte* decree is a sufficient cause for defendant's non-appearance and restoration under Order IX, r. 13. A. I. R. 1922 Pat. 585=1 Pat. 188=69 Ind. Cas. 837.

Suit is liable to be dismissed if adjournment costs are not paid as directed. 90 P. W. R. 1916=158 P. L. R. 1916=35 Ind. Cas. 534. The order dismissing the suit for non-appearance of parties at an adjourned hearing is one under Order XVII, rule 2 and not under rule 3. 32 Ind. Cas. 714. Judicial discretion should be exercised under Order XVII, rule 2, before disposing of a case under Order IX, r. 8, and where *prima facie* case had been made out by the plaintiff. 31 Ind. Cas. 869. Where a suit has been dismissed owing to absence of both the pleader and the client, such an order of dismissal is one under Order XVII, rule 2 and no appeal lies therefrom. 32 Ind. Cas. 766. Adjournment hearing being refused, dismissal of a suit for failure to produce evidence is a decree and not an order. 45 Ind. Cas. 200; see also (1917) M. W. N. 565=33 M. L. J. 553=39 Ind. Cas. 948. An order of dismissal whether it be for want of evidence or not is an order under O. IX, unless the facts show that the decision was on merits. 4 P. L. J. 712=52 Ind. Cas. 290. If defendant and his advocate are absent on the date fixed for appointment of commissioner, Court should proceed under Order XVII, rule 2, and appoint Commissioner and not pass an *ex parte* decree. 42 Ind. Cas. 537. Where parties do not appear on the day fixed for consideration of the application for amendment of issues, suit cannot be dismissed but the application for amendment can be. A. I. R. 1921 Pat. 96=6 P. L. J. 331=2 P. L. T. 760=63 Ind. Cas. 746. Where the suit has been adjourned for finding out the whereabouts of the unserved defendant and on the adjourned date, defendant appears but the plaintiff does not, the suit must under Order IX, r. 8, be dismissed. 13 S. L. R. 149=53 Ind. Cas. 560. Where witnesses being absent, fresh adjournment was applied for but was refused and the suit was dismissed after recording defendant's evidence, it was held that the dismissal was under Order XVII, r. 2 and not under r. 3. A. I. R. 1922 Pat. 2=3 P. L. T. 64=6 Pat. L. J. 313=61 Ind. Cas. 897; A. I. R. 1934 Cal. 116. Where date is fixed for producing evidence but party is absent *ex parte* decree and not order under Order 17, rule 3, should be passed. 138 Ind. Cas. 200=33 P. L. R. 298=A. I. R. 1932 Lah. 477; see also 143 Ind. Cas. 355=A. I. R. 1933 Lah. 248. Where case is disposed of in absence of defendants after Court hours, application for restoration should be granted. 1933 A. L. J. 1298=A. I. R. 1933 All. 652. Where defendant is present and plaintiff's pleader applies for adjournment, the suit should be dismissed under rule 3, if the adjournment is refused. 144 Ind. Cas. 141=1933 A. L. J. 4=A. I. R. 1933 All. 41. Where pleader states that he has no instruction, the case does not come within explanation to rule 2. 1933 A. L. J. 1298=A. I. R. 1933 All. 652. Where plaintiff was directed to appear but instead of him, his vakil appeared on that date, it is no appearance by party. 137 Ind. Cas. 792=36 M. L. W. 422=1932 M. W. N. 423=A. I. R. 1932 Mad. 414.

**Distinction between rules 2 and 3.**—Rule 2 which finds a place in the Chapter of adjournments, provides that if on any day, to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX, or make such order as it thinks fit. The effect of this rule is to make rule 8 of Order IX applicable to adjourned hearing of the cases. (23 C. 738). Rule 3 then provides that, if any party to a suit, to whom time has been granted, fails to produce his evidence or to cause the attendance of his witnesses or to perform any other act necessary to the further progress of the suit for which time has been allowed, the

Court may notwithstanding such default, proceed to decide the case forthwith. It is obvious that the scope of rule 2 is quite distinct from that of rule 3. Rule 3 appears to contemplate a case in which the Court has materials before it to enable it to proceed to a decision of the suit. What rule 3 provides is, that the mere fact of a party making default in performance of what he was directed to do would not lead to the dismissal of the plaintiff's suit, if he was the party in default, or the decreeing of the claim against the defendants, if the defendant was the person who made the default; the words "notwithstanding such default" clearly imply that the Court is to proceed with the disposal of the suit in spite of the default, upon such materials as are before it. Rule 2, on the other hand speaks of the disposal of the suit, and undoubtedly includes cases in which there might not be any materials before the Court to enable it to pronounce a decision on the merits. It is clear that the contingency contemplated in rule 2 may happen in a case which falls within the letter of rule 3. It may well happen, for instance, that a plaintiff to whom time has been granted to produce evidence, not only fails to do so, but also fails to appear. In such a case, if there are no materials on the record, the appropriate procedure to follow would be that laid down in rule 2, but if there are materials on the record, the Court ought to proceed under rule 3. 34 C. 235 (237, 238); see also 41 C. 956=18 C.W.N. 775. The proper way of construing rule 3 is, that where no default occurring under rule 2, default occurs under rule 3, Court should proceed under the latter provision and dispose of a case on merits; but if the default consists in non-appearance, it is rule 2, which deals with such a case specifically that in terms applies. A. I. R. 1936 Mad. 625=70 M. L. J. 688=1936 M. W. N. 589=43 L. W. 738=1936 M. W. N. 589; see also A. I. R. 1936 All. 670=1936 A. L. J. 902. In order to attract the provisions of Order 17, r. 3 of the Civil Procedure Code, two conditions must co-exist. First, the application for adjournment must be at the instance of the party to suit applying for the production of evidence and secondly, there must be some materials on record on which the Court can proceed to pass judgment. When these two conditions are not satisfied, the proper course is to pass an order under rule 2 of Order 17. 39 C. W. N. 859; see also A. I. R. 1935 All. 210=1935 A. L. J. 209=156 Ind. Cas. 754; 30 N. L. R. 94=149 Ind. Cas. 512; 39 L. W. 353=1934 M. W. N. 40=A. I. R. 1934 Mad. 199; A. I. R. 1934 Lah. 56=34 P. L. R. 1027; but see A. I. R. 1934 Oudh 171=11 O. W. N. 393=148 Ind. Cas. 456; A. I. R. 1935 All. 210=1935 A. L. J. 290; A. I. R. 1930 Rang. 123. Order IX, rule 6, provides for hearing of the suit on the day fixed in the summons for the defendant's appearance, whereas Order XVII, rule 2, does for hearing of the suit at some later stage. In either case what is contemplated in these two rules is the procedure on the first day on which the hearing of suit, as distinguished from interlocutory proceedings takes place. Order XVII, rule 3, does not apply to a case of default in appearance but a case, in which a party who has appeared and has been given time to do some act in further prosecution of his case has failed to do so within the time allowed. In such a case the Court may proceed with the suit and the decision is not *ex parte*. A. I. R. 1922 Pat. 485=1 Pat. 188=69 Ind. Cas. 837; 57 Ind. Cas. 748. In default of appearance of the party, the proper order for the trial Court to pass is one under Order XVII, rule 2, and not rule 3. A. I. R. 1925 Bom. 328=27 Bom. L. R. 477=87 Ind. Cas. 710; see also A. I. R. 1925 Oudh. 433=2 O. W. N. 432=89 Ind. Cas. 418. The dismissal of a suit dismissed on having mistaken the date of hearing is under Order XVII, rule 2, and not r. 3. A. I. R. 1927 Rang. 46=4 Rang. 408=99 Ind. Cas. 717. Lower Appellate Court is competent to determine the question whether a decree was passed under Order XVII, rule 2 or under Order XVII, r. 3. A. I. R. 1928 Lah. 427=108 Ind. Cas. 61. Case of non-appearance falls under Order XVII, rule 2 and not under r. 3 and as such provisions of Order IX must be followed in such cases, there being no trial on merits. A. I. R. 1925 Oudh. 360=85 Ind. Cas. 528; see also A. I. R. 1925 All. 267=47 A. 140=85 Ind. Cas. 470. Provisions of Order XVII, r. 2, apply even where defendant takes time for producing evidence and absents himself. A. I. R. 1925 All. 267=47 A. 140=85 Ind. Cas. 470. Even if the defendant is absent on the date of hearing the Court ought to pass an *ex parte* decree and not a judgment on merits under Order XVII, rule 3. The words "make such order as it thinks fit" in rule 2 do not include an order under r. 3. A. I. R. 1925 All. 182=47 A. 181=22 A. L. J. 1041=85 Ind. Cas. 27. Order 2 cannot be distinguished from Order IX, which provides the procedure to be followed in cases falling under Order XVII, r. 2. Order XVII, r. 3, is quite different and the remedy of

the party in that case is by way of appeal. It applies where two elements namely, extension of time for producing evidence is granted and where there is material on record to decide the case on merits. A. I. R. 1925 Oudh 278=78 Ind. Cas. 340; see also A. I. R. 1934 All. 107; A. I. R. 1934 Oudh 171; A. I. R. 1934 Mad. 199; 29 N. L. R. 326=A. I. R. 1933 Nag. 234. Where both parties are absent on account of heavy rains, the order should be under rule 2. A. I. R. 1933 Nag. 370. Court can proceed under rule 3 if adjournment is given at instance of party and if there are materials on record. 37 C. W. N. 666=A. I. R. 1933 Cal. 412=144 Ind. Cas. 462; see also 32 Bom. L. R. 1430=A. I. R. 1931 Bom. 111; but see 142 Ind. Cas. 86=56 C. L. J. 12=A. I. R. 1933 Cal. 73.

**Appeal and Revision.**—Revision lies from a wrong decision that Order IX, rule 13, did not apply to a case under Order XVII, rule 2. A. I. R. 1925 All. 267=47 A. 140=85 Ind. Cas. 470. Where the Court acted wrongly in deciding the case on merits under Order 17, rule 3, the remedy lay by way of appeal. A. I. R. 1925 All. 252=84 Ind. Cas. 521. Pleader's unpreparedness to argue does not amount to non-appearance and the Court must proceed to decide the case on merits but a revision can lie on the ground that in dismissing an appeal the Court clearly acts illegally, and with material irregularity. A. I. R. 1925 Nag. 236=83 Ind. Cas. 257. The case cannot be dismissed after the decree is passed and an order under Order XVII, r. 2, would be without jurisdiction which can be rightly set aside in High Court. A. I. R. 1924 P. C. 158=35 M. L. T. 143=47 M. L. J. 441=20 M. L. W. 491=51 I. A. 321=22 A. L. J. 990=40 C. L. J. 339=29 C. W. N. 391=5 P. L. T. 623=81 Ind. Cas. 741.

**3. [S. 158.]** Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may notwithstanding such default, proceed to decide the suit forthwith.

*N. B.*—For local amendments in Allahabad and Oudh—*Vide infra*.

**Scope.**—This Rule is directed to a case where a party is definitely given time in order that he may take a certain step while it is necessary for him to take if he is to prosecute his case, and fails to take the step. A. I. R. 1928 Cal. 341=111 Ind. Cas. 430=47 C. L. J. 467. This rule applies only when a default is subsequently made by a party who himself had asked for adjournment. A. I. R. 1929 Rang. 73=6 Rang. 766=115 Ind. Cas. 668; A. I. R. 1928 Rang. 191. The word "default" in the rule includes any default amounting to non-prosecution of the appeal, by the plaintiff. A. I. R. 1931 Mad. 133=(1930) M. W. N. 1236=130 Ind. Cas. 657. Failure of a party to produce a stay order within the time which is not an act necessary to the further progress of the suit, cannot be ground for the dismissal of the suit for non-prosecution. A. I. R. 1928 Nag. 24=10 N. L. J. 177=105 Ind. Cas. 30. Words "notwithstanding such default" clearly imply that the Court is to proceed with the suit in spite of the default upon such materials as are before it. And if such materials fail to substantiate the claim, the suit will be dismissed for this reason and not for default. A. I. R. 1927 Mad. 109=51 M. L. J. 684=99 Ind. Cas. 32. "Forthwith" means on merits as gathered from facts available. 3 L. W. 1067=31 Ind. Cas. 307. Rule is an enabling and not a mandatory rule. 52 Ind. Cas. 292=150 P. R. 1919. Where no time was granted for production of evidence, r. 3 is not applicable. A. I. R. 1923 Lah. 281=69 Ind. Cas. 368. A case for default in appearance is not contemplated by Order XVII, rule 3, but a case where party is given time to do some act in further prosecution of case and fails to do it within that time. The suit may in such case be proceeded with but the decision is not *ex parte*. A. I. R. 1922 Pat. 485=1 Pat. 188=69 Ind. Cas. 837; see also A. I. R. 1921 Bom. 458=45 B. 1181=23 Bom. L. R. 511=64 Ind. Cas. 289; 41 A. 663=17 A. L. J. 849=51 Ind. Cas. 850; A. I. R. 1924 Mad. 43=18 L. W. 209=(1923) M. W. N. 802=73 Ind. Cas. 982; A. I. R. 1923 Oudh 18=9 O. L. J. 543=72 Ind. Cas. 394. Rule 3 applies only after suit has been instituted and only after it has been adjourned for evidence. 86 Ind. Cas. 491=A. I. R. 1925 Mad. 1045. The dismissal of a suit under Order XVII, rule 3, for failure to supply copies of entry in account books in certain specific language is illegal. A. I. R. 1925 Pat. 316=75 Ind. Cas. 1. Where vakil pleads on instruction and party is not prepared to go on, rule 2 applies. A. I. R. 1934 Mad. 199. Rule 3 applies only where party to whom time has been granted fails to perform any act necessary for the progress of suit.

A. I. R. 1933 All. 907 ; see also 29 N. L. R. 326=A. I. R. 1933 Nag. 234 ; 143 Ind. Cas. 307=1932 A. L. J. 1100=A. I. R. 1933 All. 118.

Where plaintiff was present on the day of hearing, Court is not justified in dismissing the suit under Order XVII, r. 3, on the ground that the plaintiff was absent on the day fixed for hearing for return of summons. Such an order is illegal. A. I. R. 1927 Lah. 484=102 Ind. Cas. 289 Order dismissing a suit on default after having refused adjournment is a decree and not an order from which an appeal lies. A. I. R. 1927 Rang. 148=5 Rang. 838=6 Bur. L. J. 77=101 Ind. Cas. 618. Failure of plaintiff to give evidence as a witness as ordered is ground for the dismissal of a suit and the Court must try the suit on merits. A. I. R. 1927 Lah. 388=100 Ind. Cas. 788. Order XVII, r. 3 of the Code does not apply to non-production of document which ought to be produced by plaintiff when plaint is presented. A. I. R. 1924 Lah. 608=76 Ind. Cas. 254. Rule 3 does not authorise summary dismissal where party has paid the process-fee and the Court and its officers are responsible for effecting service and an adjournment caused by non-attendance of witnesses, for want of service is an adjournment in the ordinary course and does not amount to time granted under Order XVII, r. 3. A. I. R. 1924 Lah. 404=71 Ind. Cas. 862 ; A. I. R. 1926 Lah. 27=89 Ind. Cas. 857. Plaintiff alone cannot be held responsible for failure to cause attendance of witnesses for not paying process-fee in time where process-server was negligent. This stringent provisions of Order XVII, r. 3, should not be applied to such a case. A. I. R. 1924 Lah. 272=69 Ind. Cas. 665. Where defendant wanting stay of suit is ordered to produce copy of certain document on date fixed and defendant fails to appear on that date an *ex parte* decree cannot be passed where no order is passed fixing date for trial and case should be heard on merits. 111 P. L. R. 1916=137 P. W. R. 1916=36 Ind. Cas. 32. Where in a suit a date was fixed for the appointment of a guardian of a minor defendant, and on plaintiff's failure to appear on that day the suit was dismissed : Held that the default of the plaintiff fell under Order XVII, r. 3 and not under Order IX, r. 8 of the C. P. Code. A. I. R. 1922 Pat. 252=6 P. L. J. 650=2 P. L. T. 572=63 Ind. Cas. 570. Where a pleader appears for a defendant who is absent and says there is no instruction and a decree is passed under Order XVII, r. 3, the decree is on merits and not an *ex parte* decree. A. I. R. 1922 All. 497=77 Ind. Cas. 527. Re-hearing cannot be claimed in any case in which a suit is decided under Order XVII, r. 3, even if Order XVII, r. 2, is mentioned by mistake instead of Order XVII, r. 3 in the judgment. The remedy is by way of appeal. A. I. R. 1925 Oudh 495=86 Ind. Cas. 356. There is no justification in dismissing suit for failure to amend plaint and pay adjournment costs, under Order IX, r. 8, nor can the dismissal come under Order XVII, r. 3, where there is no judgment on merits. A. I. R. 1926 Lah. 571=96 Ind. Cas. 312. After having allowed five days' time to the defendant to produce his witnesses, the Court was not justified in passing an *ex parte* decree without waiting for five days. A. I. R. 1930 Cal. 251=50 C. L. J. 549=126 Ind. Cas. 411. Where order apparently passed under Order XVII, r. 3 but really was under Order IX, r. 8, the lower Court was competent to hear the appeal from an order refusing to restore the suit. 27 A. L. J. 391=116 Ind. Cas. 752. Where an application for setting aside of an *ex parte* decree was allowed conditionally on payment of costs, and on default of payment the Court decided the suit on merits, it was held that the decision is a decree under Order XVII, r. 3 and not an order under Order IX, r. 6. A. I. R. 1930 Oudh 351=70 W. N. 582=127 Ind. Cas. 27. Adjournment having been refused, pleader withdrew from the suit and failed even to examine witness in attendance for which no valid reason was given, held the order of dismissal under Order XVII, r. 3, should be passed. A. I. R. 1929 All 432=(1929) A. L. J. 507=119 Ind. Cas. 569.

Rule 2 of Order XVII applies only when one of the parties or both parties are absent. Where both parties were present but the suit was dismissed for default, the fact that a formal order and not a decree was prepared by the Court, cannot be final of the question whether or not the decision of Court was one under rule 3 of Order XVII. A. I. R. 1927 All. 507=102 Ind. Cas. 273. In a revenue suit adjournment was granted on payment of costs which were not paid and the suit was decreed it was held that the case ought not to have been decided on merits from the evidence available and not arbitrarily. 14 R. D. 86. Court should not be too technical in the matter of adjournment and should not refuse it for a solitary failure to produce witnesses. A. I. R. 1926 Mad. 859=(1926) M. W. N.



434=96 Ind. Cas. 536 ; see also 93 Ind. Cas. 1024=A. I. R. 1926 Lah. 501. Where suit is dismissed for default on failure of party to produce evidence when party is present, the dismissal must be deemed to be an order under rule 3 and an appeal is competent. 95 Ind. Cas. 798.

**Appeal.**—Where a decree is wrongly passed on merits under Order XVII, rule 3, party aggrieved should appeal against decree itself and not treat it as *ex parte* and against order refusing to set it aside. 3 L. W. 524=33 Ind. Cas. 660. Order purporting to be passed under Order XVII, rule 3, cannot be treated as an *ex parte* decree and hence an application to set aside would not lie but an appeal does lie therefrom. A. I. R. 1927 Lah. 562=103 Ind. Cas. 192.

## ORDER XVIII.

### *Hearing of the Suit and Examination of Witnesses.*

1. [S. 179, Expl.] The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin.

**Scope.**—Where in a suit for restitution of conjugal rights by husband, the wife admitted marriage but pleaded coercion and non-consent, the defendant had the right to begin. 23 Ind. Cas. 242=7 Bur. L. T. 129. The general rule is that the party on whom the burden of proof lies should begin. *Taylor on Evidence* § 379. Generally a plaintiff has the right to begin in a civil case. 7 C. L. R. 274. In a claim for *mesne* profits by the successful appellant against the other party who had taken possession in execution of decree of trial Court the person claiming it in the position of a plaintiff and he should begin. A. I. R. 1925 Mad. 145=47 M. 800=48 M. L. J. 89=92 Ind. Cas. 792. If on the issue or issues of facts, the burden of proof is on the defendant, he has the right to begin. 40 C. W. N. 865.

2. [S. 179, first para, S. 180, first and second paras.] (1) On the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.

(2) The other party shall then state his case and produce his evidence (if any) and may then address the Court generally on the whole case.

(3) The party beginning may then reply generally on the whole case.

*N. B.*—For local amendments in Calcutta, Madras and Rangoon.—*Vide infra.*

**Scope.**—Day on which issues are framed is not meant by or included in "day fixed for hearing of suit." A. I. R. 1925 All. 98=82 Ind. Cas. 73. Party cannot introduce new pleadings without leave of Court, at the time of stating the case under O. XVIII, r. 2, but has only the right to state his case as already put forward. A. I. R. 1927 Lah. 615=103 Ind. Cas. 501. Where parties were not ready on day to which case was adjourned for argument, but was permitted to put in written argument and subsequently the Judge's predecessor came in and after local inspection delivered judgment : *Held* parties had sufficient opportunity to argue and judgment was not vitiated. A. I. R. 1924 Lah. 107=4 Lah. 364.

3. [S. 180, third para.] Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it, by way of answer to the evidence produced by the other party ; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning ; but the party beginning will then be entitled to reply generally on the whole case.

4. [S. 181.] The evidence of the witnesses in attendance shall be taken orally in open Court in the presence and under the personal direction and superintendence of the Judge.

Witnesses to be examined in open Court.

Scope.—Evidence in civil cases must be recorded by Judge himself. It is extremely undesirable to allow witnesses to be examined by some one else, and the procedure is gravely objectionable. Yet the procedure is only an error, defect or irregularity in the proceedings, and does not affect the merits of the case or the jurisdiction of the Court and is no ground for reversing the decision of the Judge. A. I. R. 1928 Pat. 438=10 P. L. T. 474=115 Ind. Cas. 237. A Court should in all cases exercise the powers, with which they are entrusted by law in the examination of witnesses if they are not properly examined. 10 W. R. 280. As regards the examination of *pardanashin lady*. Vide 15 C. 775 ; 1 B. L. R. 5.

5. [S. 182.] In cases which an appeal is allowed the evidence of each witness shall be taken down in writing, in the language of the Court, by or in the presence and under the personal direction and superintendence of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and, when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall if necessary, correct the same, and shall sign it.

N. B.—For local amendment in Rangoon.—*Vide infra*.

Scope.—Provisions of this section are not complied with where Judge dictates evidence to the typist and revises and signs the typed copy, but it amounts to a mere irregularity and not illegality. A. I. R. 1929 Cal. 78=55 C. 1084=113 Ind. Cas. 833. If there is only one record in cases where an appeal is allowed it should be made in writing by the Judge's own hand ; while if evidence is taken down by some other person though, in the presence and under the personal direction and superintendence of the Judge, the Judge also must make or cause to be made a memo as provided by rr. 8 and 14. A. I. R. 1929 Cal. 78=55 C. 1084=113 Ind. Cas. 833. Parties need not be examined on oath but Court can do so if necessary. Statements of witnesses are required to be read out to him for a double reason. Any mistake by deponent or by the writer may be rectified and secondly, a *locus penitential* is provided for a person who had made a false statement. Omission to read out deprives him of *locus penitential* and such omission renders conviction under s. 193, I. P. Code, illegal altogether. 12 P. R. Cr. 1917=18 Cr. L. J. 607=15 P. W. R. Cr. 1917=39 Ind. Cas. 847 ; A. I. R. 1924 Cal. 705=51 C. 236=25 Cr. L. J. 1027=81 Ind. Cas. 803. Rule is sufficiently complied with when read over by witness himself, depositions so read over prove themselves under s. 80, Evidence Act. 46 C. 895=23 C. W. N. 661=29 C. L. J. 533=50 Ind. Cas. 660. Small Cause Court Judge is not bound to read over to witnesses their depositions and therefore the depositions so recorded are admissible in evidence against those witnesses in prosecution for perjury. A. I. R. 1925 Nag. 412=26 Cr. L. J. 1350=89 Ind. Cas. 390. Non-compliance with provisions of Order XVIII, rules 5, and 6 do not render the deposition inadmissible in evidence at a subsequent trial of the deponent for perjury the provisions being directory only. A. I. R. 1923 Nag. 39=18 N. L. R. 192=23 Cr. L. J. 500=68 Ind. Cas. 36. Secondary evidence to prove witnesses' statement not read over to them as required by Order XVIII, r. 5, C. P. Code is inadmissible under s. 91, Evidence Act. 10 P. W. R. 1920 Cr.=21 Cr. L. J. 830=58 Ind. Cas. 830. Reading out deposition to a witness in adjoining room and at a distance of 30 feet from Judge's seat is sufficient compliance and deposition is admissible in evidence in prosecution under s. 193, I. P. Code. Irregularity in reading out affects its weight and not its admissibility. (1918) M. W. N. 239=7 L. W. 435=24 M. L. T. 242=45 Ind. Cas. 507=19 Cr. L. J. 603 ; see also 45 C. 825=27 C. L. J. 377=22 C. W. N. 825=45 Ind. Cas. 258. Where a Commissioner of partition and Special Referee is appointed by the original side of the High Court, the provisions of Order 18, rules 5 and 6 apply although Order 49, rule 3, makes those provisions inapplicable to the proceedings conducted by the Court itself. Therefore the deposition of a witness should be read over and explained to him after it is completed and, if necessary, translated into a language which he understands. A. I. R. 1934 Cal. 737=38 C. W. N. 624=61 C. 488.

6. [S. 183.] Where the evidence is taken down in a language different from that in which it is given, and the witness does not understand the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given.

*N. B.*—For local amendment in Rangoon.—*Vide infra*.

**Scope.**—Where evidence by witness given in *urdu* and recorded by Judge in English and not interpreted to him, this rule is not applicable. 132 Ind. Cas. 270=8 O. W. N. 685=A. I. R. 1931 Oudh 385.

7. [New.] Evidence taken down under section 138 shall be in the form prescribed by rule 5 and shall be read over and signed and, as occasion may require, interpreted and corrected as if it were evidence taken down under that rule.

8. [S. 184.] Where the evidence is not taken down in writing by the Judge, he shall be bound, as the examination of each witness proceeds, to make a memorandum of the substance of what each witness deposes and such memorandum shall be written and signed by the Judge and shall form part of the record.

*N. B.*—For local amendment in Rangoon.—*Vide infra*.

9. [S. 185.] Where English is not the language of the Court, but all the parties to the suit who appear in person, and the pleaders of such as appear by pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down.

10. [S. 186.] The Court may, of its own motion or on the application of any party or his pleader, take down any particular question and answer, or any objection to any question, if there appears to be any special reason for so doing.

11. [S. 187.] Where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

**Notes.**—Court may rule out as irrelevant any particular answer after it is given but cannot say beforehand that all evidence yet to be taken is going to be irrelevant and cannot refuse to record it on the ground that it believed it to be biased. A. I. R. 1923 Nag. 58=68 Ind. Cas. 272.

12. [S. 188.] The Court may record such remarks as it thinks material respecting the demeanour of any witness while under examination.

**Notes.**—Court's power as regards demeanour, *vide* A. I. R. 1922 All. 107=44 A. 401=66 Ind. Cas. 1005.

13. [S. 189.] In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge and shall form part of the record.

**Notes.**—Memorandum of substance of evidence and not short extract should be taken. 9 C. W. N. 418; 9 C. W. N. 420; 30 Ind. Cas. 634=2 L. W. 803=(1915) M. W. N. 768.

14. [S. 190.] (1) Where the Judge is unable to make a memorandum as required by this Order, he shall cause the reason of such inability to be recorded, and shall cause the memorandum to be made in writing from his dictation in open Court.

(2) Every memorandum so made shall form part of the record.

*N. B.*—For local amendment in Rangoon—*Vide infra*.

15. [S. 191.] (1) Where a Judge is prevented by death, transfer or other cause from concluding the trial of a suit, his successor may deal with any evidence or memorandum taken down or made under the foregoing rules as if such evidence or memorandum had been taken down or made by him or under his direction under the said rules and may proceed with the suit from the stage at which his predecessor left it.

(2) The provisions of sub-rule (1) shall, so far as they are applicable, be deemed to apply to evidence taken in a suit transferred under section 24.

*Scope.*—This rule provides the case of a Judge dying or leaving the Court before the conclusion of a suit and gives his successor powers to deal with the evidence as if he himself has taken it down. 110 P. R. 1886 ; 17 Ind. Cas. 278=1912 M. W. N. 599. But it does not empower the Judge to decide a case on evidence taken by his predecessor without giving notice to the parties and giving them an opportunity of being heard before judgment is pronounced. 110 P. R. 1886 ; see also 91 P. R. 1904 ; 39 Ind. Cas. 651=19 P. R. 1917. Where after remand a new plaintiff is substituted, a suit should be tried *de novo*. 9 Ind. Cas. 254=9 M. L. T. 324 ; see also 39 Ind. Cas. 651=14 P. R. 1917. This rule is applicable where a case has been transferred after being heard in part. 25 M. 595.

16. [S. 192.] (1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.

(2) Where such evidence is not taken forthwith and in the presence of the parties such notice as the Court thinks sufficient of the day fixed for the examination, shall be given to the parties.

(3) The evidence so taken shall be read over to the witness, and if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.

*Notes.*—*Vide* 5 B. L. R. O. C. 252.

17. [S. 193.] The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.

18. [*New.*] Court may at any stage of a suit inspect any property or thing concerning which any question may arise.

*N. B.*—For insertion of new rule in Allahabad.—*Vide infra*.

*Notes.*—Finding based absolutely on local inspection should be allowed in special cases only. A. I. R. 1929 All. 116=113 Ind. Cas. 762 ; see also A. I. R. 1923 Lah. 546=73 Ind. Cas. 616. Local inspection when foundation for judgment must be recorded. 65 Ind. Cas. 601. Propriety of inspection, which need not be recorded is only to test correctness of evidence. Judgment cannot be based on it. A. I. R. 1925 Cal. 170=85 Ind. Cas. 292. Court's inference in plot examination without statement of facts seen is not sufficient and cannot be substituted for oral

evidence. A. I. R. 1929 All. 116=113 Ind. Cas. 865. Propriety of inspection is to ascertain truth about evidence given. A. I. R. 1930 Lah. 152=124 Ind. Cas. 346. Decision following Court's observation is wrong for want of cross-examination. A. I. R. 1930 Nag. 40=119 Ind. Cas. 695. Failure to record result of local inspection does not vitiate judgment. 58 Ind. Cas. 909. Re-enactment of scene in local inspection regarding accident is not desirable. A. I. R. 1929 Cal. 774=1929 Cr. Cas. 518=123 Ind. Cas. 745. Party cannot complain if Court issues statements made by witness during inspection to confirm his independent impression provided procedure is followed with party's consent. 4 Pat. L. W. 189=(1918) Pat. 131=44 Ind. Cas. 262. Judges are entitled to make local inspection to understand evidence. But they cannot base findings of facts solely upon its result. 131 Ind. Cas 139=A. I. R. 1931 Mad. 531.

## ORDER XIX.

### *Affidavits.*

1. [S. 194.] Any Court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing on such conditions as the Court thinks reasonable :

Provided that where it appears to the Court that either party *bona fide* desires the production of a witness for cross-examination, and that such witness can be produced an order shall not be made authorising the evidence of such witness to be given by affidavit.

Scope.—Document may be proved by *ex parte* affidavit only in special case. A. I. R. 1926 All. 166=23 A. L. J. 961=89 Ind. Cas. 22. Affidavits amount to evidence only under Order XIX. 1921 Mad. 381=30 M. L. T. (H. C.) 26=63 Ind. Cas. 258. Affidavit signed by Court and sworn before it need not be sealed. A. I. R. 1927 Lah. 376=2 Pat. L. R. 300=101 Ind. Cas. 615. Regarding signature of counsel no difference lies between affidavits and pleadings. A. I. R. 1928 Mad. 175=54 M. L. J. 65=(1927) M. W. N. 885=27 L. W. 237=51 M. 242=107 Ind. Cas. 804. There is no need of affidavits where counsel is asked to make statement relating to facts of case. A. I. R. 1928 Mad. 690=(1928) M. W. N. 634=110 Ind. Cas. 837. Fact that Court admitted affidavit of plaintiff's next friend to prove pronote and not calling him as witness is not illegal if there is no contention as to facts. 142 Ind. Cas. 386=A. I. R. 1933 Mad. 164. By virtue of r. 24 of the Non-Domiciled Divorce Rules under the Colonial Divorce Jurisdiction Act, 1926, and by virtue of sections 51 and 45 of the Indian Divorce Act and Order XIX, rule 1 of C. P. Code, the Court may at any time, for efficient reason, allow a petitioner and her witness in divorce proceedings, to give evidence on affidavit provided always that they will have to be present for cross-examination if and when required. 38 C. W. N. 969.

2. [S. 195.] (1) Upon any application evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.

3. [S. 196.] (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted : provided that the grounds thereof are stated.

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall unless the Court otherwise directs, be paid by the party filing the same.

N. B.—For local amendments in Allahabad and Rangoon.—*Vide infra.*

Scope.—Matters of knowledge and information should be distinguished. A. I. R. 1924 Pat. 312=5 Pat. L. T. 124=73 Ind. Cas. 721. Affidavit as to points in argument

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sworn by deponent without understanding language is valueless. 41 Ind. Cas. 1. Where matters are alleged to be true to information, but source of information is not disclosed, Court will not take notice of such matters. 35 C. W. N. 1297=136 Ind. Cas. 901=A. I. R. 1932 Cal. 255; see also 22 C. W. N. 700=46 Ind. Cas. 335. Affidavit not complying with requirements of Order 19, r. 3, is still declaration. 144 Ind. Cas. 157=A. I. R. 1933 Pat. 513. Where one proposes to rely on an affidavit, the provisions of Order XIX, r. 3, must be strictly followed, and every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity to enable the Court to judge whether it would be safe to act on the deponent's belief. 37 C. 259=6 Ind. Cas. 666; see also 38 C. W. N. 771=61 C. 814.

## ORDER XX.

### *Judgment and Decree.*

1. [S. 198.] The Court, after the case has been heard, shall pronounce judgment when pronounced. judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their pleaders.

*N.B.*—For local amendment in Madras.—*Vide infra.*

**Scope of order XX.**—Order XX extends to Provincial Small Cause Courts. A. I. R. 1928 All. 688=110 Ind. Cas. 818. In a suit for damages for failure to take delivery of goods no preliminary decree can be passed. A. I. R. 1926 Lah. 337=93 Ind. Cas. 1012. Failure to make mention of oral evidence does not show that evidence was ignored. 59 Ind. Cas. 963.

**Scope of rule 1.**—Commencement to write judgment before hearing whole evidence and arguments is irregular. A. I. R. 1933 All. 196. Where judgment was written and signed by Judge at home, and communicated to parties by clerk in absence of Judge on account of illness, the case was remanded for fresh hearing. 130 Ind. Cas. 573=52 C. L. J. 566=A. I. R. 1930 Cal. 164. Mere order in order sheet "that suit be dismissed in terms of compromise" is not disposal of suit. A. I. R. 1933 Pat. 135. Judgment delivered not in presence of, or without notice to parties is not nullity. 141 Ind. Cas. 44=28 N. L. R. 308=A. I. R. 1933 Nag. 12. Judgment is deemed to have been given even if not read by Judge. 94 Ind. Cas. 121. Decree following judgment though not validly pronounced, should not be interfered. A. I. R. 1925 All. 293=47 A. 332=23 A. L. J. 145=86 Ind. Cas. 869. Day of pronouncing judgment if not pronounced on same day should be notified to parties. 9 Bur. L. J. 250=38 Ind. Cas. 675. Judgment pronounced in contravention of Order XX, rules 1 to 3, is irregular but if waived by party it should not be reversed. 46 C. 979=29 C. L. J. 438=51 Ind. Cas. 405. Judgment pronounced in absence of party without notice to him is not correctly pronounced. A. I. R. 1925 All. 293=47 A. 332=23 A. L. J. 145=86 Ind. Cas. 869. Rule of pronouncing judgment in open Court should be strictly adhered to. A. I. R. 1923 Pat. 129=1 Pat. 771=75 Ind. Cas. 879. Notice of result of appeal must be given to parties. Mere posting on notice-board is not sufficient. A. I. R. 1921 Mad. 690=41 M. L. J. 385=14 L. W. 514=(1921) M. W. N. 866=65 Ind. Cas. 82.

Power to pronounce judgment written by Judge's predecessor. 2. [S. 193.] A Judge may pronounce a judgment written but not pronounced by his predecessor.

**Scope.**—Judgment not pronounced by Judge may be delivered by successor. 42 A. 362=18 A. L. J. 356=61 Ind. Cas. 932; see also A. I. R. 1931 All. 90=(1930) A. L. J. 1566=130 Ind. Cas. 303; 29 C. L. J. 568=46 Ind. Cas. 618; 80 P. R. 1916=128 P. W. R. 1916=43 P. L. R. 1917=35 Ind. Cas. 938; 1 Pat. L. T. 77=5 P. L. J. 147=58 Ind. Cas. 437; 50 Ind. Cas. 641. Executing Court should not take notice of uncertified or unwritten adjustment. A. I. R. 1921 Pat. 360=1 P. L. T. 149=5 P. L. J. 70=55 Ind. Cas. 890. Judgment after expiration of authority is nullity. A. I. R. 1924 Rang. 358=4 U. B. R. 171=76 Ind. Cas. 170. Judgment by retiring Judge held to be validly pronounced by his successor in office. 130 Ind. Cas. 303=1930 A. L. J. 1566=53 All. 133=A. I. R. 1931 All. 90. A judgment written by an ex-Judge after he has ceased to be a Judge is valid as a judgment, which may be

pronounced by his successor in office under Order 20, rule 2. A. I. R. 1936 Rang. 147=14 Rang. 136 (F. B.) Under Order 20, rule 2, it is not necessarily incumbent upon the successor of the Judge, who wrote a judgment after he had ceased to be a Judge of the Court in which the trial was held to pronounce the judgment that had been written by his predecessor. He has a discretion in the matter, and if he is in doubt as to the correctness of the judgment that had been written by his predecessor he ought either to act in accordance with the provisions of Order 18, rule 15 or to hear the case *de novo*. *Ibid*.

3. [S. 202.] The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it, and when Judgment to be signed. once signed, shall not afterwards be altered or added to save as provided by section 152 or on review.

*N. B.*—For local amendment in Madras.—*Vide infra*.

**Notes.**—Pronouncing judgment written and signed by predecessor is valid. 5 Pat. L. J. 147=1 Pat. L. T. 77=58 Ind. Cas. 437. Provisional judgment is not operative until passing of decree. 9 S. L. R. 193=34 Ind. Cas. 867. Inherent powers cannot be exercised against provisions of Code. A. I. R. 1925 Pat. 36=3 Pat. 778=6 P. L. T. 309=84 Ind. Cas. 820 ; see also A. I. R. 1925 Pat. 47=3 Pat. 654=82 Ind. Cas. 813. Court cannot substantially alter judgment pronounced once except for clerical or arithmetical mistakes. A. I. R. 1923 Mad. 663=18 L. W. 105=72 Ind. Cas. 688. Order passed under s. 151 cannot be recalled except in review or under s. 152. A. I. R. 1924 Pat. 696=5 P. L. T. 631. Order setting aside *ex parte* decree is judgment and cannot be set aside save under s. 152 or on review. 145 Ind. Cas. 302=10 O. W. N. 794=A. I. R. 1933 Oudh 385. Where owing to misdescription decree is wrongly named, Court can in execution bring real judgment-debtor on record. 144 Ind. Cas. 901=35 Bom. L. R. 200=A. I. R. 1933 Bom. 200. Where a Court passed an order under a misapprehension of facts, it is open to it under its inherent power to set aside such order when true facts are brought to light. Order 20, rule 3, has no application to such cases. 148 Ind. Cas. 614=1934 A. L. J. 862=A. I. R. 1934 All. 287 ; see also A. I. R. 1934 Nag. 234=152 Ind. Cas. 211. The infringement of the procedure prescribed by Order 20, rules 1, 2 and 3 merely constitutes an irregularity curable by consent or waiver and it affords no ground for reversal of the decree based on the judgment irregularly pronounced. A. I. R. 1934 Lah. 763=149 Ind. Cas. 430.

4. [S. 293.] (1) Judgments of a Court of Small Causes need not contain more than the points for determination and the Judgment of Small Cause decision thereon.

(2) Judgments of other Courts shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

**Judgment of Small Cause Courts.**—Small Cause Court's judgment must comply with provisions of Order XX, rule 4. 95 Ind. Cas. 584. Judgment of Small Cause Judge need not be in detail, but application of judicial mind must be apparent. A. I. R. 1930 All. 832=(1930) A. L. J. 1090=128 Ind. Cas. 766. The simple statement that issues are not proved and claim be dismissed is not sufficient. 10 Lah. C. J. 248. But judgment of Small Cause Courts need not involve reasons. 13 O. L. J. 301=97 Ind. Cas. 172 ; A. I. R. 1925 Oudh 648=88 Ind. Cas. 376. Small Cause Court's judgment must involve points for determination and reasons for it. A. I. R. 1925 Oudh 283=79 Ind. Cas. 547 ; A. I. R. 1923 Rang. 252=2 Bur. L. J. 108=76 Ind. Cas. 600 ; see also A. I. R. 1937 Cal. 308. Judgment of Small Cause Court mixing points and issues is against Order XX, r. 4. A. I. R. 1925 Mad. 1229=49 M. L. J. 354=90 Ind. Cas. 968. Small Cause Court's judgment need only comply with provisions of Order XX, r. 4. A. I. R. 1922 Mad. 360=42 M. L. J. 583=15 C. W. N. 642=31 M. L. T. 124=70 Ind. Cas. 791 ; 48 Ind. Cas. 752 ; 67 Ind. Cas. 85. Judgment of Small Cause Court should be intelligible and contain points for decision. A. I. R. 1922 Pat. 337=3 P. L. T. 122=(1921) Pat. 298=64 Ind. Cas. 226. To show application of Judge's mind, judgment of Small Cause Court must involve short statement of reasons for decisions. 12 L. W. 285=59 Ind. Cas. 906. Small Cause Court's judgment not complying with provisions of Order XX, r. 4, is open to revision. 27 P. L.

R. 135=93 Ind. Cas. 632. Small Cause Court case must be decided as carefully as regular suits. Judgment must contain points for decision and decision thereon. 136 Ind. Cas. 701=7 Luck. 526=9 O. W. N. 24=A. I. R. 1932 Oudh 143; see also 142 Ind. Cas. 844=A. I. R. 1933 Sind 62; 55 M. 671=A. I. R. 1932 Mad. 336=62 M. L. J. 439=35 M. L. W. 520=137 Ind. Cas. 369. A judgment is sufficient and can be said to conform with the provisions of Order 20, rule 4, if it states the main points for determination, and has made a statement sufficient to show that the Judge has applied his mind to the main points and has recorded a decision on them. A. I. R. 1936 Mad. 486=43 L. W. 514=1936 M. W. N. 572=163 Ind. Cas. 251. The judgment of the Small Cause Court need not contain the reasons for its decisions. A. I. R. 1934 Pat. 243=146 Ind. Cas. 1056. Rule 4, Order 20, does not require that either the reasons for arriving at a conclusion or discussion of the evidence should be given by the lower Court. In accordance with the rule the points for determination in order to arrive at the result and the resulting decision thereon need be stated. If all that is set out, is the ultimate result without an indication of the points for determination, there is no compliance with the rule. As statement of issues only does not necessarily indicate the points to be determined although in some cases it may well do so. Each case must be judged by itself. A. I. R. 1936 Mad. 913.

**Other Judgments.**—Judgment need not include every part of evidence relied on by parties. A. I. R. 1931 All. 210=130 Ind. Cas. 289. Judgment not involving points of determination is not legal. A. I. R. 1928 All. 688=110 Ind. Cas. 818. Judgment based on Judge's personal knowledge and without any evidence can be reversed in revision. A. I. R. 1923 Cal. 311=67 Ind. Cas. 302. Judgment is not adequate if it reproduces arguments of counsel with short statement regarding Court's opinion. A. I. R. 1921 Lah. 119=2 Lah. 271=64 Ind. Cas. 929. Judgment if short and its reasons unintelligible case must be remanded for passing judgment according to law. A. I. R. 1922 Lah. 122=4 Lah. L. J. 55. Finding must be clear and definite. 37 Ind. Cas. 304. Matter in dispute being complicated involving various questions, Judge must bring out point of issue on which evidence is to be given. 59 Ind. Cas. 703. Omission to state points for determination does not cause failure of justice provided points are obvious. 40 Ind. Cas. 890. Brevity of judgment and avoidance of repetition of pleadings must be borne in mind. (1919) M. W. N. 356=53 Ind. Cas. 354. Where it appeared that the judgment of the lower appellate Court was delivered in contravention of the provisions of the law, Chief Court in second appeal set it aside and remanded the case for decision on its merits. 35 P. L. R. 1919. High Court can interfere where in the judgment material portion of the evidence has not been considered. 137 Ind. Cas. 445=35 C. W. N. 1242=A. I. R. 1932 Cal. 257. Judgment need not discuss evidence. A. I. R. 1933 Rang. 174. Points for determination must be stated in judgment and not pleadings on record. 146 Ind. Cas. 16=A. I. R. 1932 Nag. 272.

5. [S. 204.] In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit.

**Scope.**—The Court should state its reasons on each issue. (1886) P. L. J. 71; 17 C. W. N. 55 (57)=17 Ind. Cas. 881. Court by its decision cannot lay down mode of execution of decree. 45 Ind. Cas. 250.

6. [S. 206, first and second paras.] (1) The decree shall agree with the judgment; it shall contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what property and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter.

*N. B.*—For local amendments in Madras.—*Vide infra.*



**Scope.**—When decree is passed by consent it should so appear when drawn up 131 Ind. Cas. 316=35 C. W. N. 612=60 M. L. J. 648=14 N. L. J. 7=27 N. L. R. 139=33 Bom. L.R. 925=1931 M. W. N. 748=A. I. R. 1931 P. C. 107 (P. C.). Preparation of decree after judgment is pronounced cannot be stopped. 137 Ind. Cas. 855=13 P.L.T. 304=11 Pat. 532=A. I. R. 1932 Pat. 228. Court has to prepare decree whether claim is allowed or dismissed except in cases excepted under General Rules and Circular Orders. A. I. R. 1933 Pat. 135. Even when suit is dismissed, decree ought to be prepared showing amount of costs and giving directions in respect thereof even if each party has to bear his own costs A. I. R. 1933 Pat. 135. Where judgment grants costs but decree taxes them improperly, decree differs from judgment. 136 Ind. Cas. 817=54 A. 497=1932 A. L. J. 272=A. I. R. 1932 All. 337. Where there is contract between parties to make interest charge on property, decree should be prepared on that basis. A. I. R. 1933 Lah. 941. Where sufficient explanation for delay in amending decree is not forthcoming amendment was refused. 139 Ind. Cas. 528=36 C. W. N. 97=A. I. R. 1932 Cal. 563. Specific motion must be made of consent decree. A. I. R. 1931 P. C. 107=35 C. W. N. 612=60 M. L. J. 648=14 N. L. J. 71=33 L. W. 723 (P. C.)=131 Ind. Cas. 316. Decree apparently improper should never be passed. 14 N. L. R. 97=45 Ind. Cas. 425. Judgment and decree must appear as separate. 70 P. W. R. 1921=1 Lah. 223=54 Ind. Cas. 913. Rule that decree must concur with judgment is mandatory A. I. R. 1921 All. 818=22 A. L. J. 291=46 A. 864=82 Ind. Cas. 184=L. R. 5 A. 545 Civ; A. I. R. 1925 Mad. 735=(1925) M. W. N. 209=49 M. L. J. 385=88 Ind. Cas. 828; A. I. R. 1928 Rang. 215=114 Ind. Cas. 679. Omission to mention interest in decree, statement of which is made in judgment can be rectified provided omission does not cause ambiguity. A. I. R. 1930 Cal. 349=51 C. L. J. 280=34 C. W. N. 907=126 Ind. Cas. 764.

**7. [S. 205.]** The decree shall bear date the day on which the judgment

was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree.

**Scope.**—Date of decree must be the same as date of judgment even though judgment is signed on different date. A. I. R. 1930 Rang. 67=126 Ind. Cas. 543; see also A. I. R. 1927 Rang. 337=6 Bur. L. J. 23=101 Ind. Cas. 319; A. I. R. 1924 Cal. 1064=40 C. L. J. 87=82 Ind. Cas. 746; A. I. R. 1922 Nag. 113=69 Ind. Cas. 7; A. I. R. 1923 Pat. 129=1 Pat. 771=75 Ind. Cas. 879; 34 C. L. J. 494=65 Ind. Cas. 650; 42 B. 309=20 Bom. L. R. 81=46 Ind. Cas. 107. Even in High Court on original side date of decree and judgment must correspond. (1929) A. L. J. 73=112 Ind. Cas. 715. Although a decree not drawn up on a non-judicial stamp paper is invalid and incapable of execution, it is validated with effect from its original date when by order of the Court which made the decree, a non-judicial stamp of the requisite value is affixed to the decree as drawn up and defaced and the names of the parties and the cause-title as written upon it. If the Judge, when ordering the non-judicial stamp to be affixed, makes a note thereof on the original decree and puts down his initials thereon with a date which is the same as the date of such affixing, the decree must be taken as a decree passed on the latter date. 38 C. W. N. 118. Time to appeal runs from date of judgment and not from date of signing decree. A. I. R. 1926 Nag. 349=22 N. L. R. 60=97 Ind. Cas. 307. Parties are not deprived of right to appeal although decree is not drawn after judgment. 66 P. R. 1919=52 Ind. Cas. 479. Date of the decree is the date on which it was ordered to be drawn and not when it was signed. 32 Ind. Cas. 744; see also 1933 M. W. N. 23=37 M. L. W. 180=64 M. L. J. 251=55 M. 458=A. I. R. 1933 Mad. 315. Court's proceedings are presumed to be legal and correct. 146 Ind. Cas. 310=A. I. R. 1933 Oudh 466.

**8. [New.]** Where a Judge has vacated office after pronouncing judgment

but without signing the decree, a decree drawn up in accordance with such judgment may be signed by his successor or, if the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.

**Scope.**—Judgment written by one of two Judges of High Court is valid even if pronounced by other. 34 Ind. Cas. 584. In part-heard case prior decision though

with consent of parties can be considered against by succeeding Judge. 11 Bur. L. T. 97=47 Ind. Cas. 555.

9. [S. 207.] Where the subject-matter of the suit is immovable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by numbers in a record of settlement or survey, the decree shall specify such boundaries or numbers.

**Scope.**—A decree should distinctly and accurately state what property it deals with. 24 W. R. 291; see also 19 W. R. 81; 25 Ind. Cas. 534; 23 W. R. 285; 22 W. R. 330; 74 P. R. 1905.

10. [S. 208.] Where the suit is for movable property, and the decree is for the delivery of such property, the decree shall also state the amount of money to be paid as an alternative if delivery cannot be had.

**Scope.**—Under Order XX, rule 10, delivery of property may not be decreed in every case. A. I. R. 1924 Nag. 176=75 Ind. Cas. 833. Decree-holders executing decree under Order XX, rule 10, must comply with provisions of Order XXI, r. 31, if money portion is to be executed. A. I. R. 1927 Cal. 652=55 C. 26=31 C. W. N. 850=103 Ind. Cas. 740. Order 20, rule 10, Civil Procedure Code, does not say that a person who is entitled to the delivery of specific movables must in all cases sue for such delivery and not for their value or damages, for in many cases the movables themselves would be of no use to him after conversion or detention. Nor does the rule say that the Court must invariably decree the articles claimed and not their value only. The Court is bound to pass a decree for the articles in the first instance and in the alternative only for their value. 61 C. 711=A. I. R. 1935 Cal. 39. Where a decree is in the form contemplated by this rule and there is no question of determination in value of the articles decreed to be recovered, the decree-holder is not entitled to execute the money, part of the decree before applying for delivery of the articles; it is in the defendant's election whether he would deliver the chattels or pay the assessed value on them. *Ibid.*

11. [S. 210.] (1) Where and in so far as a decree is for the payment of money the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest notwithstanding anything contained in the contract under which the money is payable.

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit.

**N. B.**—For Local amendments in Madras and Rangoon—*Vide infra.*

**Scope.**—Passing of instalment decree on certain conditions is not bad in law. A. I. R. 1927 Oudh 236=1 Luck. Cas. 75=101 Ind. Cas. 816. Order postponing payment if incorporated in decree is appealable as part of decree. 133 Ind. Cas. 233=A. I. R. 1931 Rang. 152; see also 142 Ind. Cas. 833=A. I. R. 1933 Pesh. 31. Order of instalments made on time-barred application is not nullity. A. I. R. 1937 Cal. 236. Where after the decree parties agree that the decretal amount should be paid by instalments and the Court accepts a compromise and dismisses an execution case, the Court must be deemed to have directed that the payment of the amount decreed should be made by instalments under Order 20, rule 11 (2). The order of the executing Court directing the payment of the decretal amount to be made in instalments with the consent of the parties therefore clearly comes within the provisions of Order 20, rule 11 (2) of the Code and is therefore executable in the execution proceedings. A. I. R. 1937 Cal.

236. The discretion to order payment of a decretal amount by instalments must never be exercised so as to constitute a virtual denial of the decree-holder's rights. A. I. R. 1935 Rang. 495. Even a Small Cause Court in granting instalments is required under the provisions of Order 20, rule 11, C.P. Code, to state the reasons for granting the prayer. Simply because instalment is prayed for and the claim is not contested, that does not entitle a debtor to get an instalment decree as a matter of course. In making orders for instalments not only the condition of the debtor and his ability to pay must be considered, but also all other circumstances must be taken into consideration, namely, the date when the loan was incurred, the amount of the loan, the amount of the instalments ordered and the number of years in the course of which it is to be satisfied. An instalment decree spreading the instalments over a large number of years is a thing oppressive to the creditor and the Court should, in passing instalment decree be careful to guard also the interest of the creditor. Too much pity on a debtor is not consideration which is to prevail over all other claims. A. I. R. 1935 Cal. 559=61 C. L. J. 93=157 Ind. Cas. 12; see also A. I. R. 1934 Pesh. 2=148 Ind. Cas. 349.

Where Court passes a decree for Rs. 884 and orders that defendant should pay in six monthly instalments of Rs. 60 each and allowing no future interests, it is not proper exercise of discretion. 143 Ind. Cas. 44=54 All. 539=A. I. R. 1933 All. 90. Revenue Court cannot direct for rent in case of tenants other than permanent or fixed rate tenants to be paid by instalments. 138 Ind. Cas. 254=54 A. 521=1932 A. L. J. 315=A. I. R. 1932 All. 436. Under this section *bona fides* of debtor is dominating factor. 16 N. L. J. 78=A. I. R. 1933 Nag. 330. Where decree has been varied by consent and the Court attested it, varied decree can be executed and separate suit is unnecessary. 144 Ind. Cas. 158=A. I. R. 1933 Lah. 758. Rule 11 is not controlled by Imperial Bank Act. Refusal to grant instalments in proper cases on grounds of postponement of realization of dues by Bank over six months would amount to failure of duty. 16 N. L. J. 78=A. I. R. 1933 Nag. 330. Instalment decree can be passed even if estate of defendant is under Court of Wards. A. I. R. 1923 Lah. 256=5 Lah. L. J. 571=73 Ind. Cas. 800. Instalment decree must be passed on sound ground and with due discretion. 71 Ind. Cas. 303. Payment of decretal amount, can be postponed on taking security with decree-holder's consent even if decree is appealed against. A. I. R. 1927 Mad. 416=52 M. L. J. 182=38 M. L. T. 143=1927 M. W. N. 202=100 Ind. Cas. 841.

Order under rule 11 cannot be passed by executing Court. A. I. R. 1921 Pat. 340=2 P. L. T. 80=58 Ind. Cas. 393. Court passing decree can alone postpone its execution. 21 M. L. T. 24=5 L. W. 132=1917 M. W. N. 44=32 M. L. J. 13=40 M. 233 (F. B.). Compromise filed in execution in no way extends time for execution of decree. Application for issuing order under Order XX, r. 11, must be within time. A. I. R. 1924 Lah. 342=72 Ind. Cas. 477. Application for specific performance of decree must be made within time allowed by decree. 31 Ind. Cas. 457. Order postponing execution or requiring payment by instalments amounts to order of amendment of decree. 34 Ind. Cas. 393. Postponement of amount may be allowed where there is possibility of set-off. In suits relating to independent transactions payment of decretal amount cannot be postponed. A. I. R. 1926 Lah. 604=7 Lah. 393=27 P. L. R. 562=97 Ind. Cas. 769.

Decree under Order XXI, rule (2), can be appealed against under s. 47. A. I. R. 1929 Rang. 191=119 Ind. Cas. 751. Order of refusal to satisfy decretal sum by instalment is not appealable. A. I. R. 1928 Lah. 931=10 Lah. L. J. 453=113 Ind. Cas. 239. Appeal against order of dismissal of application under Order 20, rule 11, as time-barred is competent. 135 Ind. Cas. 858=A. I. R. 1932 Rang. 54. Where there is no special reasons for special indulgence, normal course should be followed. A. I. R. 1934 Pesh. 2.

**Sub-section (2).—**A variation of a decree after it is passed can only be made by the Court which passed the decree. Hence where a decree passed by a Small Cause Court is transferred to the High Court for execution, the High Court cannot make the decree payable in instalments while acting as an executing Court. A. I. R. 1934 Rang. 197=149 Ind. Cas. 763. The Court referred in sub-section (1) of Order 20, rule 11, is clearly a Court which passed the decree and as the same wording is used in sub-section (2) also, it seems clear that the variation of the decree after it is passed can only be made by the Court which passed the decree. A Court to which a decree has been transferred for execution must take the decree as it

stands and is not entitled to question the validity of the decree. *Ibid*; see also A. I. R. 1931 Rang. 252=4 Rang. 480 (F. B.); A. I. R. 1934 Rang. 165=151 Ind. Cas. 937=12 Rang. 320; 40 L. W. 883=67 M. L. J. 801.

12. [Ss. 211, 212.] (1) Where a suit is for the recovery of possession of immovable property and for rent or *mesne* profits, the Court may pass a decree—

(a) for the possession of the property ;  
(b) for the rent or *mesne* profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or *mesne* profits ;

(c) directing an inquiry as to rent or *mesne* profits from the institution of the suit until—

(i) the delivery of possession to the decree-holder,  
(ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court, or  
(iii) the expiration of three years from the date of the decree, whichever event first occurs.

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent or *mesne* profits shall be passed in accordance with the result of such inquiry.

*N. B.*—For local amendments in Madras.—*Vide infra*

**Scope.**—*Mesne* profits are deemed to have been allowed if they are involved in judgment no matter decree does not mentioned them. A. I. R. 1929 Cal. 719=33 C. W. N. 614=127 Ind. Cas. 220. The word "may" in r. 12 (1) indicates that the Court's power is discretionary though in rule 12 (1) (a) "may" means "shall". The rule does not bar a suit for *mesne* profits from the date of suit to the date of delivery of possession, though a previous decision in a suit for possession and past and future *mesne* profits, grants only past profits and is silent about future profits. 41 M. 188=22 M. L. T. 434=33 M. L. J. 699=(1917) M. W. N. 847=6 L. W. 784. *Mesne* profits may be decreed even if claim for possession and statement of claim for *mesne* profits is made in alternative and is not distinct. 26 C. L. J. 105. Party can apply for *mesne* profits only when possession is actually delivered or three years have elapsed after passing of preliminary decree. A. I. R. 1924 Pat. 781=4 Pat. 57=5 P. L. T. 626=3 P. L. R. 32=84 Ind. Cas. 272. In claim for *mesne* profits, period of three years is to be computed from date of final decree for recovery of possession. A. I. R. 1925 P. C. 113=22 L. W. 85=28 C. W. N. 55=84 Ind. Cas. 267. Application for determining *mesne* profits not being under Code nor in execution is not subject to the Limitation Act. A. I. R. 1923 Bom. 268=77 Ind. Cas. 497. In claims for *mesne* profits during pendency of suit and up to date of delivery of possession if exceeding Munsiff's pecuniary jurisdiction, latter cannot be granted by Munsiff. 32 Ind. Cas. 788; A. I. R. 1924 Cal. 167=38 C. L. J. 142=76 Ind. Cas. 343. Where preliminary decree failed to award *mesne* profits due to negligence, they can be awarded in final decree. A. I. R. 1923 Mad. 43=16 L. W. 312=1922 M. W. N. 562=31 M. L. T. 180=74 Ind. Cas. 812. No claim for *mesne* profits can be decreed if person in wrongful possession does not get any profit. A. I. R. 1923 Bom. 37=72 Ind. Cas. 993. Three years for payment of *mesne* profits must be computed from date of appellate decree; plaintiff is not entitled for *mesne* profits obtained after offer to restore property is made. 34 C. L. J. 415=70 Ind. Cas. 6; see also 43 Ind. Cas. 855=4 Pat. L. W. 100=3 Pat. L. J. 116. Dismissal of claim for *mesne* profits operates as *res judicata*. (1921) Pat. 25=62 Ind. Cas. 747. Court can grant decree for *mesne* profits even if amount exceeds Court's pecuniary jurisdiction. 2 Pat. L. T. 648=68 Ind. Cas. 903; A. I. R. 1921 Pat. 69=6 Pat. L. J. 54=2 P. L. T. 143=60 Ind. Cas. 346; 2 Pat. L. J. 394=41 Ind. Cas. 231. Final decree must direct enquiry into *mesne* profits till delivery is actually given. Inquiry into *mesne* profits without notice to opposite party, decree is subject to revision. 43 Ind. Cas. 458. In final decree granting *mesne* profits Court-fee must be charged for amount in dispute. A. I. R. 1923 Mad. 19=45 Mad. 80=42 M. L. J. 184=14 L. W. 730=30 M. L. T. 83=69 Ind. Cas. 722. Additional Court-fees must be paid if claim for *mesne* profits is made. 1 P. L. T. 235=55 Ind. Cas. 24. Where order granting possession and

decreasing claim for *mesne* profits is passed, amount is to be determined by execution Court. A. I. R. 1934 All. 465 ; see also A. I. R. 1934 Cal. 472.

**Possession of property.**—It is valid to leave question of determination of boundaries to be decided in execution. 32 Ind. Cas. 862. Decree for possession involves decree for *mesne* profits till possession is delivered. 42 A. 497=18 A. L. J. 613=61 Ind. Cas. 947 ; see also 66 Ind. Cas. 494=2 Lah. 383 ; 25 C. W. N. 369=66 Ind. Cas. 49. Decree for delivery of possession and award of *mesne* profits without order for enquiring amounts to final decree. A. I. R. 1925 Mad. 1276=22 L. W. 347=90 Ind. Cas. 789.

**Mesne profits.**—Executing Court cannot determine *mesne* profits. A. I. R. 1931 Pat. 1=12 P. L. T. 127. Order passed not in conformity with Order XX, rule 12 is not void for want of jurisdiction. It only being irregular exercise of jurisdiction still binds executing Court which must take decree as it stands. A. I. R. 1930 Mad. 30=30 L. W. 840=50 M. L. J. 728=53 M. 838=124 Ind. Cas. 290. Court may grant future *mesne* profits ; words "*mesne* profits" when unqualified include past and subsequent *mesne* profits. A. I. R. 1930 Mad. 30=30 L. W. 810=57 M. L. J. 728=53 M. 838=124 Ind. Cas. 290. Order to determine *mesne* profits in execution proceedings indicates Court's intention to grant them and decree-holder can therefore claim them. A. I. R. 1930 Mad. 30=3 L. W. 810=57 M. L. J. 728=53 M. 838=124 Ind. Cas. 290. Court has discretion to make enquiry as regards future *mesne* profits. A. I. R. 1931 Oudh 131=7 O. W. N. 831=128 Ind. Cas. 751. Fresh suit for future *mesne* profits is maintainable, where decree for possession does not decide the question of *mesne* profits. A. I. R. 1931 Pat. 1=12 P. L. T. 127=130 Ind. Cas. 785. Where by execution application to ascertain *mesne* profits is made, Court can regard it as application in suit. A. I. R. 1930 Mad. 30=30 L. W. 810=57 M. L. J. 728=53 M. 838=124 Ind. Cas. 290. The provisions of clause (c) of Order 20, rule 12, Civil Procedure Code, suggest that when a person obtains a decree for possession of immovable property, the defendant would be answerable to the plaintiff for *mesne* profits either until he delivers up possession to the decree-holder or at least relinquishes possession with notice to the decree-holder through the Court. These provisions indicate the *prima facie*, liability of a defendant in possession of immovable property. 70 M. L. J. 87=A. I. R. 1936 Mad. 137=43 L. W. 221 ; see also 71 M. L. J. 388. A person applying under Order 20, rule 12, for ascertainment of *mesne* profits prior to suit need not pay any Court-fee which should be paid only after the amount of *mesne* profits has been ascertained. A. I. R. 1935 All. 206=1935 A. L. J. 254=153 Ind. Cas. 476. In a suit for *mesne* profits, it is the duty of a Court to pass the preliminary decree and to direct an enquiry to ascertain the amount of the *mesne* profits under Order 20, rule 12, and then pass a final decree in accordance with it. So that the order directing the inquiry for *mesne* profits to the execution Court, though bad should be treated as one under Order 20, rule 12. A. I. R. 1934 All. 465=1934 A. L. J. 86=151 Ind. Cas. 755. Even where the decree passed after 1908 directs ascertainment of *mesne* profits in the course of execution, the effect of the dismissal of the previous application for execution on the ground of default does not amount to a dismissal of the claim for *mesne* profits and fresh application is not barred. Although the decree is a wrong decree, parties not having appealed it is binding. A. I. R. 1934 Cal. 472=38 C. W. N. 141=151 Ind. Cas. 913. There is no provision in the Code for deciding the basis upon which *mesne* profits are to be assessed, at a date subsequent to the passing of the preliminary decree. When the Judge passes the preliminary decree under Order 20, rule 12, and directs an inquiry as to *mesne* profits he should, at the same time, decide the basis upon which the *mesne* profits are to be assessed. Then at a subsequent date an application can be made by one or other of the parties for the appointment of a Commissioner who would proceed to hold an inquiry, and assess the *mesne* profits upon the basis which the Judge had already directed when he passed the preliminary decree. A. I. R. 1934 Cal. 503=38 C. W. N. 384=151 Ind. Cas. 922.

Declaratory decree does not give right to *mesne* profits, which must be independently established. A. I. R. 1930 Lah. 72=126 Ind. Cas. 681. Where partition decree is silent regarding *mesne* profits fresh suit lies from it. A. I. R. 1929 Nag. 208=12 N. L. J. 131=1929 Nag. 293=118 Ind. Cas. 869. Co-sharer is entitled to interest on *mesne* profits if co-tenant is kept out of possession. A. I. R. 1929 Nag. 291=12 N. L. J. 131=118 Ind. Cas. 869. *Mesne* profits must be calculated on actual receipt. A. I. R. 1929 P. C. 300=56 Ind. Cas. 290=34 C. W. N. 89=58 M.

L. J. 74=31 L. W. 7=50 C. L. J. 369=57 C. 1=32 Bom. L. R. 148=121 Ind. Cas. 525. Order for determination of *mesne* profits in execution proceedings though irregular is still within jurisdiction. Execution Court must take it as it stands. A. I. R. 1929 Bom. 217=31 Bom. L. R. 400=118 Ind. Cas. 700.

*Mesne* profits being only by way of damages must be awarded according to justice of the case and hence trespasser may be refused charges for collecting rent. A. I. R. 1929 Oudh 55=111 Ind. Cas. 760. After decree is passed application for determination of *mesne* profits being part of suit cannot be dismissed; time for application does not run against so long as such suit is pending. A. I. R. 1928 Bom. 236=52 B. 360=30 Bom. L. R. 509=309 Ind. Cas. 734. Claim under Order XX, r. 12, relates to wrongful possession of defendant. A. I. R. 1928 Pat. 565=7 Pat. 491=9 P. L. T. 720. Awarding a decree for compensation for cause of action not arisen is out of jurisdiction. A. I. R. 1928 Pat. 565=7 Pat. 491=9 P. L. T. 720=113 Ind. Cas. 577. Court must enquire into *mesne* profits and pass final decree when application for *mesne* profits is made. A. I. R. 1928 Mad. 522=(1928) M. W. N. 222=54 M. L. J. 665=28 L. W. 152=109 Ind. Cas. 528. Application for *mesne* profits not being plaint verbal application is sufficient. A. I. R. 1926 Pat. 218=5 Pat. 361=7 P. L. T. 313=(1926) Pat. 492 (F. B.)=93 Ind. Cas. 939. Application for determination of *mesne* profits is application in suit. A. I. R. 1926 Cal. 175=90 Ind. Cas. 811. Value of *mesne* profits claimed even if it exceeds pecuniary limits does not bar Court's jurisdiction and application for *mesne* profits does not amount to plaint. A. I. R. 1925 Cal. 1076=42 C. L. J. 49=89 Ind. Cas. 726. Application for *mesne* profits is not controlled by the Limitation Act. A. I. R. 1929 Pat. 141=5 Pat. 223=7 P. L. T. 340=92 Ind. Cas. 629. Once decree for *mesne* profits is passed application to determine the same cannot be rejected. A. I. R. 1926 Pat. 141=5 Pat. 223=7 P. L. T. 340=92 Ind. Cas. 629. *Mesne* profits are to be ascertained by Court passing decree. 130 Ind. Cas. 785=12 P. L. T. 127=A. I. R. 1931 Pat. 1. Where question of *mesne* profits is left open while possession is decreed, suit for future *mesne* profits is maintainable. 130 Ind. Cas. 785=12 P. L. T. 127=A. I. R. 1931 Pat. 1.

Order 20, rule 12, being directory only, it does not compel plaintiff to claim future *mesne* profits in suit for possession. 133 Ind. Cas. 298=1931 A. L. J. 673=53 A. L. J. 951=A. I. R. 1931 All. 429 (S. B.). Assessment of *mesne* profits is proceeding in suit and not in execution, plaintiff should assess *mesne* profits and pay Court-fees. 136 Ind. Cas. 77=1931 A. L. J. 413=A. I. R. 1931 All. 538. Court is given discretion to direct inquiry in respect of future *mesne* profits. 138 Ind. Cas. 751=7 O. W. N. 831=6 Luck. 243=A. I. R. 1931 Oudh 131. Decision as to maintainability of claim for *mesne* profits is not case decided. 138 Ind. Cas. 30=9 O. W. N. 339=A. I. R. 1932 Oudh 271. In a claim for *mesne* profits against trespassers, nature of decree to be passed may be either joint and several for whole amount or may be several for their respective liability. 58 C. L. J. 8=A. I. R. 1933 Cal. 554. Where plaintiff was precluded from obtaining *khas* possession, decree for *mesne* profits can be allowed. 58 C. L. J. 8=A. I. R. 1933 Cal. 554. Fresh notice for execution of decree for *mesne* profits within a week after disposal of execution of decree for possession is not necessary. 144 Ind. Cas. 832=A. I. R. 1933 Cal. 560. Apportionment of *mesne* profits is necessary where various sets of people are held liable for *mesne* profits. 134 Ind. Cas. 1042=58 Cal. 1048=A. I. R. 1931 Cal. 788. Executing Court cannot allow interest when decree is silent as to interest. 135 Ind. Cas. 305=54 Mad. 955=61 M. L. J. 596=34 M. L. W. 305=1931 M. W. N. 576=A. I. R. 1931 Mad. 650 (F. B.). Person in possession is presumed to get rent according to prevailing rate. 1931 M. W. N. 1182=38 M. L. W. 714=A. I. R. 1933 Mad. 828. In case for *mesne* profits, onus of proving actual profits received is on defendant. Onus shifts to plaintiff if he claims more, to prove that defendant ought to have received more. 1933 M. W. N. 1182=38 M. L. W. 714=A. I. R. 1933 Mad. 825. In a suit for *mesne* profits, Court has only to see whether possession of defendant is wrongful. 1933 M. W. N. 1182=38 M. L. W. 714=A. I. R. 1933 Mad. 825. Preliminary decree becomes necessary where the exact amount has to be ascertained after examination of fresh evidence. A. I. R. 1937 All. 36.

13. [S. 213.] (1) Where a suit is for an account of any property and

Decree in administration suit. for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Court of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and liabilities, the same rules shall be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being, within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged or declared insolvent; and all persons who in any such case would be entitled to be paid out of such property, may come in under the preliminary decree, and make such claim against the same as they may respectively be entitled to by virtue of this Code.

**Notes**—Decree in administration suit must comply with provisions of Code regarding secured and unsecured debts. Under s. 49, Presidency Towns Insolvency Act, Crown debts must first be satisfied. 45 C. 653=22 C. W. N. 793=49 Ind. Cas. 529. If there is no cause of action suit for amount and administration may be dismissed at a preliminary stage. A. I. R. 1931 Cal. 45=34 C. W. N. 634=57 C. 1358=129 Ind. Cas. 566. It is necessary to keep preliminary decree the same in administration suit in Rangoon High Court to avoid conflict of authorities. A. I. R. 1925 P. C. 261=23 L. W. 399=30 C. W. N. 769=50 M. L. J. 644=(1925) M. W. N. 847 (P. C.)=91 Ind. Cas. 432. In the case of an administrative action unsecured creditors are entitled to interest up to the date of the preliminary decree and not up to the date of payment or any other date, whereas secured creditors are entitled to interest from the proceeds of the sale of the secured property up to the date of payment. 112 Ind. Cas. 621=A. I. R. 1929 Mad. 242. The Court is not bound to make an order for the administration of the estate if the questions, between the parties can be properly determined without such order. The order may be refused, even if the testator has directed his executors to take proceedings to have his estate administered by the Court. A. I. R. 1936 Bom. 423=38 Bom. L. R. 864. The Code of Civil Procedure nowhere lays down what are to be the contents of a final decree in an administration suit. The contents must depend upon the nature of dispute in each case. A. I. R. 1936 Lah. 879. Where a preliminary decree is passed in an administration suit, all the attaching creditors stand on the same footing, even though the attachment may have been effected before the decree, provided that the decree was passed before any payment is made. 61 C. 240=A. I. R. 1934 Cal. 559=152 Ind. Cas. 69. A debtor who got heavily indebted asked another to take up the administration of his debt for the purpose of liquidating his liabilities. A composition-deed was drawn up whereby all movable and immovable property were alleged to be handed over to latter and a list of creditors was incorporated in the document. Some of the creditors brought a suit on 29th July, 1926, against the debtor and the other persons and got a decree passed in accordance with the provisions of the composition-deed: *Held* that the composition-deed and the decree amounted to nothing more nor less than a private arrangement between debtor and the other person. It was certainly not an administration decree as contemplated by Order 20, rule 13, as it was not the administration of the estate of a deceased person. It was a judgment in personam and obviously binding on the person who were parties to it. A. I. R. 1935 Pesh. 63.

14. [S. 214] (1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and Decree in pre-emption suit. the purchase-money has not been paid into Court, the decree shall—

(a) specify a day on or before which the purchase-money shall be so paid, and

(b) direct that on payment into Court of such purchase-money together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption, the decree shall direct—

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property, including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and.

(b) if, and in so far as the claims decreed are different in degree, that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

**Scope.**—Compromise decree in a pre-emption suit is not a decree under Order XX, rule 14, in strict terms. 26 P. W. R. 1917=37 Ind. Cas. 806. Title to property is complete when payment is made and not when decree is passed. A. I. R. 1929 All. 953=51 A. 998=(1929) A. L. J. 1049=122 Ind. Cas. 604; see also A. I. R. 1929 All. 237=1929 All. 423=115 Ind. Cas. 113; A. I. R. 1925 Lah. 202=85 Ind. Cas. 182. Pre-emptor is entitled to property only after complying with Order XX, r. 14 (1) (b). It is then divested from purchaser. A. I. R. 1930 Lah. 273=31 P. L. R. 274=11 Lah. 128=12 Lah. L. J. 45=128 Ind. Cas. 58. Passing of pre-emption decree in favour of joint decree-holders does not amount of vesting of title in all decree-holders even if money is paid. Their respective rights must be decided if dispute arises. A. I. R. 1929 All. 953=51 A. 998=(1929) A. L. J. 1049=122 Ind. Cas. 604. Decree must mention date of payment of pre-emption money. A. I. R. 1926 All. 158=24 A. L. J. 63=90 Ind. Cas. 287.

Payment of pre-emption money not on fixed date due to Court being closed but on date on which it reopened is good payment. A. I. R. 1924 All. 218=22 A. L. J. 110=46 A. 328 (F. B.)=78 Ind. Cas. 1014; see also A. I. R. 1922 All. 278=77 Ind. Cas. 539. Time for payment of pre-emption money may be extended. A. I. R. 1923 All. 516=45 A. 456=74 Ind. Cas. 745. Pre-emption money not paid for whatever reasons gives judgment-debtor right to re-claim property. A. I. R. 1923 Lah. 250=81 Ind. Cas. 329.

Even if pre-emption decree is silent as to crops, decree-holder is entitled to them on payment of decretal amount. A. I. R. 1923 Nag. 327=75 Ind. Cas. 193. If payment of costs is not involved in pre-emption decree, but all the same they are awarded if they may not be paid within allotted time. A. I. R. 1924 Oudh. 104=26 O. C. 345=74 Ind. Cas. 558. Where cost of suit was awarded to defendant in appeal, but its payment is not made condition precedent to execution of decree, decree-holder may not pay cost within time allowed for payment of purchase money. A. I. R. 1924 Oudh. 104=26 O. C. 342=74 Ind. Cas. 558. When depositor satisfies the requirement, pre-emption money may be raised by mortgage of decreed property. 40 Ind. Cas. 35. Rights of a pre-emptor are different from those of ordinary purchaser. Under a pre-emption decree the right of possession of the property and the consequential right to *mesne* profits accrue to the pre-emptor only from the date when he pays the amount of purchase price.

Costs not paid before allotted time entails dismissal of claim. A. I. R. 1924 Lah. 359=73 Ind. Cas. 891. Failure to pay additional sum ordered to be paid by Appellate Court in time allowed, entails dismissal of suit. 92 P. L. R. 1918=48 Ind. Cas. 470. Payment of pre-emption money out of Court if certified by vendor is valid. A. I. R. 1921 All. 159=19 A. L. J. 493=63 Ind. Cas. 889. Failure to deposit full amount in pre-emption decree entails dismissal of suit. A. I. R. 1924 Lah. 384=69 Ind. Cas. 516. In pre-emption decree, payment of money in Court completes his title even though property claimed may be with mortgagee. A. I. R. 1923 All. 507=21 A. L. J. 417=45 A. 482=73 Ind. Cas. 646. Provisions of Order XX, rule 14, do not apply where vendee is not bound to deliver possession. A. I. R. 1923 All. 507=45 A. 482=21 A. L. J. 417=73 Ind. Cas. 646. Under Oudh Laws Act, Ch. II, in pre-emption decree for possession, pre-emptor is liable to pay charges paid by purchaser. A. I. R. 1924 Oudh. 1=10 O. L. J. 112=74 Ind. Cas. 503. Pre-emption decree with condition entailing dismissal of suit for non-payment within time is complete decree and dismissal of suit in pursuance of



it is unappealable. 7 O. L. J. 378=23 O. C. 254=2U. P. L. R. (J. C.) 171=57 Ind. Cas. 488. Tender of money on the last day is sufficient even if it was not deposited for two days through mistake of officer of Court. 123 P. W. R. 1916=72 P. L. R. 1917=35 Ind. Cas. 183; see 134 Ind. Cas. 201=33 P. L. R. 91=A. I. R. 1931 Lah. 388. Plaintiff in pre-emption suit does not lose his right of pre-emption for failure to make deposit within time allowed by decree. 135 Ind. Cas. 695=7 Luck. 350=8 O. W. N. 1267=A. I. R. 1932 Oudh. 63. When the last date for payment is a holiday, the payment can be made on the next opening date. 134 Ind. Cas. 201=33 P. L. R. 91=A. I. R. 1931 Lah. 381; see also 133 Ind. Cas. 434=32 P. L. R. 255=A. I. R. 1931 Lah. 386. Person depositing amount in Court becomes entitled to land from date of such payment. 144 Ind. Cas. 695=A. I. R. 1933 Lah. 791. Appeal from decree for pre-emption, does not extend time for paying pre-emption price in Court. 141 Ind. Cas. 15=A. I. R. 1933 All. 113. Court cannot enlarge time fixed for payment of pre-emption decree. A. I. R. 1934 Oudh. 17. The Court decreeing a claim to pre-emption is bound to direct on payment into Court of the purchase money, etc., the defendant shall deliver possession of the property to the plaintiff whose title thereto shall be deemed to have accrued from that date. If the property is in possession of the mortgagees of the pre-emptor merely pre-empt the equity of redemption and if he deposits the money in Court within the period specified by the decree, he need not execute the decree for possession nor need he immediately sue the mortgagee for possession. A. I. R. 1935 Lah. 523=158 Ind. Cas. 78.

15. [S. 215.] Where a suit is for the dissolution of a partnership or the taking of partnership accounts, the Court, Decree in suit for dissolution of partnership. before passing a final decree, may pass a preliminary decree declaring the proportionate share of the parties, fixing the day on which the partnership shall stand dissolved or be deemed to have been dissolved, and directing such accounts to be taken, and other acts to be done, as it thinks fit.

**Scope.**—Final decree in account suits must be based on evidence and time must be given to produce accounts. 41 P. L. R. 1918=31 P. W. R. 1918=43 Ind. Cas. 718. Dissolution of partnership should be fixed from the date of notice or plaint when parties are fighting. 45 Ind. Cas. 727. Suit against minor representative of deceased partner is regulated by Order XX, r. 15. 40 A 446=16 A. L. J. 305. Official Receiver should not be appointed a Receiver if the appointment is likely to prejudice business. A. I. R. 1927 Rang. 139=5 Rang. 99=101 Ind. Cas. 791. A decree is final as regards matters finally decided and preliminary as regards matters still undisposed of. A. I. R. 1930 Mad. 528=53 M. 398=59 M. L. J. 102=32 L. W. 329=131 Ind. Cas. 160. Directions given to an official Commissioner to allow credit to one of the parties in respect of partnership goods is not a decree and so no appeal lies. A. I. R. 1928 Sind 100=23 S. L. R. 87=107 Ind. Css. 214. The proceedings between the two decrees are in the nature of a continuation of the suit for the purpose of carrying out the directions contained in the preliminary decree. A. I. R. 1930 Mad. 528=53 M. 378=59 M. L. J. 102=23 L. W. 329=131 Ind. Cas. 160. The preliminary decree, obtained by the partners under Order XX, r. 15, being a declaratory decree and the only effect it had was to define the rights of several partners. It does not affect the creditor's right to sell the partner's interest under the decree obtained by him on the basis of the hypothecation prior to the preliminary decree obtained by the partners. A. I. R. 1929 Mad. 641=52 M. 563=29 L. W. 823=57 M. L. J. 264=116 Ind. Cas. 343. A preliminary decree directing the taking of accounts and involving the payment in money of the partner's share is not a decree for the payment of money within the meaning of r. 53, Order XXI and so cannot be sold in execution. A. I. R. 1929 Mad. 641=29 L. W. 823=52 M. 563=57 M. L. J. 264=116 Ind. Cas. 343. A preliminary decree directing the taking accounts of partnership suit does not come within the purview of r. 42 of Order XXI, as the expression "any other matter" does not cover such a decree. A. I. R. 1929 Mad. 641=116 Ind. Cas. 343. A Commissioner taking accounts has no power to decide questions relating to the terms of the partnership, its duration or the shares of the partners. He is bound by the terms of the decretal order of reference. 38 Bom. L. R. 1058. Such agreement is to be proved before the Court. *Ibid.* At the time of passing the preliminary decree, the Court should decide who is to be the accounting party. 157 Ind. Cas. 1113=37 P. L. R. 663.

16. [S. 215A.] In a suit for an account of pecuniary transactions between a principal and an agent, and in any other suit not hereinbefore provided for, where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit.

**Scope.**—Rule 16 is not restricted to suits between agent and principal but applies wherever taking of accounts is involved and the Court does not want to do it itself. A. I. R. 1921 Sind 42=15 S. L. R. 16=62 Ind. Cas. 537 ; see also A. I. R. 1937 All. 276. In partnership suit also wherever one partner has contracted to render accounts decree under Order XX, rule 16, can be passed. 21 P. W. R. 1919=49 Ind. Cas. 441. Where extent of liability is to be determined between two parties preliminary decree should be passed. 36 Ind. Cas. 210. Preliminary judgment need not specify all details. A. I. R. 1931 Cal. 358=35 C. W. N. 17=132 Ind. Cas. 195. When all accounts are in principal's possession he cannot sue under Order XX, rule 16, on off-chance of making agents liable. A. I. R. 1929 Cal. 418=49 C. L. J. 285=120 Ind. Cas. 100 ; see also 52 C. 765=A. I. R. 1925 Cal. 1069=90 Ind. Cas. 944. Preliminary decree is not indispensable. A. I. R. 1930 Mad. 721=53 M. 475=59 M. L. J. 316=32 L. W. 143. Liability must be decided by Court and extent of liability is to be determined by Commissioner. A. I. R. 1929 Cal. 418=49 C. L. J. 285=120 Ind. Cas. 100. Omission to pass preliminary decree does not invalidate decree passed after evidence of account and if non-prejudicial. A. I. R. 1928 Nag. 229=109 Ind. Cas. 385. Objection to certain items should be reserved for the stage of enquiry into accounts. A. I. R. 1926 Nag. 359=95 Ind. Cas. 171. Creditor can sue for accounts an Agent of debtor when agent agreed to pay advance made out of the profits. A. I. R. 1929 Lah. 182=114 Ind. Cas. 321. A preliminary decree without direction as to the scope of the examination by Commissioner such as circumstances of the case require is bound to operate to the prejudice and harassment of the defendant. A. I. R. 1925 Cal. 1069=52 C. 766=90 Ind. Cas. 944. Preliminary judgment need not be detailed and exhaustive. 132 Ind. Cas. 195=35 C. W. N. 17=A. I. R. 1931 Cal. 358. In a suit for accounts which has been remanded to the District Judge in second appeal, the actual decree for costs should not ordinarily be made until the stage of final decree is reached. But if the preliminary decree does specify the costs in the decree and such decree is put in execution, High Court cannot interfere to amend the decree. The proper course is to proceed to exercise a proper discretion at the time of the final decree and set all the matters right. A. I. R. 1934 Pat. 146=143 Ind. Cas. 572.

17. [New] The Court may either by the decree directing an account to be taken or by any subsequent order give special directions with regard to the mode in which the account is to be taken or vouched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained with liberty to the parties interested to take such objection thereto as they may be advised.

Decree in suit for partition of property or separate possession of a share therein. 18. [New.] Where the Court passes a decree for the partition of property or for the separate possession of a share therein then,—

(1) if and in so far as the decree relates to an estate assessed to the payment of revenue to the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54 ;

(2) if and in so far as such decree relates to any other immovable property, or to movable property the Court may, if the partition or separation

cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

**Scope.**—Enquiry about partibility of movables must be made before passing preliminary decree. 6 O. L. J. 142=50 Ind. Cas. 876. Proceedings between preliminary and final decree in continuation of suit shares awardable are those that can be claimed on date of final decree. A. I. R. 1921 Pat. 296=2 P. L. T. 215=59 Ind. Cas. 872. Preliminary decree in partition cannot order joint possession. A. I. R. 1929 Oudh 117=112 Ind. Cas. 205. Interlocutory order embodied in final decree appeal must be filed against the final decree. A. I. R. 1930 Mad. 988=(1930) M. W. N. 644=60 M. L. J. 79=33 L. W. 391=129 Ind. Cas. 63. Charge on other co-sharers property can be created by final decree for adjustment of equal share. A. I. R. 1930 Mad. 988=(1930) M. W. N. 641=60 M. L. J. 79=33 L. W. 391=129 Ind. Cas. 63. After preliminary decree absolute partition can be made by passing final decree for application must be made and no separate suit will lie. A. I. R. 1929 Oudh 456=6 O. W. N. 804=121 Ind. Cas. 287. Interest can be awarded even if preliminary decree is silent on the point. A. I. R. 1929 Bom. 406=49 B. 282=27 Bom. L. R. 226=94 Ind. Cas. 686. After the preliminary decree the Court was *functus officio* so far as the agricultural land was concerned and that the Court was not competent to issue an *ad interim* injunction in regard to agricultural land. A. I. R. 1925 Lah. 357=7 Lah. L. J. 4=86 Ind. Cas. 244. Where the decree gives no directions as required by this rule is defective and it is incumbent upon the plaintiffs to have it corrected within the time allowed by law. A. I. R. 1935 Sind 192. Where in a partition suit, future *mesne* profits were prayed for but plaintiff neglected to see that proper provision was made in decree, he cannot make such claim afterwards. 138 Ind. Cas. 578=34 Bom. L. R. 447=59 Bom 292=A. I. R. 1932 Bom. 222. Where the decree gives no directions as required by Order 20, rule 18, clause (1) and is defective, it is incumbent upon the plaintiffs to have it corrected within the time allowed by law, and if they fail to do so they cannot ask the Court to transfer the proceedings to the Collector in the absence of any such directions contained in the decree. A. I. R. 1934 Sind 192=158 Ind. Cas. 372.

19. [S. 216.] (1) Where the defendant has been allowed a set-off against the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either party.

(2) Any decree passed in a suit in which a set-off is claimed shall be subject to the same provisions in respect of appeal to which it would have been subject if no set-off had been claimed.

(3) The provisions of this rule shall apply whether the set-off is admissible under rule 6 of Order VIII or otherwise.

**Scope.**—Decree in favour of defendant can be passed in case of equitable set-off also. A. I. R. 1931 Cal. 358=35 C. W. N. 17=132 Ind. Cas. 195. Only one decree should be drawn up in a suit in which a set-off is claimed and after deciding all materials in dispute. 62 P. R. 1917=65 P. W. R. 1917=39 Ind. Cas. 508. Equitable set-off in suit for accounts is governed not by Order 8, rule 6 but by Order 20, rule 19. 132 Ind. Cas. 195=35 C. W. N. 17=A. I. R. 1931 Cal. 358. It is not necessary for a set-off that it should be limited to Order 8, rule 6, and a set-off arising under leases can be claimed in a suit for arrears of rent on leases, although it cannot be claimed under Order 8, rule 6, as being unascertained or in the nature of unliquidated damages for breach of contract. A. I. R. 1936 All. 522=1936 A. L. J. 625=163 Ind. Cas. 872; see also A. I. R. 1936 Cal. 277.

Certified copies of judgment and decree to be furnished.

20. [S. 217.] Certified copies of the judgment and decree shall be furnished to the parties on application to the Court, and at their expense.

*N. B.*—For insertion of new rules in Allahabad and Burma.—*Vide infra*.

**Scope.**—Any application made to an official of Court, must also be deemed to have been made to the Court. A. I. R. 1928 Lah. 759=29 Cr. L. J. 1028=112 Ind. Cas. 356.

## ORDER XXI.

### *Execution of Decrees and Orders.*

#### *Payment under Decree.*

**1. [S. 257.]** (1) All money payable under Modes of paying money a decree shall be paid as follows, namely :—  
under decree.

(a) into the Court whose duty it is to execute the decree ;or

(b) out of Court to the decree-holder ; or

(c) otherwise as the Court which made the decree directs.

(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payment shall be given to the decree holder.

*N. B.*—For local amendments in Central Provinces and Lahore.—*Vide infra*.

**Scope of Order 21.**—The law as to solicitor's lien in India, which has been governed by the principles of English law, has not been altered or abrogated by the provisions of Order 21 of the C. P. Code. 38 C. W. N. 1031. Before an execution sale can be set aside it must be brought within Order 21. A Court has obviously no jurisdiction to set aside a sale outside order 21. A. I. R. 1935 Pat. 242=155 Ind. Cas. 228.

**Notes.**—Payment by judgment-debtor under Court's direction must absolve him. A. I. R. 1929 Oudh 231=6 O. W. N. 334=117 Ind. Cas. 748. Decree-holder attaching decree can receive money and certify payment. A. I. R. 1930 All. 659=(1930) A. L. J. 945=129 Ind. Cas. 382. The principle that it is the duty of judgment-debtor to find out judgment-creditor and pay him the amount of the judgment-debt so long as the latter is within the realm relates to a judgment-debt capable of being discharged by payment. A. I. R. 1927 Cal. 652=31 C. W. N. 850=55 C. 26=103 Ind. Cas. 740. Payment to attaching creditor is no payment to decree-holder under Order XXI, rule 1 (4). A. I. R. 1925 All. 123=80 Ind. Cas. 947. Tender of instalment in compromise decree on next opening day of Court, last day being holiday is beyond time as payment could be made to decree-holder direct on due date. A. I. R. 1929 All. 207=51 A. 527=(1929) A. L. J. 286=115 Ind. Cas. 795 ; see also A. I. R. 1927 Mad. 1196=106 Ind. Cas. 502 ; A. I. R. 1925 All. 687=87 Ind. Cas. 620 ; A. I. R. 1925 Mad. 743=(1925) M. W. N. 566=48 M. L. J. 596=21 L. W. 469=87 Ind. Cas. 560. Payment by judgment-debtor to Receiver in execution does not absolve him from liability if Receiver misappropriates. (A. I. R. 1929 Oudh 231=6 O. W. N. 334=117 Ind. Cas. 748 overruled). A. I. R. 1932 P. C. 33 (P. C.)=137 Ind. Cas. 900=59 Ind. Cas. 311=(1932) A. L. J. 747=34 B. L. R. 1188=56 C. L. J. 48=36 C. W. N. 882=1932 M. W. N. 830=9 O. W. N. 571=63 M. L. J. 658=7 Luck. 382. In case of deposit in Court without notice to decree-holder, the decree-holder is entitled to interest till he receives notice, as also cost of taking out execution *bonafide* without knowledge of deposit. 135 Ind. Cas. 799=35 C. W. N. 544=A. I. R. 1932 Cal. 111. Where portion of decretal amount is paid in Court, decree-holder, cannot take out execution for full amount. 141 Ind. Cas. 297=11 P. L. T. 796=14 P. L. T. 591=A. I. R. 1933 Pat. 89. In the absence of a special direction the judgment-debtor is entitled to choose between clauses (a) and (b). A. I. R. 1935 Lah. 369=158 Ind. Cas. 352. There is a general principle of law that where parties are prevented from doing a thing in Court on a particular day, not by any act of their own but by the act of the Court itself, they are entitled to do it at the first subsequent opportunity. Hence if the judgment-debtors are entitled to pay the money into Court by a certain date but they were prevented from doing it on such day on account of the Court vacation they are therefore within their rights in making the deposit on the re-opening of the Court after the vacation. A. I. R. 1935 Lah. 369. Payment of the decree to one of several decree-holders and admission of satisfaction by him will not bind the others. 1936 A. M. L. J. 32. A payment to arbitrator does not amount to payment

of money into Court. A. I. R. 1924 Rang. 263=3 Bur. L. J. 6=80 Ind. Cas. 238. If the judgment-debtor prevents the deposited sum reaching the decree-holder, he is really applying for stay of the execution and therefore he should be held liable for interest until the money is available to decree-holder. A. I. R. 1929 Nag. 227=115 Ind. Cas. 165. The judgment-debtor is to pay the necessary process-fees for notice of payment. But even if he does not pay them, the Court is bound to inform the decree-holder of the payment when next he appears to ask for sell of the property. A. I. R. 1921 Nag. 148=67 Ind. Cas. 242. Payment out of Court in pre-emption suit is valid if made within time. A. I. R. 1921 All. 159=19 A. L. J. 493=63 Ind. Cas. 889. Decree for *mesne* profits is money decree. 4 Pat. L. J. 336=5 Pat. L. W. 191=(1918) Pat. 257=48 Ind. Cas. 183. Payment into Court by stranger, is not satisfaction of decree. (1916) 1 M. W. N. 195=34 Ind. Cas. 350. Deposit in Court causes cessation of interest from date of notice. 42 M. 576=(1919) M. W. N. 458=26 M. L. T. 295=50 In l. Cas. 410. Where money paid into Court by a judgment-debtor is ordered to be paid out to persons other than the decree-holder without notice to him, it is not competent to the Court to direct the decree-holder to file a suit for the amount and the person who drew the money out of Court to furnish security. It shall have treated the application of the decree-holder as one to set aside the *ex parte* order authorising payment to be set aside. A. I. R. 1922 All. 190=20 A. L. J. 353=4 U. P. L. R. All. 89=66 Ind. Cas. 744. Order XXI, rule 1, clause 2, is not applicable to cases of mortgage decrees which are governed by Order XXXI, rule 8. A. I. R. 1924 Mad. 102=45 M. L. J. 687=18 L. W. 686=35 M. L. T. 101=(1923) M. W. N. 753=75 Ind. Cas. 566. Certificate by decree-holder is not applicable to take step-in aid of execution. 134 Ind. Cas. 922=54 C. L. J. 201=35 C. W. N. 1192=59 C. 760=A. I. R. 1931 Cal. 719 (F. B.). Where judgment-debtor deposits money in Court without notice of assignment of the decree, it absolved him. A. I. R. 1924 Pat. 118=2 Pat. 714=76 Ind. Cas. 55. Decree-holder includes decree-holders. A. I. R. 1934 Mad. 330. Concurrence of other decree-holders is necessary to give valid discharge in case of joint decree. *Ibid.* Agreement is not adjustment. A. I. R. 1934 Rang. 190.

**2. [S. 258.]** (1) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise

Payment out of Court to adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder, shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified, and if, after service of such notice the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree.

*N. B.*—For local amendment in Madras.—*Vide infra.*

**Adjustment.**—An adjustment under Order XXI, rule 2, means settlement which extinguishes the decree-debt. A. I. R. 1930 Mad. 410=(1930) M. W. N. 137=123 Ind. Cas. 604. An adjustment is not the same thing as satisfaction. It is some method of settling the decree which is not provided for in the decree itself. A. I. R. 1926 Mad. 184=49 M. L. J. 730=22 L. W. 853=(1926) M. W. N. 29=91 Ind. Cas. 1051; see also 80 Ind. Cas. 454=A. I. R. 1925 Oudh 136. Order XXI, rule 2, relates to adjustment subsequent to the decree and not to adjustment before the appellate decree. A. I. R. 1923 Mad. 619=17 L. W. 635=44 M. L. J. 599=32 M. L. T. 401=1923 M. W. N. 297=72 Ind. Cas. 836. Order 21, rule 2, contemplates an adjustment to the satisfaction of the decree-holder. An adjustment to be binding must be one between the decree-holder and the judgment-debtor and by their consent. The rule does not contemplate an adjustment which, although not consulted to is made binding by operation of law. A. I. R. 1937 Cal. 211. The executing Court is entitled to look at the agreement made prior to the date of the decree in order to see whether it prevented execution according to the terms of the decree. And there is nothing in Order 21, rule 2, which prevents proof of the fact that a condition precedent to the coming into

operation of such an agreement as this has been performed. A. I. R. 1934 Bom. 370=36 Bom. L. R. 798=152 Ind. Cas. 575=58 B. 610; see also 22 B. 463. An adjustment of a decree must be presumed to have been duly certified. 19 N. L. J. 175. Actual payment is not necessary to constitute valid adjustment within this rule. A. I. R. 1936 Bom. 277=38 Bom. L. R. 505=60 B. 729=164 Ind. Cas. 9. Valid adjustment of decree can be made pending an appeal from the decree. Such an adjustment if not certified or recorded as required under Order 21, rule 2, the Court is debarred by sub-rule 3 from recognizing such an adjustment. A. I. R. 1936 Mad. 494=43 L. W. 601=1936 M. W. N. 123. One of several decree-holders cannot, be receiving payment of the decretal amount out of Court, certify satisfaction of the entire decree, if not authorized by his co-decree-holders. 62 C. L. J. 560. After a sale is duly held, the Court cannot refuse to confirm the sale on the ground that the decree-holder and the judgment-debtor say that the decree has been satisfied out of Court. A.I.R. 1931 P. C. 33=33 Bom. L. R. 450=53 C.L.J. 187=35 C. W. N. 381=14 N.L.J. 28=(1931) A. L. J. 257=60 M. L. J. 423=(1931) M. W. N. 281. Decree-holder may accept and parties may record an adjustment agreement itself to perform something else. A.I.R. 1937 Cal. 222. Where an agreement clearly reduces the amount of the decree by reason of certain arrangements between the parties, it is an adjustment of the decree. A. I. R. 1921 Pat. 135=2 P.L.T. 765=9 P. L. J 337=63 Ind. Cas. 535. The executing Court cannot enlarge, extend or modify the decree even by consent of parties subsequent to the decree unless it is an adjustment of the decree contemplated by Order XXI, r. 2. A. I. R. 1922 Cal. 311=27 C. W. N. 280=38 C. L. J. 17=71 Ind. Cas. 378. An agreement discharging liability under the decree by substituting a new liability under the agreement may properly be held to be step of adjustment of the decree. A. I. R. 1926 Oudh 385=29 O. C. 26=94 Ind. Cas. 317. Adjustment not certified can be proved by judgment-debtor for proving that assignee of decree-holder is *benamidar* for judgment-debtor. A.I.R. 1924 Mad. 189=18 L. W. 453=76 Ind. Cas. 845. When an award is filed subject to terms agreed upon between the parties and has been entered as part satisfaction of the award execution can be taken for balance of the award. A. I. R. 1921 Sind 132=16 S. L. R. 245=79 Ind. Cas. 477. An adjustment need not be in writing. If the parties make a final and binding agreement with regard to the decree then it amounts to an adjustment. If, on the other hand, the finality of the agreement or compromise is conditional on the future acts of the parties; as for instance, the execution of documents then the agreement is still in the executing stage and does not come within the definition of adjustment. A. I. R. 1927 Lah. 544=102 Ind. Cas. 753. Judgment-debtor in bar to execution of a decree against him can plead a pre-decree arrangement that the decree was not to be executed. A. I. R. 1926 Mad. 582=48 M. 513=50 M. L. J. 364=(1926) M. W. N. 368=24 L. W. 72=98 Ind. Cas. 428. An adjustment of decree by surety of judgment-debtor with decree-holder may be proved unless there is some bar to its proof. A. I. R. 1928 Lah. 61=108 Ind. Cas. 376. When an adjustment is not certified a Court executing a particular decree is barred by the provisions of sub-rule (3), r. 2, Order XXI, from trying the question of the satisfaction for adjustment of the decree. A. I. R. 1928 Oudh 195=3 Luck. 170=5 O. W. N. 68=108 Ind. Cas. 105. "Otherwise adjusted" in r. 2 (1) of Order XXI, cover an oral adjustment of a decree. A. I. R. 1926 Cal. 643=91 Ind. Cas. 705. A compromise after decree, effecting immovable property worth over Rs. 100 and embodied in a petition presented under Order XXI, r. 2, which has been recorded by the Court is exempt from registration. A. I. R. 1927 Sind 66=97 Ind. Cas. 321. The Court executing a decree is barred from trying the question of the satisfaction or adjustment of the decree when such satisfaction or adjustment has not been certified to the Court under sub-rule (1) or (2) of the same rule. 5 O. W. N. 452=110 Ind. Cas. 244. The adjustment referred to in Order XXI, rule 2, is such an adjustment as completely or partly extinguishes the decree under execution and cannot mean an adjustment to give effect to the terms which would be to create a new decree at variance with the decree under execution and which will again have to be executed. A. I. R. 1928 Cal. 527=32 C. W. N. 434=113 Ind. Cas. 9. Fresh contract otherwise legal though involving promise by judgment-debtor to do something in future is adjustment. 141 Ind. Cas. 429=1932 M. W. N. 840=63 M. L. J. 598=36 M. L. W. 558=56 M. 193=A. I. R. 1933 Mad. 28. Compromise after decree with promise to be performed in future cannot operate as bar to execution and does not amount to adjustment. 132 Ind. Cas. 205=A. I. R. 1931 Lah. 505. Adjustment means alteration of liability under decree. 146 Ind. Cas. 3=A. I. R. 1933 Pat. 576; see also 144 Ind. Cas. 721=A. I. R. 1933 Pesh. 53.

In order to constitute an adjustment which can be recorded under Order 21, rule 2, it is indeed necessary that the arrangement between the parties should extinguish the decree either wholly or in part. A. I. R. 1935 Lah. 595=62 C. 28=158 Ind. Cas. 1074. An agreement to accept a portion of the decretal amount to be paid in instalments in full satisfaction of the decree is an adjustment within the meaning of Order 21, rule 2, and if certified as required by law, then it can be recorded and acted upon if proved. It is not necessary that such an agreement should be reduced to writing and it is open to the Court to accept oral evidence of it. A. I. R. 1935 Bom. 303=37 B. 230=157 Ind. Cas. 646.

Whether an adjustment has been made as contemplated by rule 2 is not a question of law only but a mixed question of law and fact and in such case the question is to be determined from the intention of the parties. The only test to determine whether an adjustment has taken place or not is to find whether the decree has been completely satisfied or not ; if the decree is completely satisfied then the adjustment is complete as required by rule 2 of the order. If it is not complete, Court is not bound to record it. A. I. R. 1935 Lah. 347 ; A. I. R. 1935 Lah. 973.

**Soope.**—Order XXI, rule 2, is not confined to money decrees only but applies also to a decree for partition. A. I. R. 1928 Cal. 715=117 Ind. Cas. 833 ; see also A. I. R. 1922 Bom. 380=46B. 226=64 Ind. Cas. 490. The provisions of Order XXI, rule 2, relating to adjustment of decrees apply to awards under the Indian Arbitration Act. A. I. R. 1927 Sind 66=97 Ind. Cas. 321. Where a decree is for payment of certain money with direction to sell mortgaged property in default the claim in the first instance being for money, the claim falls within the scope of Order XXI, r. 2. A. I. R. 1930 Lah. 814=126 Ind. Cas. 513. Section 115 of the Evidence Act does not override Order XXI, r. 2, C. P. Code. A. I. R. 1925 Sind 140=18 S. L. R. 51=79 Ind. Cas. 89. Rule 2 does not limit or affect the operation of s. 47 and does not prevent the Court from deciding any question out of the execution of the decree. A. I. R. 1922 L. B. 31=1 Bur. L. J. 43=70 Ind. Cas. 859. Suit includes not only the stage of a suit to its termination by the decree of the first Court but also includes its appellate stage and proceedings in execution of the decree made in the suit. A. I. R. 1921 Pat. 107=6 Pat. L. J. 253=2 Pat. L. T. 273=62 Ind. Cas. 608. Rule 2 covers a decree under which money is payable and not to all kinds of decrees. A. I. R. 1926 Mad. 749=50 M. L. J. 547=49 M. 716=24 L. W. 235=95 Ind. Cas. 701. Order XXI, rule 2 (3) applies only to Court executing the decree. A. I. R. 1923 Bur. 44=1 Bur. L. J. 171=79 Ind. Cas. 278. Where the decree ordered that the decree-holder would not be entitled to execute the decree if the judgment-debtor would fulfil certain conditions, and where the judgment-debtor did not certify that he had fulfilled the conditions within the prescribed time on application for execution by the decree-holder : *Held* that the judgment-debtor could prove that as a matter of fact the conditions in the decree had been complied with and in such a case Order XXI, rule 2 (3), did not apply. A. I. R. 1926 Lah. 641=8 Lah. L. J. 43=27 P. L. R. 100=93 Ind. Cas. 369. Where Court is moved to proceed against the surety under s. 145, it is not "the Court executing the decree" within the express meaning of those words as used in Order XXI, rule 2 (3). A. I. R. 1926 Sind 105=20 S. L. R. 362=96 Ind. Cas. 234. It is not necessary for the application of Order 21, rule 2, that there should be relations of judgment-creditor and judgment-debtor between the parties to an uncertified adjustment at the time of adjustment. A. I. R. 1937 Cal. 31. The words "the decree" in Order 21, rule 2, surely mean "a decree of any kind" and would include a decree for possession of a house. No adjustment of such decree can be recognized by the Court unless it is certified and no application for certification can be made, except within 90 days. A. I. R. 1936 Lah. 842=165 Ind. Cas. 358. The words "of any kind" in sub-rule (1) of Order 21, rule 2, were introduced in the amended Code of Civil Procedure of 1908, in order to get over the conflicts between various High Courts on the question whether or not the mere word "decree" as it originally stood referred only to decrees for payment of money. The term "decree of any kind" means a decree of any kind capable of execution. 14 Pat. 488=185 Ind. Cas. 976=16 Pat. L. T. 311=A. I. R. 1935 Pat. 385. The terms of Order 21, rule 2, C. P. Code, must be understood in the light of the scheme of the Code and with due regard to the scope of Order 23, rule 3. Comparing the terms of Order 23, rule 3 with Order 21, rule 2, one difference is noteworthy. Under the former the Court may not merely order the agreement, compromise or satisfaction to be recorded, but also pass a decree

in accordance therewith, whereas under Order 21, rule 2, the Court can only record the adjustment. A Court acting under Order 21, rule 2, cannot pass a fresh executable decree on the agreement of the parties, but further proceedings, if any, in execution, as for instance, when part satisfaction has been recorded, can take place on foot of the original decree. 42 L. W. 968=1935 M. W. N. 1311=69 M. L. J. 759 (F. B.)=A. I. R. 1936 Mad. 34 (F. B.); see also A. I. R. 1935 Oudh 313=1935 C. W. N. 541.

Adjustment cannot be made to defeat the existing interest of the Government. A. I. R. 1935 Sind 111=159 Ind. Cas. 765.

Rule 2 is not applicable to the case of payments made prior to decree and the payments cannot be pleaded in bar of execution A. I. R. 1931 Mad. 399=1930 M. W. N. 1152=32 L. W. 919=54 M. 184=129 Ind. Cas. 818. This rule is not applicable to complex decrees where immovable property is ordered to be delivered. 1917 M. W. N. 227=40 Ind. Cas. 820. But this rule applies to partition decree providing for the payment of money as well as for other relief such as a partition of immovable property and to adjustment with regard to such property. Such an adjustment cannot be recognized unless certified or recorded. 43 M. 476=(1929) M. W. N. 261=27 M. L. T. 279=56 Ind. Cas. 289. An executing Court has no power to enquire into the existence of a prior alleged agreement between the parties that no decree should be obtained in the suit. 8 L. W. 205=(1918) M. W. N. 547=46 Ind. Cas. 880. Section 92 of the Evidence Act does not bar the oral evidence to prove an agreement by way of adjustment of a decree. 16 N. L. R. 204=60 Ind. Cas. 316. Oral agreement that instalment is to be paid and which later on so paid amounts to adjustment of a decree and is capable of proof. A. I. R. 1931 Sind 42=131 Ind. Cas. 710. To enable an executing Court to execute an adjusted decree an adjustment should be certified under Order 21, r. 2. The decree-holder can certify such adjustment at any time. A. I. R. 1929 Cal. 687=34 C. W. N. 213=127 Ind. Cas. 258. Where the judgment-debtor pleads an adjustment binding on the parties he is entitled to an opportunity to establish his allegations. A. I. R. 1927 Lah. 544=102 Ind. Cas. 753. Executing Court cannot investigate the fact of payment in respect of the decretal amount out of Court. The determination of this question is taken out of the purview of s. 47, C. P. Code by O. XXI, rule 2 (3). C. P. Code. 135 P. R. 1919=58 Ind. Cas. 443. An agreement to give time for the satisfaction of the judgment-debtor is void, when not certified and sanctioned by Court for want of proper consideration. A suit for damages for breach of such agreement is not maintainable. 7 L. W. 503=(1918) M. W. N. 292=24 M. L. T. 16=45 Ind. Cas. 16. Where a compromise is entered into at the time of execution; and although compromise is not incorporated in the decree it must be considered and treated as such if the parties and the Court treat it as one. 57 Ind. Cas. 591.

An inchoate contract, which, if completed would bar the execution of a decree, cannot be pleaded as a bar to the execution. The judgment-debtor has no right to claim that the contract should be completed and then evoked in bar of execution. 43 Ind. Cal. 537. An award of arbitration on a reference made during the execution proceedings binds the parties as an adjustment of the claim. 3 Pat. L. W. 146=42 Ind. Cas. 467. Under Order XXI, r. 2, a decree-holder and his judgment-debtor can adjust their respective rights and liabilities in any manner including the discharge of the judgment-debtor. The decree-holder can release some of the judgment-debtors from their liability under the decree. 40 Ind. Cas. 1. Where a prior compromise unknown to the Court, is made and is inconsistent with the decree subsequently passed and where the decree is time-barred a person in whose favour a certain lease was executed as a result of the compromise cannot recover the sum of the lease money in execution. 1 Lah. 445=24 P. L. R. (Lah) 117=136 P. L. R. 1920=3 Lab. L. J. 10=57 Ind. Cas. 153. When a decree has been passed, every time that an adjustment is arrived at between the parties a fresh decree need not be drawn up or original modified. A. I. R. 1925 Nag. 49=20 N. L. R. 122=83 Ind. Cas. 162. Application to record an adjustment of a decree is in the nature of a summary suit. A. I. R. 1927 Sind 66=97 Ind. Cas. 321. An order refusing the application to record the adjustment of a decree is also a decree, and is final until set aside or varied by a Court of appeal in review. A. I. R. 1927 Lah. 809=26 P. L. R. 237=105 Ind. Cas. 724. Where only some of the parties to the decree have joined in the compromise, it should be determined whether the compromise can be given effect to as regards some,



leaving the decree outstanding as regards others. If this cannot be conveniently done the Court will presume that the adjustment is not binding on such parties. A. I. R. 1927 Mad. 155=98 Ind. Cas. 698. Judgment-debtor's application for recording an adjustment need not be a document 'separate' from the objections filed by him on the ground of such adjustment. A. I. R. 1929 All. 79=113 Ind. Cas. 760. An agreement not to execute the decree which would be passed, cannot be taken cognizance of by executing Court but to avail of it the judgment-debtors will have to institute a separate suit, to restrain the decree-holder from executing the decree. A. I. R. 1928 Cal. 527=32 C. W. N. 434=113 Ind. Cas. 9. Parties can enter into oral agreement for settlement of money-decree. A. I. R. 1928 Rang. 316=6 Rang. 573=114 Ind. Cas. 682. An objection to an execution sale on the ground that decree in execution of which the sale took place was satisfied prior to the sale cannot be pleaded by the judgment-debtor in a suit by the decree-holder as purposer for possession of the property sold in execution of the decree. A. I. R. 1929 Cal. 374=33 C. W. N. 795=49 C. L. J. 441=118 Ind. Cas. 857. A Court need not sue whether the consideration for the adjustment is reasonable under the circumstances of the case or not. If the adjustment is made and certified to the Court the provisions of the law will be fully satisfied and the decree will be deemed as capable of execution. A. I. R. 1925 Oudh 364=12 O. L. J. 156=28 O. C. 255=86 Ind. Cas. 907. A Court other than a Court executing a decree has power to recognise a certified payment or adjustment of a decree, and direct a refund of the amount in a suit brought for that purpose. 12 P. L. R. 1917=39 Ind. Cas. 15. An auction-purchaser in execution of a money-decree can apply for entering up satisfaction of a decree affecting the property which would otherwise endanger it. 9 L. W. 596=50 Ind. Cas. 931. The transferee must prove his right before he can be allowed to execute the decree and then only a question of adjustment will arise. A. I. R. 1922 Mad. 510=16 L. W. 758=43 M. L. J. 761=31 M. L. T. 463=72 Ind. Cas. 861. Rule 2 does not apply, in case of payment before decree. 129 Ind. Cas. 818=1930 M. W. N. 1152=32 M. L. W. 919=54 Ind. Cas. 184=60 M. L. J. 721=A. I. R. 1931 Mad. 399. Uncertified adjustment cannot be pleaded in execution even by assignee of decree-holder. 140 Ind. Cas. 872=1932 M. W. N. 1333=37 M. L. W. 79=64 M. L. J. 22=56 M. 316=A. I. R. 1933 Mad. 157. Certification by decree-holder under Order 21, rule 2 (1), is not step-in-aid of execution. 1933 A. L. J. 258=55 A. 393=A. I. R. 1933 A. 364. No limitation is fixed for decree-holder to certify payments. 132 Ind. Cas. 426=A. I. R. 1931 All. 219. Sale cannot be set aside on ground of adjustment after execution of sale between decree-holder and judgment-debtor. 130 Ind. Cas. 686=33 Bom. L. R. 450=53 C. L. J. 187=35 C. W. N. 381=14 N. L. J. 28=1931 A. L. J. 257=60 M. L. J. 423=1931 M. W. N. 281=8 O. W. N. 585=58 I. A. 50=27 N. L. R. 95=A. I. R. 1931 P. C. 33 (P. C.). Duty to certify under Order 21, rule 2, does not make it consideration for receipt of money due. 1933 A. L. J. 670=A. I. R. 1933 All. 511. Court executing decree can only enquire into alleged adjustment by judgment-debtor. It cannot decline to enter into such question when application is in time. 137 Ind. Cas. 517=34 Bom. L. R. 203=A. I. R. 1932 Bom. 202. Judgment-debtor cannot plead uncertified adjustment when opposing transfer under rule 16. 137 Ind. Cas. 28=35 M. L. W. 538=55 Mad. 720=62 M. L. J. 562=1932 M. W. N. 190=A. I. R. 1932 Mad. 372 (F. B.); see also 137 Ind. Cas. 28=35 M. L. W. 538=55 Mad. 720=62 M. L. J. 562=1932 M. W. N. 190=A. I. R. 1932 Mad. 372 (F. B.). Where decree providing that produce of land if realized by decree-holder to be adjusted towards interest, Order 21, rule 2, has no application. A. I. R. 1933 Lah. 831. Decree-holder's mention of payment in application for execution is sufficient certification. 129 Ind. Cas. 909=25 S. L. R. 360=A. I. R. 1931 Sind 28. Oral agreement that instalment is to be paid and which is later on so paid amounts to adjustment. 131 Ind. Cas. 710=25 S. L. R. 279=A. I. R. 1931 Sind 42. Agreement by judgment-creditor merely release judgment-debtor or cancel security bond does not amount to adjustment of decree. A. I. R. 1933 Sind 305. Order refusing certificate is appealable. A. I. R. 1933 Pat. 634. Adjustment by minor's guardian not sanctioned by Court cannot be recognized. A. I. R. 1933 Rang. 186. Stay of confirmation of Court-sale on ground that judgment-debtor raised question of adjustment in another proceeding is prohibited. 132 Ind. Cas. 713=9 Rang. 104=A. I. R. 1931 Rang. 148. Where application is made by decree-holder stating full satisfaction of decree, Judge should not adjourn case for appearance of judgment-debtor. 134 Ind. Cas. 213=A. I. R. 1931 Rang. 332. It is doubtful whether mention of payments in execution application amounts to application under Order 21, r. 2. 141 Ind. Cas. 745=A. I. R. 1933 Pesh. 14. It is

enough if payment made by judgment-debtor is brought to notice of executing Court. Once decree-holder had admitted payment by judgment-debtor he cannot be allowed to execute his decree for same amount over again. A. I. R. 1937 Mad. 511.

**Sub-rule (3).**—Sub-rule (3) to Order 21, rule 2, C. P. Code, does not give right to decree-holder to ignore any payment against the decretal amount. On the contrary, sub-rule 1, says that he shall certify the payment. The purpose of Order 21, rule 2 (3), which merely prevents the judgment-debtor from pleading an uncertified payment, seems to be to avoid unnecessary delay and to obviate the trial of complicated issues in execution proceedings, which might prevent decree holders from realising promptly the fruit of the decrees. A. I. R. 1927 Mad. 511.

**Agreement.**—An ulterior agreement that a decree shall not be executed cannot be set up as a bar to execution. Suit can be brought to restrain execution contrary to the agreement. A. I. R. 1930 Cal. 356=34 C. W. N. 150=126 Ind. Cas. 265 ; see also A. I. R. 1929 Nag. 339=119 Ind. Cas. 704 ; A. I. R. 1921 Mad. 616=14 L. W. 317=(1921) M. W. N. 382=64 Ind. Cas. 148 ; 107 Ind. Cas. 860=A. I. R. 1928 Rang. 316=5 Rang. 685. An oral agreement not performed by either party cannot bar the execution of the decree. A. I. R. 1927 Lah. 537=103 Ind. Cas. 86. Even an oral agreement not to proceed against one of the judgment-debtors beyond a certain limit must be certified under this rule in order to bar an execution. A. I. R. 1927 Mad. 911=50 M. 897=26 L. W. 386=(1927) M. W. N. 630=53 M. L. J. 533=105 Ind. Cas. 248 ; see also 85 Ind. Cas. 672=20 L. W. 849. An inchoate agreement to adjust cannot bar execution. A. I. R. 1930 Lah. 231=113 Ind. Cas. 238 ; A. I. R. 1922 All. 13=44 A. 258=64 Ind. Cas. 990 ; A. I. R. 1935 Lah. 347. An agreement prior or subsequent to a decree contradicting or varying the terms of the decree cannot be proved by oral evidence. A. I. R. 1930 Mad. 673=(1930) M. W. N. 240=125 Ind. Cas. 543. A decree which on the face of it is enforceable to the fullest extent cannot in execution proceedings be challenged as being unexecutable wholly or in part on account of an agreement between the parties entered into prior to the decree. A. I. R. 1926 Rang. 140=5 Bur. L. J. 41=4 Rang. 118=96 Ind. Cas. 773. Decree-holder's agreement with judgment-debtor's alienee pending execution not to proceed against particular property not being in satisfaction or adjustment of decree. Order XXI, rule 2, does not bar proof of such agreement. A. I. R. 1923 Mad. 220=16 L. W. 988=44 M. L. J. 80=31 M. L. T. 423=72 Ind. Cas. 839. Where there has been an adjustment or satisfaction as between the judgment-debtor and an assignee who has attained the status of a decree-holder by an order made under Order XXI, r. 16, Order XXI, rule 2, would be clearly applicable. 104 Ind. Cas. 4=A. I. R. 1927 Cal. 694=31 C. W. N. 921. Agreement is adjustment and can be proved if certified within 90 days. 145 Ind. Cas. 924=34 P. L. R. 887=A. I. R. 1933 Lah. 806. Decree does not stand, where parties settle payment and report to Court. 135 Ind. Cas. 535=1931 M. W. N. 1141=34 M. L. W. 635=62 M. L. J. 272=55 Mad. 320=A. I. R. 1932 Mad. 115. An agreement for payment of enhanced interest cannot in any sense be regarded as an adjustment, in whole or in part of the decree, within the meaning of Order 21, r. 2. A. I. R. 1934 Oudh 465=11 O. W. N. 1103=151 Ind. Cas. 1103. An executory agreement, *viz.*, a transfer of the land by the judgment-debtor to the decree-holder, not becoming an adjustment to the satisfaction of the decree-holder, the agreement cannot amount to an adjustment which can be taken into account in the execution of the decree. A. I. R. 1934 Rang. 192. It is competent for the parties to a decree to substitute a fresh contract in lieu of the decree. When such a contract comes into existence the judgment-debtor is at liberty to apply under this rule to have the adjustment recorded. 1935 A. M. L. J. 97 ; 15 Pat. 340=A. I. R. 1926 Pat. 619. But oral agreement does not constitute an adjustment because it is not capable of being enforced or executed. 30 S. L. R. 249=A. I. R. 1936 Sind 191. An act of the parties agreeing to vary the decree is not an adjustment of a decree. A. I. R. 1936 Cal. 518. Promise of the decree-holder to cancel the decree if the judgment-debtor does certain thing is not an adjustment. A. I. R. 1936 Rang. 289=164 Ind. Cas. 106.

**Certification.**—Decree-holder's mention of payment in application for execution is sufficient certification and it is a mistake to regard the process of certificate as a revival of the decree. A. I. R. 1931 Sind 28=129 Ind. Cas. 909 ; A. I. R. 1930 Rang. 329=8 Rang. 310=127 Ind. Cas. 600 ; A. I. R. 1930 Rang. 329=127 Ind. Cas. 600 ; A. I. R. 1930 All. 123=124 Ind. Cas. 22 ; A. I. R. 1928 All. 629 (F. B.)=51 A. 237=26 A. L. J. 966=112 Ind. Cas. 73 ; A. I. R. 1921 Bom. 411=45 B. 91=59 Ind.

Cas. 399 ; but see 83 Ind. Cas. 737=A. I. R. 1924 All. 706=46 A. 635=22 A. L. J. 581=L. R. 5 A. 318. The mere certification by the decree-holder of a payment to him out of Court by the judgment-debtor under r. 2 (1) is an application within the meaning of Art. 181, Limitation Act. A. I. R. 1929 (P. C.). 19=3 Luck. 684=56 I. A. 30=33 C. W. N. 267=56 M. L. J. 233=(1929) A. L. J. 33=6 O. W. N. 29=31 Bom. L. R. 289=114 Ind. Cas. 581 (P. C.). Certification under Order XXI, r. 2 (1), is not an application for the purpose of Art. 182 (5) and is not a step-in-aid of execution. A. I. R. 1930 Rang. 61=126 Ind. Cas. 540. Under Order XXI, rule 2, any adjustment whether it be to a pre-decree or post-decree agreement must be certified. A. I. R. 1930 Mad. 673=(1920) M. W. N. 240=125 Ind. Cas. 543. It is not necessary for an adjustment to be recognised by the Court it shall have been both certified and recorded ; certification alone is sufficient. A. I. R. 1927 Mad. 155=98 Ind. Cas. 698. An uncertified payment cannot be recognised by the executing Court. Intimation in reply to the Court's notice for execution cannot be recognised. (1922) M. W. N. 189=16 L. W. 290=65 Ind. Cas. 830. Rule 2 does not contemplate an enquiry being made into the truth of the statements made by the decree-holder where he comes to Court to certify a payment and the judgment-debtor cannot question the right of the decree-holder to certify satisfaction. 5 O. L. J. 482=21 O. C. 161=41 Ind. Cas. 177. Money realised by a usufructuary mortgagee according to the terms of a decree is not money payable under the decree in r. 2, payments may not be certified to Court. 39 M. 1026=38 Ind. Cas. 675. This rule does not prohibit an executing Court from treating an admission of payments in a decree-holder's application for execution as an application to certify such payments. A. I. R. 1921 Sind 159 (F. B.)=16 S. L. R. 207=83 Ind. Cas. 360. Where a decree has been satisfied the decree-holder shall under Order XXI, rule 2, certify the payment to the Court whose duty is to execute the decree and the Court shall record the same accordingly. A. I. R. 1923 Rang. 88=1 Bur. L. J. 207=11 L. B. R. 429=70 Ind. Cas. 115. There is no time fixed within which the decree-holder is bound to certify a payment made out of Court, such payment could be certified at any time. Execution application reciting payments already made amounts to certifying. A. I. R. 1921 Bom. 411=45 B. 91=59 Ind. Cas. 399 ; see also A.I.R. 1929 Mad. 811=117 Ind. Cas. 790. A decree-holder may certify an alleged payment after making an application for execution, to prove that payment in the execution proceedings, before any objection has been taken either by an officer of the Court or before the issue of notice or by the judgment-debtor when he appears to contest the application. A. I. R. 1928 All. 629=51 A. 237=26 A. L. J. 966 (F. B.). Where a payment has been made within three years of the last starting point of limitation for an execution application, but is certified after the expiry of the three years, the certification makes the payment entitled to recognition as a payment made on the date when it was actually made and not as a payment on the date it was certified. A. I. R. 1925 All. 802=47 A. 873=23 A. L. J. 836=89 Ind. Cas. 415. Even an agreement to adjust requires certification. A. I. R. 1930 Mad. 429=119 Ind. Cas. 480. Dismissal of judgment-debtor's application under rule 2 (2) does not bar the decree-holder's certifying the payment under rule 2 (1). A. I. R. 1925 Pat. 822=7 P. L. T. 753=(1926) Pat. 100=89 Ind. Cas. 195. One of two joint-holders of a decree cannot certify satisfaction of the whole decree so as to bind the other decree-holders. But a joint decree-holder may certify satisfaction in respect of his own interest therein. A. I. R. 1925 Pat. 822=7 P. L. T. 95=(1926) Pat. 100=89 Ind. Cas. 195. The part payment of a decree-amount entered in an execution petition presented within three years from the date of such alleged payment will operate, to save limitation under s. 20 of the Limitation Act as it amounts to a certificate of payment under rule 2. A. I. R. 1924 Lah. 670. Where decree-holder applies for entering satisfaction, any one objecting to such certification, must prove that the certification is not *bona fide*. 35 M.L.J. 252=51 Ind. Cas. 411. A decree-holder need not issue a notice to the judgment-debtor before certifying payment. 4 Pat. L. J. 159=1919 Pat. 260=50 Ind. Cas. 364. Presumption of oral application does not arise on application for certification under Order 21, r. 2. 137 Ind. Cas. 768=7 Luck. 590=9 O. W. N. 209=A. I. R. 1932 Oudh 148 (F. B.). Uncertified payments by judgment-debtor of sums falling due after adjudication cannot be recognized as against Receiver. 137 Ind. Cas. 394=35 M. L. W. 161=A. I. R. 1932 Mad. 250. In instalment decree, a decree-holder cannot enter payments after controversy arises. A. I. R. 1934 All. 524. Where decree is certified as fully satisfied through negligence of agent of pleader, the order cannot be revised. A. I. R. 1934 Nag. 143.

**Form of certification.**—A mere admission by decree-holder of part satisfaction and its record by Court is legally sufficient 55 P. L. R. 1919=54 Ind. Cas. 257. Rule 2 (1) governs the case where the decree-holder seeks to certify a payment made to him out of Court by the judgment-debtor. The application need not be distinct from an application for execution of decree. A. I. R. 1922 Cal. 30=35 C. L. J. 71=26 C. W. N. 529=68 Ind. Cas. 780. A casual reference of satisfaction of a decree in a plaint or other civil proceedings is not enough. 13 S. L. R. 130=22 Ind. Cas. 901. A mention of payment in execution application is certifying within rule 2. (1918) M. W. N. 507=49 Ind. Cas. 141; see also 43 C. 207=20 C. W. N. 272=23 C. L. J. 390=34 Ind. Cas. 606. An executing Court can take evidence for considering whether the decree-holder has certified satisfaction of the decree. Order XXI, rule 2 (2), enables a Court to recognize a payment or adjustment which has been certified but not recorded. 52 Ind. Cas. 764. Mere fact of certificate of payment being termed an application and being in the form of petition does not convert it into an application within the meaning of the Limitation Act art. 181. A. I. R. 1929 P. C. 19=56 M. L. J. 233=5 Luck 684=31 Bom. 289=56 I. A. 30=6 O. W. N. 29=(1929) A. L. J. 33=33 C. W. N. 267=114 Ind. Cas. 581. A mention by a decree-holder of payments made out of Court is sufficient for a Court to consider them, since a certificate of payment given by a decree-holder to a Court is merely an intimation that he has received the money. A. I. R. 1934 Bom. 370=58 B. 610=152 Ind. Cas. 575=36 Bom. L. R. 798=A. I. R. 1934 Bom. 370.

**Enquiry.**—A Court executing a decree cannot enquire into the fact of payment or adjustment which has not been certified as required by Order XXI, rule 2, even if fraud is imputed to the decree-holder. A. I. R. 1928 Cal. 527=32 C. W. N. 434=113 Ind. Cas. 9; see also A. I. R. 1921 Pat. 135=6 P. L. J. 337=2 P. L. T. 65=63 Ind. Cas. 535; A. I. R. 1926 Oudh 482=13 O. L. J. 493=93 Ind. Cas. 53; 32 Ind. Cas. 590=38 A. 204=14 A. L. J. 132. Court can inquire where alleged adjustment is disputed by the decree-holder, and record the adjustment if it is proved. A. I. R. 1929 All. 79=113 Ind. Cas. 760; see also A. I. R. 1928 Rang. 62=5 Rang. 833=110 Ind. Cas. 123; 17 A. L. J. 677=41 A. 443=50 Ind. Cas. 65; 31 M. L. J. 207=35 Ind. Cas. 70. Where a decree-holder admits payment of a sum of money towards satisfaction of the decree the Court must recognise the fact of payment and cannot call upon the judgment-debtor for proof of payment. 55 P. L. R. 1919=54 Ind. Cas. 257. Payment out of Court when not certified can be ignored only in execution of the decree, but not otherwise. 58 Ind. Cas. 123; see also 55 Ind. Cas. 669. For showing that a decree has been satisfied an uncertified payment cannot be taken into account. 50 Ind. Cas. 331; see also 33 Ind. Cas. 71; 38 A. 289=14 A. L. J. 370=35 Ind. Cas. 234; 51 Ind. Cas. 567=13 S. L. R. 71; 5 L. W. 644=40 Ind. Cas. 889; 50 Ind. Cas. 956=15 N. L. R. 158; A. I. R. 1925 Rang. 349=4 Bur. L. J. 179=92 Ind. Cas. 677; A. I. R. 1924 Oudh 208=10 O. L. J. 351=77 Ind. Cas. 337; 10 L. W. 179=54 Ind. Cas. 922; A. I. R. 1922 Bom. 380=46 B. 226=23 Bom. L. R. 981=64 Ind. Cas. 490.

When it appears to the Court that the decree-holder has been acting fraudulently, the Court can examine the merits of an uncertified adjustment when it is pleaded in bar to execution. A. I. R. 1926 Mad. 945=24 L. W. 404=(1926) M. W. N. 622=97 Ind. Cas. 608; see also A. I. R. 1929 Mad. 783=30 L. W. 526=(1929) M. W. N. 13=119 Ind. Cas. 594; A. I. R. 1924 Oudh 208=10 O. L. J. 351=77 Ind. Cas. 337; A. I. R. 1924 Mad. 189=18 L. W. 453=76 Ind. Cas. 854; A. I. R. 1923 Bom. 404=25 Bom. L. R. 474=47 B. 643=75 Ind. Cas. 893; but see A. I. R. 1923 Cal. 342=50 C. 668=76 Ind. Cas. 31.

**Fraud as regards certification.**—Executing Court cannot recognise payment made out of Court, if not certified. A judgment-debtor who has paid money out of Court and against whom a fraudulent application is made for execution notwithstanding such payment must find his remedy in a regular suit based on the alleged fraud. A. I. R. 1925 Oudh 482=13 O. L. J. 493=3 O. W. N. 198=93 Ind. Cas. 53; see also A. I. R. 1927 Mad. 947=53 M. L. J. 901=1927 M. W. N. 924=105 Ind. Cas. 86; A. I. R. 1925 Sind 140=79 Ind. Cas. 89=18 S. L. R. 51; A. I. R. 1923 Sind 10=15 S. L. R. 77=63 Ind. Cas. 238; A. I. R. 1923 Rang. 103=11 L. B. R. 363=4 Bur. L. J. 226=68 Ind. Cas. 924; A. I. R. 1929 Rang. 269=7 Rang. 310=119 Ind. Cas. 742; A. I. R. 1925 Bom. 309=49 B. 648=27 Bom. L. R. 403 (F. B.)=95 Ind. Cas. 687; 79 Ind. Cas. 125=A. I. R. 1925 Lah. 54; A. I. R. 1923 Bom. 253=25 Bom. L. R. 247=95 Ind. Cas. 410; A. I. R. 1923 Cal. 313=67 Ind. Cas. 885; 48 Ind. Cas. 765; but see 40 B. 333=18 Bom. L. R. 22=33 Ind. Cas. 232; 45 Ind. Cas. 222=5

O. L. J. 92. Decree-holder's omission to certify satisfaction of the decree, does not amount to fraud. A. I. R. 1925 Oudh. 225=27 O. C. 277=78 Ind. Cas. 776 ; 15 Pat. 422=17 Pat. L. T. 195=A. I. R. 1936 Pat. 270.

**Notice.**—A notice in writing of the payment of the amount due under a decree by the judgment-debtor in Court should be served on the decree-holder like the summons. A. I. R. 1925 Nag. 52=81 Ind. Cas. 1001. Where a case of a judgment-debtor for adjustment of decree was adjourned without notice to the decree-holder and on the day fixed he being absent, an *ex parte* decree was passed, such order is not justified. 115 Ind. Cas. 467=A. I. R. 1930 Lah. 113=36 P. L. R. 510. Although there is no specific provision in the Code in that behalf, when the decree-holder certifies part satisfaction and the materials put before the Court by the decree-holder are such as to put the Court on notice that there was a dispute between the parties as to whether the amount certified was less than the amount which had been actually paid, it is quite competent for the Court to give notice to the judgment-debtor and enter into an enquiry as to whether more has been paid than that the decree-holder certifies. A. I. R. 1936 Mad. 468=1936 M. W. N. 140=164 Ind. Cas. 434.

**Omission to certify.**—The judgment-debtor can sue the decree-holder for damages for omission to certify or credit the amount received out of Court for the decree. (1919) M. W. N. 3=36 M. L. J. 175=48 Ind. Cas. 810 ; 50 Ind. Cas. 584=36 M. L. J. 376=42 M. 338=9 L. W. 443 ; but see 5 Pat. L. J. 70=1 P. L. T. 149=55 Ind. Cas. 890 ; A. I. R. 1923 Nag. 219=6 N. L. J. 217=72 Ind. Cas. 461 ; 19 N. L. J. 175 ; A. I. R. 1936 Nag. 281 ; A. I. R. 1936 Nag. 218 ; A. I. R. 1935 Pat. 65. Decree-holder filing application for execution and judgment-debtor opposing him on ground of payment made less than 20 days previously but not yet got certified, Court must treat judgment-debtor's petition of objection as application under sub-rule 2, so that bar under sub-rule 3 cannot come into operation. A. I. R. 1930 Pat. 526=9 Pat. 251=11 P. L. T. 763=126 Ind. Cas. 159. In the absence of a certificate of payment decree-holder is entitled in law to execute his decree against the judgment-debtor. A. I. R. 1926 Mad. 674=49 M. 325=50 M. L. J. 584=24 L. W. 361=94 Ind. Cas. 522 ; A. I. R. 1934 All. 209=1934 A. L. J. 198=148 Ind. Cas. 1118. Where the creditor by taking out a *darkhast* recovers the decretal amount over again, the judgment-debtor can by suit recover the amount paid to his creditor without its being certified. A. I. R. 1923 Bom. 253=25 Bom. L. R. 247=95 Ind. Cas. 410. Where the payment is made out of Court and is not certified the Court cannot take any legal notice of it. 14 L. R. 859 (Rev.). There is no reason why the position of an assignee decree-holder under Order 21, rule 16, seeking to execute his decree should in any way be inferior to the position of an original decree-holder in regard to the provisions contained in sub-clause (3). A. I. R. 1934 Sind 205. The provisions of Order 21, rule 2 (3), are highly technical in that they preclude, on the execution side, proof of a payment or adjustment which has not been certified or recorded according to sub-rules (1) and (2). These provisions must therefore, be construed very strictly. A. I. R. 1935 Nag. 230. Until the name of the transferee of a decree is formally substituted in place of the original decree-holder, the decree-holder referred to in Order 21, rule 2 (1), is the only person in whose favour the decree is passed and whose name stands on the face of the decree in the record of the Court. Transferee of the decree is not a decree-holder unless he is recognized by the Court. Where therefore an adjustment embodied in an agreement is made by the judgment-debtors with the transferee of a decree when he is not brought on the record as the decree-holder in place of the original decree-holder, Order 21, rule 2 (2), does not impose upon the judgment-debtors, the duty of having the adjustment recorded as certified and adjustment can be successfully pleaded as a bar to the execution in spite of the fact that it is not certified. A. I. R. 1935 Nag. 230. Any satisfaction of a decree the report of which has not been made in the suit or in execution proceedings connected therewith and where it has also been certified or recorded within the meaning of Order 21, rule 2 (3), cannot be recognized by the executing Court. 39 C. W. N. 961 ; see also A. I. R. 1935 Rang. 481. The obvious policy of the legislature is to prevent a controversy during execution proceedings as to whether the dispute between the parties has been settled and the legislature enacting Order 21, rule 2, has used words which are of widest application. A. I. R. 1936 Pat. 253=162 Ind. Cas. 482. Sub-rule (3) is mandatory and means that if there is a question of any payment in satisfaction of the decree or adjustment of the decree which has not been certified, the Court shall refuse to recognize it in execution proceedings. Sub-clause (3) clearly contemplates a certification before

the objection is taken to the execution on the basis of adjustment, etc. A. I. R. 1930 Pat. 253=162 Ind. Cas. 482. A claim for restitution under s. 144, before it is allowed by the Court of first instance, cannot be regarded as a decree or order of the Court. An adjustment of a claim to restitution does not therefore come within the provisions of Order 21, rule 2 and the Court is not precluded from taking into consideration such adjustment on the ground that it is certified. A. I. R. 1936 Mad. 840=71 M. L. J. 344=1936 M. W. N. 758.

**Mortgage decree.**—A final decree in a mortgage suit can also be adjusted under Order XXI, rule 2. A. I. R. 1923 Nag. 20=68 Ind. Cas. 443. An uncertified adjustment of the preliminary mortgage-decree cannot be pleaded in bar to the execution of the final decree though the adjustment was made in pursuance of the arrangement entered into, before the passing of the preliminary decree. 37 M. L. J. 356=54 Ind. Cas. 137. Even after a mortgage-decree a judgment-debtor can in the execution Court plead to the effect that something has taken place since the passing of the decree which amounts to a partial satisfaction of the decree. If such a plea be entered in the execution Court can enquire into the same and continue the execution proceedings, in respect of so much only of the decree which it finds after inquiry to be still unsatisfied. A. I. R. 1924 All. 297=21 A. L. J. 818=83 Ind. Cas. 832; see also 5 Pat. L. J. 672=1 P. L. T. 416=57 Ind. Cas. 473. Application to make a decree absolute in a mortgage suit is not a proceeding in execution, and sub-rule (3) does not prevent the Court from recognising an uncertified payment or adjustment made out of Court. 14 Pat. 488=16 Pat. L. T. 311=A. I. R. 1935 Pat. 385.

**Payment of decretal amount.**—The Court is not bound to record a payment when it is not satisfied that such payment has been made. A. I. R. 1928 Rang. 185=6 Rang. 218=111 Ind. Cas. 371. Payments can be certified in the application for execution of the decree. A. I. R. 1921 Cal. 643=35 C. L. J. 566=26 C. W. N. 534=64 Ind. Cas. 72; but see 64 Ind. Cas. 32=A. I. R. 1922 Cal. 200. A Court must recognize the payments previously made and s. 20, Limitation Act, comes into save limitation. 29 M. L. J. 669=18 M. L. T. 475=31 Ind. Cas. 318. A plea of tender so as to disentitle the opposite party to his interest may be pleaded in execution proceeding. (1917) M. W. N. 308=5 L. W. 718=38 Ind. Cas. 295. Where a decree is admitted by the decree-holder to be satisfied it ceases to exist as a decree capable of execution and the confirmation of sale, which is a proceeding in execution should not be ordered. A. I. R. 1922 Nag. 248=18 N. L. R. 134=95 Ind. Cas. 331. Rule 2 (2) applies to a pending execution in the Court and not where the execution has come to an end. A. I. R. 1929 Pat. 400=11 P. L. T. 503=123 Ind. Cas. 798. Under rule 2 payment need not both be certified and recorded but should either be certified or recorded to enable the executing Court to recognize payment made by judgment-debtor. A. I. R. 1925 Mad. 230=47 M. L. J. 498=(1924) M. W. N. 815=82 Ind. Cas. 588. In case of joint decree for costs, payment out of Court to some decree-holders, debars others from executing the entire decree. A. I. R. 1930 Cal. 78=126 Ind. Cas. 124. The payment directed to be made to a third person under a decree comes within Order 21, rule 2. A. I. R. 1923 All. 271=21 A. L. J. 97=45 A. 304=71 Ind. Cas. 457. One member of a firm can receive payment of a decretal amount and can certify satisfaction. A. I. R. 1926 Sind. 167=92 Ind. Cas. 387. A specific provision of the Code, that a plea of payment cannot be recognised when it has not been previously certified, or rather not certified within the time allowed by law cannot be overridden by Court's general power of considering questions between parties to a decree and evidence is not admissible to prove fact of payment. A. I. R. 1926 Oudh 620=91 Ind. Cas. 979. For certification deposit by judgment-debtor of decretal amount under Order XXI, r. 89, to prevent confirmation of sale, though made after 30 days of sale, can be treated as payment under Order XXI, r. 2. A. I. R. 1925 Nag. 17=79 Ind. Cas. 903. Where the defendant in reply to an execution application alleges an adjustment within ninety days of the alleged adjustment that information given to the Court in a written statement put in by defendant in answer to an application for application for execution may be regarded as a sufficient compliance within the terms of Order 21, rule 2(2). On such an application for recording adjustment can be entertained by the executing Court. A. I. R. 1935 Bom. 303=37 Bom. L. R. 230. In an application under Order 21, rule 2(2), the burden is on the judgment-debtor to prove the adjustment set up. 1935 A. M. L. J. 97. Where the judgment-debtor pleads that the decree-holder has accepted a smaller sum that was due to him under the decree in full satisfaction of it, s. 92 of the Evidence Act does not bar him from proving such adjustment

under this rule, by oral evidence. 156 Ind. Cas. 834=1935=M. W. N. 335=A. I. R. 1935 Mad. 424.

**Limitation.**—No limitation is fixed for decree-holder to certify payment. The certification lets in evidence in proof of payment. A. I. R. 1931 All. 219=132 Ind. Cas. 426; see also A. I. R. 1928 All. 629=51 A. 237=26 A. L. J. 966=112 Ind. Cas. 73; A. I. R. 1927 Oudh. 43=3 O. W. N. 987=98 Ind. Cas. 1069; A. I. R. 1927 Oudh. 7=29 O. C. 358=3 O. W. N. 829=1 Luck. 428=98 Ind. Cas. 353; 13 S. L. R. 37=52 Ind. Cas. 804; A. I. R. 1934 Pat. 380; 23 C. W. N. 320=50 Ind. Cas. 242; 38 M. L. J. 219=22 M. L. T. 115=(1917) M. W. N. 502=41 M. 251=41 Ind. Cas. 701; A. I. R. 1925 Cal. 1012=30 C. W. N. 945=54 C. 143=86 Ind. Cas. 1051; A. I. R. 1930 Rang. 329=8 Rang. 310=127 Ind. Cas. 600; 15 P. L. T. 457=A. I. R. 1934 Pat. 380; 4 A. W. R. 846; A. I. R. 1936 Nag. 281; A. I. R. 1935 Mad. 922=159 Ind. Cas. 38; A. I. R. 1935 Nag. 25=31 N. L. R. 271. Limitation for an application by a judgment-debtor is within ninety days under Art. 174. A. I. R. 1930 Rang. 329=8 Rang. 310=127 Ind. Cas. 600; see also A. I. R. 1929 All. 674=115 Ind. Cas. 139; A. I. R. 1934 All. 209; A. I. R. 1922 Cal. 30=26 C. W. N. 529=35 C. L. J. 71=68 Ind. Cas. 780. An uncertified payment does not operate to extend the period of limitation for an application for execution. 45 C. 630=42 Ind. Cas. 472; A. I. R. 1924 Oudh. 392=11 O. L. J. 379=79 Ind. Cas. 799. Where a payment of a judgement-debtor is relied upon to save limitation for an application for execution, an execution Court must compute limitation from date not of payment but of certification. When a decree-holder applies for execution he only invokes a payment certified before execution became time-barred. A. I. R. 1928 All. 55=50 A. 259=25 A. L. J. 933=107 Ind. Cas. 40.

### *Courts executing Decrees.*

3. [New.] Where immovable property forms one estate or tenure situate within the local limits of the jurisdiction of Lands situate in more than two or more Courts, any one of such Courts one jurisdiction. may attach and sell the entire state or tenure.

**Notes.**—Where Court is selling immovable property outside its jurisdiction except as provided by rule 3, the sale is a nullity. 27 C. W. N. 542=A. I. R. 1933 Cal. 619=77 Ind. Cas. 253. Order passed by Court under misapprehension of facts can be set aside. A. I. R. 1934 All. 287. Court cannot sell property outside its jurisdiction. A. I. R. 1933 Sind 231.

4. [S. 223, fifth para.] Where a decree has been passed in a suit of which the value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject-matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency or a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras "or Bombay"\* such Court may send to the Court of Small Causes in Calcutta, Madras "or Bombay"\* as the case may be, the copies and certificates mentioned in rule 6; and such Court of Small Causes shall thereupon execute the decree as if it had been passed by itself.

**Amendment in Burma.**—In rule 4 omit a "Presidency or" and "as the case may be" and substitute Rangoon for "Calcutta, Madras or Bombay."—*Vide* G. B. Order of 1937.

**Notes.**—Decrees of foreign Court are governed by rule 4. (1917) M. W. N. 498=6 L. W. 361=36 M. L. J. 539=40 Ind. Cas. 670. It is for the transferring Court to decide whether the transfer of a decree can or cannot be properly made, and once the decree is transferred it is not within the powers of the Court to which the transfer is made to determine the correctness or propriety of the order authorising such transfer. This is so, even where the subject-matter of the decree is exempt from the jurisdiction of the executing Court. The remedy of the aggrieved party is by way of appeal from the order of the transferring Court. An order of the Small Cause Court being the Court to which the decree was transferred for execution—that as the subject-matter of the suit was exempt from the cognizance

\* Substituted by G. I. Order of 1937.

of the Small Causes Court and therefore by virtue of Order 21, rule 4, the Small Cause Court had no jurisdiction to execute the decree, was accordingly set aside. 40 C. W. N. 267.

**5. [S. 223, sixth para]** Where the Court to which a decree is to be

**Mode of transfer.**

sent for execution is situate within the same district as the Court which passed such decree, such Court shall send the same directly to the former Court. But, where the Court to which the decree is to be sent for execution is situate in a different district, the Court which passed it shall send it to the District Court of the district in which the decree is to be executed.

*N. B.*—For local amendments in Allahabad, Lahore, Oudh and Rangoon.—*Vide infra.*

**Scope.**—Where decree is sent direct to a Subordinate Judge in another District, the Subordinate Judge has no jurisdiction to execute it. The decree must be sent to the District Judge. 4 Pat. L. J. 49=49 Ind. Cas. 374; see also A. I. R. 1933 Lah. 839. Where application for execution is not entertained by the Court having jurisdiction to entertain it, nor properly transferred by that Court to another Court, the transferee Court does not derive jurisdiction by the mere filing of application. A. I. R. 1921 Pat. 152=2 Pat. L. T. 374=6 Pat. L. J. 304=(1921) Pat. 186=62 Ind. Cas. 487. Where decree is transferred to another Court for execution, the latter Court can entertain execution application even though copy of decree has not been received by it. 144 Ind. Cas. 923=38 M. L. W. 133=1933 M. W. N. 789=56 M. 692=65 M. L. J. 137=A. I. R. 1933 Mad. 627. Where petition contains a prayer for transfer of decree and for handing over decree, papers to applicant, the latter prayer is no "distinct subject" and double Court-fee is not required. A. I. R. 1933 Sind 343. A Munsiff can transfer a decree for execution to the Subordinate Judge in the same district even where there is no express prayer for such transfer by the decree-holder. A. I. R. 1936 Cal. 571=64 C. L. J. 47. There is no justification for the view that if the mode of transfer laid down in Order 21, r. 5, is not strictly followed, the proceedings of the Court, to which the decree is transferred must of necessity be without jurisdiction. 164 Ind. Cas. 917; see also 64 C. L. J. 47=A. I. R. 1936 Cal. 571; A. I. R. 1936 Lah. 765=164 Ind. Cas. 693=38 P. L. R. 505.

**6. [S. 224.]** The Court sending a decree  
Procedure where Court desires that its own decree shall for execution shall send—  
be executed by another Court.

- (a) a copy of the decree;
- (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the jurisdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unsatisfied; and
- (c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect.

*N. B.*—For local amendments in Allahabad, Oudh, Peshwar and Rangoon.—*Vide infra.*

**Scope.**—Decree papers should be handed over to the judgment-creditor on his applying for the same unless he is a person not fit to be treated with such paper. A. I. R. 1933 Sind 343. Omission to send a certificate does not affect jurisdiction of Court to entertain application. 134 Ind. Cas. 944=35 C. W. N. 308=A. I. R. 1931 Cal. 649. Where two Courts are presided over by the same Judge it is not necessary to transfer the decree to himself with all necessary documents. A. I. R. 1928 Rang. 15=5 Rang. 613=105 Ind. Cas. 654. Where decree is transferred to another Court for execution, the transferring Court can again transfer the decree to a third Court. A. I. R. 1928 Nag. 29=23 N. L. R. 126=101 Ind. Cas. 279. The decree of a Native State coming within the purview of s. 44 does not cease to be a foreign judgment. 40 B. 551=18 Bom. L. R. 486=36 Ind. Cas. 363. Where certificate is issued by the Court passing the decree and transferring it to another Court for execution, notice to execute the decree can only be issued by the Court of trans-



fer. 26 C. W. N. 292=63 Ind. Cas. 116. Where decree has been transferred, the decree-holder cannot be compelled to make a second application for execution in the transferee Court. A. I. R. 1924 Pat. 120=2 Pat. 909=5 Pat. L. T. 11=74 Ind. Cas. 753. If the Court transferring the decree puts a wrong construction on the decree in the certificate, the judgment-debtor need not be directed to approach that Court for getting it amended. Any such order passed by the executing Court is *ultra vires* and an interference in revision is justified. A. I. R. 1925 Pat. 807=4 Pat. 440=7 Pat. L. T. 456=93 Ind. Cas. 257. Where execution has been transferred, application under s. 73 can be entertained by original Court. A. I. R. 1934 Lah. 113.

7. [S. 225.] The Court to which a decree is so sent shall cause such Court receiving copies of decree, etc., to file the same without proof. copies and certificates to be filed, without any further proof of the decree or order for execution or of the copies thereof, unless the Court for any special reasons to be recorded under the hand of the Judge requires such proof.

**Scope.**—Where decree is transferred for execution, executing Court is not competent to question the validity of decree. A. I. R. 1931 All. 192=(1930) A. L. J. 1552=131 Ind. Cas. 244; see also A. I. R. 1931 Pat. 27=9 Pat. 829=127 Ind. Cas. 138; 46 Ind. Cas. 419=42 P. L. R. 1918=93 P. W. R. 1918=22 P. R. 1919; 36 Ind. Cas. 10=10 Bur. L. T. 159=2 U. B. R. 119. Decision of decreeing Court as to who is plaintiff or appellant in decreeing Court is final, executing Court cannot question it. A. I. R. 1930 Bom. 141=31 Bom. L. R. 1254=54 B. 95=124 Ind. Cas. 236. An executing Court to which a decree is sent for execution can refuse to execute a decree which on the face of it, is absolutely bad and a nullity. A. I. R. 1930 Rang. 337=129 Ind. Cas. 519. Where the decree is against a dead person, the Court to whom the decree is transferred can also refuse to execute decree as being nullity. A. I. R. 1934 Lah. 117. Otherwise, the transferee Court cannot question either the validity of the decree or the jurisdiction of the Court passing the decree. 131 Ind. Cas. 244=1930 A. L. J. 1552=53 A. 125=A. I. R. 1931 All. 52; 138 Ind. Cas. 376=33 P. L. R. 725=A. I. R. 1932 Lah. 601; 136 Ind. Cas. 353=1931 A. L. J. 653=53 A. 747=A. I. R. 1931 All. 689; 142 Ind. Cas. 643=37 M. L. W. 358=1933 M. W. N. 187=A. I. R. 1933 Mad. 362; 129 Ind. Cas. 138=9 Pat. 829=13 P. L. T. 149=A. I. R. 1931 Pat. 27. Judgment-debtor can question jurisdiction of Court which passed the decree even at the time of execution. A. I. R. 1933 All. 751=17 R. D. 571. Executing Court can refuse execution if decree is passed without jurisdiction. But want of jurisdiction must be patent. 142 Ind. Cas. 487=A. I. R. 1933 Nag. 211. The general powers of Court to which decree is transferred for execution are same as those of Court that passed the decree. A. I. R. 1934 Lah. 652. A Court to which a decree has been transferred for execution under Order 21, rule 7, has no power to go behind the decree and to question, or to enquire into the jurisdiction of the Court which passed the decree. 38 Bom. L. R. 1023; see also 13 Pat. 17=A. I. R. 1934 Pat. 203=151 Ind. Cas. 368. Under Order 21, rule 7, the executing Court has no right to enquire *suo motu* proof of the jurisdiction of the Court which passed the decree when copies of the decree, order for execution, etc., are forwarded to it under Order 21, r. 6. But Order 21, r. 7, does not seem to deal with the powers of an executing Court to deal with an objection as to jurisdiction if it raised on behalf of the judgment-debtor. The general powers of a Court, to which a decree is transferred for execution are under s. 42, C. P. Code, the same as those of the Court which passed the decree and there is no reason for holding that the transferee Court is debarred from taking cognizance of objections as to jurisdiction, of which the Court which transferred the decree could take cognizance. 152 Ind. Cas. 135=35 P. L. R. 482=A. I. R. 1934 Lah. 652. Where a Munsiff was incompetent to pass the final decree, firstly, because he did not possess the necessary pecuniary powers and secondly, because he lacked inherent jurisdiction in as much as the so-called preliminary decree had been passed by the Subordinate Judge, and the case had never been transferred to the Munsiff's Court, and further because the compromise decree was in fact a final decree which had completely decided the suit, the decree passed by the Munsiff is a mere nullity because he lacked inherent jurisdiction to take cognizance of the matter and that in such a case the executing Court can go into the question of the validity of the decree *i.e.* as to lack of inherent jurisdiction and refuse to execute it. A. I. R. 1934 Oudh 75 (F. B.)=11 O. W. N. 169=147 Ind. Cas. 1209=9 Luck. 435.

8. [S. 226.] Where such copies are so filed, the decree or order may, if the Court to which it is sent is the District Court, be executed by such Court or be transferred for execution to any subordinate Court of competent jurisdiction, by Court to which it is sent.

**Notes.**—The District Court to which a decree is transferred cannot transfer it to some other District Court for execution. 21 W. R. 337; 3 C. 512; 8 I. A. 165. A subordinate Court of a District is entitled to execute a transferred decree by the order of the District Court. 22 C. 764. An order under this rule forwarding a decree for execution to a subordinate Court by the District Court need not be signed by the latter. 23 C. 480; 5 Ind. Cas. 155=7 M. L. T. 132. Where a decree is transmitted by a Court, having jurisdiction over the property to which it relates, to a Court having no jurisdiction over it, the latter Court cannot execute the same. 33 M. L. J. 750=23 M. L. T. 24=(1918) M. W. N. 132=43 Ind. Cas. 79. The words "competent jurisdiction" under Order 21, rule 8, mean "competent to sell in execution" and is not referable to territorial jurisdiction. 152 Ind. Cas. 891=1934 M. W. N. 878=40 L. W. 284=A. I. R. 1934 Mad. 573.

9. [S. 227.] Where the Court to which the decree is sent for execution is a High Court, the decree shall be executed by such Court in the same manner as if it had been passed by such Court in the exercise of its ordinary original civil jurisdiction, Execution by High Court of decree transferred by other Court.

**Local Amendment in Burma**—For "a High Court" read "the High Court"—*Vide* G. B. Order of 1937.

**Notes.**—The functions of the High Court in respect of the execution of a decree of another Court, are limited to effecting execution and to the matters arising out of the proceedings in execution. 6 B. L. R. App. 66. As regards the meaning of the words "ordinary jurisdiction," *vide* 13 B. 520. Where decree passed by Small Cause Court is transferred to High Court for execution, High Court cannot make decree payable by instalment. A. I. R. 1934 Rang. 197.

#### *Application for Execution.*

10. [S. 230, first para.] Where the holder of a decree desires to execute it, he shall apply to the Court which passed the decree or to the officer (if any) appointed in this behalf, or if the decree has been sent under the provisions hereinbefore contained to another Court then to such Court or to the proper officer thereof, Application for execution.

**N. B.**—For local amendment in Rangoon.—*Vide infra*.

**Soope.**—In case of decree transferred for execution, application is necessary to execute the decree. A. I. R. 1924 Nag. 413=80 Ind. Cas. 59. An application for transfer of a decree for execution by another Court is not a substantive application for execution. The transmission order in such a case is ministerial and not a judicial order. A. I. R. 1935 Lah. 508=158 Ind. Cas. 127. Where decree is transferred for execution application for execution must be made to the transferee Court and not to the transferring Court. A. I. R. 1931 Lah. 14=130 Ind. Cas. 521. Decree-holder cannot be compelled to make a second application for the execution of the decree in the Court to which the decree is transferred if he has already made an application in the Court which passed the decree. A. I. R. 1924 Pat. 120=2 Pat. 909=5 P. L. T. 11=74 Ind. Cas. 753. Where decree has been subsequently amended, fresh notice is necessary. 1930 M. W. N. 166. Application made by decree-holder merely to issue notice to the judgment-debtor to pay the decretal amount is not illegal. A. I. R. 1929 Rang. 95=116 Ind. Cas. 474. Application for the transfer of the execution of the decree is not an application for execution but an application to take a step-in-aid of execution under Art. 181, Limitation Act. A. I. R. 1926 All 473=94 Ind. Cas. 482. The power to make an order for simultaneous or concurrent execution of a decree in more Courts than one is different from the power of transferring Court to order execution after the decree is transferred for execution. A. I.

R. 1927 Cal. 581=31 C. W. N. 653=102 Ind. Cas. 513. Applications presented after the termination of the suit are not within the rule. 8 L. W. 21=41 M. 410=48 Ind. Cas. 840. Where after attachment of property in execution of decree for money, it is transferred to the local limits of the jurisdiction of another Court, the new Court having territorial jurisdiction over the property attached can entertain an application for execution. A. I. R. 1929 Mad. 852=125 Ind. Cas. 90=30 L. W. 649. Where decree has been transferred to another Court for execution and the decree-holder in anticipation a few days before the actual arrival of the decree, application was held incompetent. A. I. R. 1931 Mad. 103=(1930) M. W. N. 568=130 Ind. Cas. 458. Where a decree has been affirmed in appeal the decree of the first Court as affirmed by the Court of appeal should be executed. 129 Ind. Cas. 138=A. I. R. 1931 Pat. 27. Where owing to misdescription the decree was passed in wrong name, Court can in execution bring real judgment-debtor on record. 144 Ind. Cas. 901=35 Bom. L. R. 200=A. I. R. 1933 Bom. 200. In case where decree is transferred, application for execution must be made to transferee Court and not to parent Court. 130 Ind. Cas. 521=A. I. R. 1931 Lah. 14. Decree-holder applying for execution is not required to satisfy Court that provision in decree sought to be enforced is provision in his favour. 138 Ind. Cas. 832=34 Bom. L. R. 670=A. I. R. 1932 Bom. 378. Execution application against dead judgment-debtor is not step-in-aid of execution. A. I. R. 1934 All. 463. Where a decree is passed in favour of three persons awarding them separate costs, a joint application for separate amounts due to them is maintainable; and it is obviously more convenient for the purposes of attachment and sale that for the execution of a single decree there should be a single application and a single procedure of attachment and a single procedure of sale, otherwise if there were a multiplicity of applications and attachments and sales there would be considerable confusion. A. I. R. 1935 All. 402=157 Ind. Cas. 429. Where a decree is transferred for execution without any reservation, the original Court has no longer the power to execute the decree until and unless the decree is returned by the transferee Court with a certificate of non-satisfaction. It is, however, open to the original Court to re-transfer the proceedings to itself or to some other Court. 152 Ind. Cas. 128=A. I. R. 1934 Lah. 728=35 P. L. R. 751.

**11. [Ss. 256, 235.] (1) Where a decree is for the payment of money**

**Oral application.** the Court may, on the oral application of the decree-holder at the time of the passing of the decree, order immediate execution thereof by the arrest of the judgment-debtor, prior to the preparation of a warrant if he is within the precincts of the Court.

**(2) Save as otherwise, provided by sub-rule (1) every application for the execution of a decree shall be in writing signed**

**Written application.** and verified by the applicant or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case, and shall contain in a tabular form the following particulars, namely :—

- (a) the number of the suit ;
- (b) the names of the parties ;
- (c) the date of the decree ;
- (d) whether any appeal has been preferred from the decree ;
- (e) whether any, and (if any) what, payment or other adjustment of the matter in controversy has been made between the parties subsequently to the decree ;
- (f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the dates of such applications and their results ;
- (g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross-decree, whether passed before or after the date of the decree sought to be executed ;
- (h) the amount of the costs (if any) awarded ;
- (i) the name of the person against whom execution of the decree is sought ; and
- (j) the mode in which the assistance of the Court is required, whether—
  - (i) by the delivery of any property specifically decreed ;

(ii) by the attachment and sale, or by the sale without attachment of any property ;

(iii) by the arrest and detention in prison of any person ;

(iv) by the appointment of a Receiver ;

(v) otherwise, as the nature of the relief granted may require.

(3) The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree.

*N. B.*—For local amendments in Allahabad, C. P., Madras and Oudh.—*Vide infra.*

**Sub-section (1).**—In cases of applications for execution the primary consideration must be the interest of the decree-holder and where interests are likely to be jeopardised by the granting of any application for time, Courts have no option but to execute the decree. The Courts have power to stay execution against the person for such time as it thinks reasonable unless there is something in the Code which prohibits such power. A. I. R. 1925 Mad. 42=48 M. 494=20 L. W. 175=84 Ind. Cas. 134 An order made at the time of the decree, continuing an *interim* attachment—in the absence of any formal application for execution—cannot be treated as an order in execution entitling the sheriff to a poundage, even where such an order was followed by an application for the sale of the attached property on the ground that they were perishable. 40 C. W. N. 1317.

**Sub-section (2).**—Appellate decree whether confirming, varying or reversing the decree of the original Court is the only decree capable of execution. A fresh application for execution is necessary. A. I. R. 1930 Bom. 225=32 Bom. L. R. 300=127 Ind. Cas. 199. Where decree-holder desires to execute his decree by the arrest and detention in prison of the judgment-debtor, the executing Court cannot deprive him of his right and compel him to accept payment in instalments. A. I. R. 1930 Lah. 220=30 P. L. R. 736=125 Ind. Cas. 61. The verification need not be signed by all the decree-holders when there are more than one. A. I. R. 1924 Pat. 23=2 Pat. 809=4 Pat. L. T. 513=(1923) Pat. 229=1 P. L. R. 453=74 Ind. Cas. 174. This rule is no bar to the maintenance of concurrent execution. A. I. R. 1923 Pat. 224=2 Pat. 328=4 Pat. L. T. 99=(1923) Pat. 61=71 Ind. Cas. 741. Defect in not mentioning the date of disposal of a previous application for execution is not material where numbers of execution case are given. Where cross-decree could not be set-off it need not be mentioned. A. I. R. 1924 Cal. 398=71 Ind. Cas. 1054. Where decree-holders deliberately refrained from mentioning a previous adjustment in their application for execution application was held not in accordance with law. A. I. R. 1924 Nag. 185=78 Ind. Cas. 291 ; see also A. I. R. 1926 Nag. 164=89 Ind. Cas. 1009. Omission to state in the application for execution names of all the persons interested in the decree, is not such a decree as would invalidate the execution proceedings. A. I. R. 1926 Cal. 811=30 C. W. N. 562=96 Ind. Cas. 692. Where the property is described in the plaint and in the mortgage-decree and a plan of the property is also on the record, it is doubtful whether an application in the form prescribed under Order 21, rule 11, is in every case necessary. A. I. R. 1934 Lah. 58=149 Ind. Cas. 1066.

Order rejecting application which is not accompanied by process-fee, is a mistake. Proper course is to order the decree-holder to file process-fee within reasonable time. A. I. R. 1930 Oudh 65=6 O. W. N. 1054=124 Ind. Cas. 445. Where a decree-holder disappears but his death cannot be legally presumed, his pleader can under rule 11 (2), file an application for execution. A. I. R. 1925 Pat. 369=4 Pat. 378=6 P. L. T. 547=3 Pat. L. R. 43=86 Ind. Cas. 358. Where pleader signed and verified the execution application being under the impression that decree-holder was still a minor while he was in reality a major, his action was held *bona fide* and his application was held valid. A. I. R. 1930 Lah. 603. Where an application for execution, though not signed and verified by the decree-holder, but signed and verified by the pleader in the original suit it is a valid application. A. I. R. 1929 Bom. 196=(1929) Bom. 430=31 Bom. L. R. 355=117 Ind. Cas. 526. When after a decree (in this case an award under the Co-operative Societies Act) the Court accepts a compromise arrived at between the parties to the effect that the decretal amount will be paid by instalments and dismisses the execution case in terms of such compromise, the order must be deemed to be one made under Order 20, rule 11 (2), C. P. Code, and although passed on an application made after six months of the decree, it would be binding till set aside in appropriate proceedings. 41 C. W. N. 480.

Application praying only for rateable distribution is not a valid application for execution. A. I. R. 1929 Nag. 148=25 N. L. J. 94=12 N. L. J. 64=116 Ind. Cas. 655. Except in a case where the decree itself directs the appointment of a Receiver, no decree-holder has a right to ask for the appointment of a Receiver only. A. I. R. 1929 Mad. 20=114 Ind. Cas. 839. Any method suggested for the satisfaction of decree not actually prohibited by law falls within the purview of r. 11 (2) (j) (v). A. I. R. 1928 Lah. 7=111 Ind. Cas. 259. Where a sum has been paid up, and the interest on the sum has been waived, the decree-holder's application to execute the decree should be dismissed. A. I. R. 1929 Rang. 182=119 Ind. Cas. 223. *Bona fide* defects as regards the names of defendants do not render the application for execution invalid. A. I. R. 1930 Mad. 172=119 Ind. Cas. 595. Executing Court has an inherent power to stay or defer the issue or operation of its own processes in cases demanding the exercise of such power in the interest of justice. A. I. R. 1927 Cal. 581=31 C. W. N. 653=102 Ind. Cas. 513. The decree-holder has the right to execute his decree in the manner he desires. Court has no reason to refuse to allow the decree-holder to attach and sell the library and office furniture of a pleader. A. I. R. 1927 Lah. 153=28 P. L. R. 86=99 Ind. Cas. 291. It is not reasonable to compel debtors to pay their debts by means which will deprive them of their livelihood, if there is available an alternative method which will be reasonably fair to the creditor. A. I. R. 1925 Rang. 33=3 Bur. L. J. 97=82 Ind. Cas. 827. Where application was filed on the last day, and time was given to the applicant for supplying the defects without fixing any date the application was held to be time-barred. A. I. R. 1926 Pat. 533=7 P. L. T. 350=90 Ind. Cas. 761. Where an application was in form prescribed by the Civil Rules of Practice but filed under Order XXI, rule 11, with the main particulars required by the rule and the Court overlooking the want of form passed an order granting the relief prayed for, the application is in execution. A. I. R. 1928 Mad. 129=107 Ind. Cas. 298. Where application for execution was put in by decree-holder's son without power-of-attorney but the judgment-debtor did not object and the power-of-attorney was presented a month before the application for execution would have been time-barred, the application for execution was held to be a proper application. A. I. R. 1929 Lah. 478=113 Ind. Cas. 781.

Whether an omission is or is not material will depend on the facts of the particular case. Omission to specify all the previous applications with their dates and their results is not material irregularity such as would render the whole of the execution proceedings illegal. A. I. R. 1926 Cal. 1146=96 Ind. Cas. 554. Proceedings in execution are proceedings in continuation of the suit and as such fresh *vakalatnama* is not required. A. I. R. 1925 Pat. 692=7 P. L. T. 220=1925 Pat. 234=91 Ind. Cas. 211. The pleaders, who represented the client in the case, out of which the execution proceedings arise, must be held to be a person who is acquainted with the facts of the case. The application in execution signed and verified by such pleader is therefore a compliance with r. 11 (2), O. 21, C. P. Code. A. I. R. 1934 Nag. 224. Application need not be verified in the presence of Court even where application for execution is made by a person other than the decree-holder. All that is necessary is that the Court should be satisfied that the person who signed the verified application is acquainted with the facts of the case. A. I. R. 1924 Cal. 811=28 C. W. N. 687=80 Ind. Cas. 313. Where application for execution was rejected wrongly as not being in accordance with law, but the decree-holder acquiesced in it, the application can be of no avail to save limitation for further execution proceedings. A. I. R. 1923 Nag. 236=8 N. L. J. 91=92 Ind. Cas. 473.

An application for execution containing formal defect is an application in accordance with law. 40 M. 949=21 M. L. T. 257=5 L. W. 648=32 M. L. J. 621=38 Ind. Cas. 136; see also A. I. R. 1922 Sind 29=15 S. L. R. 156=65 Ind. Cas. 14. Where application for execution is not in tabular form it should not be rejected. A. I. R. 1921 Lah. 37=1 L. B. R. 163. Application for execution must comply with the requirements of the rules. The Court must either reject the application or allow it to be amended. 2 Lah. L. J. 104=31 P. W. R. 1920=55 Ind. Cas. 16; see also 4 N. L. J. 207=A. I. R. 1921 Nag. 90. Defective application is not a step-in-aid of execution. 65 Ind. Cas. 120; see also A. I. R. 1922 Sind 29=15 S. L. R. 156=65 Ind. Cas. 14. Court may treat a subsequent application to amend the previous one as a fresh application itself. 58 Ind. Cas. 111. Rule 11 (2) makes no mention of a temporary alienation of land. 2 U. P. L. R. Lah. 96=115 P. L. R. 1920=2 Lah. L. J. 398=58 Ind. Cas. 603. Court can allow the amendment of the application for

execution already filed by the addition of other properties to the list of the properties sought to be attached. A. I. R. 1923 Pat. 224=4 P. L. J. 99=71 Ind. Cas. 741. Where mortgage decree is against some of the owners of the equity of redemption, decree cannot be executed against them. 47 Ind. Cas. 907. Decree-holder has a right to withdraw even after issue of sale proclamation. A. I. R. 1922 Pat. 525=1 Pat. 232=3 Pat. L. T. 445=65 Ind. Cas. 122.

Where application is defective, if no order is passed by Court it should be deemed to be pending. A. I. R. 1934 All. 481 (F. B.). The mere omission from an execution application of the particulars required by Order 21, rule 11, would not always make it otherwise than in accordance with law, if the omissions are not such as to make it impossible for the Court to issue execution on it. If the application, though defective in some particulars, is one on which executions could be lawfully ordered, then the application must be held to be in accordance with law. A. I. R. 1934 Bom. 307=36 Bom. L. R. 643. Where application for execution has not mentioned money realised by attachment of decree obtained by judgment-debtor, the omission does not vitiate application. A. I. R. 1934 Cal. 465=38 C. W. N. 163. Where in mortgage-decree, property is described in plaint and decree application for execution need not be in form prescribed under rule 11. A. I. R. 1934 Lah. 58. In application for execution, relief to sell property not situated within the jurisdiction of Court cannot be granted. 134 Ind. Cas. 1182=25 S. L. R. 528=A. I. R. 1932 Sind 160. Such application is however in accordance with law if made *bona fide*. *Ibid*. Burden of proof that the application is not barred and is in accordance with law is on applicant. 134 Ind. Cas. 1182=25 S. L. R. 528=A. I. R. 1931 Sind 160; see also 1933 M. W. N. 929=A. I. R. 1933 Mad. 872. Application for transfer of decree to Court not having jurisdiction is not step-in-aid of execution. 142 Ind. Cas. 155=11 Pat. 785=13 P. L. T. 498=A. I. R. 1932 Pat. 309. In execution application, omission to state what form of notice is wanted does not make application one not in accordance with law. 142 Ind. Cas. 435=A. I. R. 1933 Rang. 87. "In accordance with law" means fulfilling requirements of law. 142 Ind. Cas. 489=27 S. L. R. 109=A. I. R. 1933 Sind 78. Showing date of decree wrongly does not affect validity of application. 134 Ind. Cas. 1182=25 S. L. R. 528=A. I. R. 1931 Sind 160. When portion of decretal amount is deposited in Court, decree-holder cannot take out execution for full amount. 141 Ind. Cas. 297=11 Pat. 796=14 P. L. T. 591=A. I. R. 1933 Pat. 89. Where application is not in accordance with law it does not save limitation. 131 Ind. Cas. 33=A. I. R. 1931 All. 722. As regards where applicant is entitled to ratable distribution, *vide* 141 Ind. Cas. 389=34 Bom. L. R. 1405=A. I. R. 1932 Bom. 622. Execution Court has no power to alter or vary decree under execution and to substitute new decree for it. 138 Ind. Cas. 583=54 A. 573=A. I. R. 1932 All. 273 (F. B.). Execution application cannot be said to be not in accordance with law because it is not accompanied by affidavit and certificate under rule 66 (3). 139 Ind. Cas. 201=(1932) A. L. J. 578=A. I. R. 1932 All. 484. Where in a mortgage decree if the decree-holder is asking for sale of only one item of property, execution may be refused if the Court thinks this as improper. 129 Ind. Cas. 708=53 A. 391=(1931) A. L. J. 108=A. I. R. 1932 All. 85. Order passed on time-barred application is not nullity. 138 Ind. Cas. 583=54 A. 573=1932 A. L. J. 365=A. I. R. 1932 All. 373 (F. B.). Where an application is made by the decree-holder against judgment-debtor for delivery of possession and there arises a dispute between the former and the transferee of the judgment-debtor for mutation of name, a second application against him under this rule is maintainable. 144 Ind. Cas. 70=1933 A. L. J. 113=55 A. 235. After sale, subsequent settlement between decree-holder and judgement-debtor does not extinguish the right of auction purchaser. 137 Ind. Cas. 735=33 P. L. R. 146=A. I. R. 1932 Lah. 231. If minor ratifies application made by his next friend within three years of his attaining majority, such ratification renders application valid. 135 Ind. Cas. 207=32 P. L. R. 290=A. I. R. 1921 Lah. 600.

**Sub-section (3).—**Copy of the whole decree is not necessary for the purpose of executing a decree. Copy of the relevant portion of the decree is sufficient. A. I. R. 1930 Cal. 804=57 C. 996=129 Ind. Cas. 780. An order for a copy of the decree is wholly needless, when the Court in which an application is made is the very Court which made the decree especially in a case when the cost of procuring a copy is prohibitive. A. I. R. 1930 Cal. 804=57 C. 996=129 Ind. Cas. 780; see also 11 C. L. J. 243; 15 C. L. J. 89=16 C. W. N. 736.

12. [S. 236] Where an application is made for the attachment of any

Application for attachment of movable property not in judgment-debtor's possession. movable property belonging to a judgment-debtor but not in his possession, the decree-holder shall annex to the application an inventory of the property to be attached, containing a reasonably accurate description of the same.

**Scope.**—Where a decree is passed against the estate of the deceased in the hands of the judgment-debtors, the decree falls under s. 52 and Order XXI, rule 12, does not apply and as such inventory need not be attached to an application for execution to constitute it a step-in-aid of execution. A. I. R. 1927 Bom. 52=28 Bom. L. R. 1322=98 Ind. Cas. 941. Where third party is possessing some movables belonging to himself and some to the judgment-debtor, inventory is necessary before an attachment can be ordered. A. I. R. 1930 Bom. 65=31 Bom. L. R. 1291=122 Ind. Cas. 856. An application without an inventory is not in accordance with law within the meaning of Art. 182 of the Limitation Act. 37 A. 527=13 A. L. J. 706=29 Ind. Cas. 479; see also (1894) A. W. N. 54; (1896) A. W. N. 47. As regards meaning of accurate description, *vide* 9 Ind. Cas. 729=2 M. W. N. 133=9 M. L. J. 319.

13. [S. 237.] Where an application is made for the attachment

Application for attachment of immovable property to contain certain particulars. of any immovable property belonging to a judgment-debtor, it shall contain at the foot—

(a) a description of such property sufficient to identify the same and, in case such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of such boundaries or numbers; and

(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same.

*N. B.*—For local amendment in Rangoon.—*Vide infra.*

**Scope.**—Decree-holder has his choice to proceed with any property he likes. A. I. R. 1928 Mad. 713=27 L. W. 544=109 Ind. Cas. 872. The description should be sufficient to identify the property. 12 W. R. 488; 18 W. R. 411; 1 B. 601; 14 A. 192. An application not containing the particulars required by rule 13 is not valid for the purpose of Art. 182 of the Limitation Act. A. I. R. 1931 Bom. 128=32 Bom. L. R. 1368=129 Ind. Cas. 159. As regards the effect of decree-holder's gross negligence in describing that whole field belonged to his judgment-debtor, *vide* 134 Ind. Cas. 269=27 N. L. R. 318=14 N. L. J. 20=A. I. R. 1931 Nag. 116. Execution creditor should specify the share or interest of the judgment-debtor, A. I. R. 1927 Mad. 311=52 M. L. J. 68=99 Ind. Cas. 838. Where the application is not in compliance with Order XXI, rule 13, Court has an option under Order XXI, r. 17, either to reject the application or to allow the defect to be remedied within a fixed time. A. I. R. 1926 Mad. 260=49 M. L. J. 699=(1925) M. W. N. 917=92 Ind. Cas. 109; see also 34 Ind. Cas. 955=65 P. L. R. 1916=202 P. W. R. 1916; 35 Ind. Cas. 368.

14. [S. 238.] Where an application is made for the attachment of any

Power to require certified extract from Collector's register in certain cases. land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered as proprietors of, or as possessing any transferable interest in, the land or its revenue, or as liable to pay revenue for the land, and the shares of the registered proprietors.

**Scope.**—In the case of attachment of Revenue paying estate, the judgment-creditor must supply the information mentioned in the rule, 11 W. R. 175. An application by the decree-holder for extension of time for enabling him to supply the information under this section is a step-in-aid of execution. 37 B. 317=17 Ind. Cas. 969=14 Bom. L. R. 1204. Preliminary attachment is not necessary in an application

for sale in execution of a decree passed for sale of mortgaged property. 5 O. L. J. 414=47 Ind. Cas. 639.

15. [S. 231.] (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died for the benefit of the survivors and the legal representatives of the deceased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

**Scope.**—One decree determining rights of several parties is a joint decree. 139 Ind. Cas. 397=A. I. R. 1932 Pat. 261=11 Pat. 445=13 P. L. T. 719. Order 21 rule 15, C.P. Code, refers to a decree which has been passed jointly in favour of more than one plaintiff. It does not apply when the decree is passed in favour of one person only. A. I. R. 1934 Pat. 627=152 Ind. Cas. 776. Joint decree-holder executing a decree to which he and others are entitled executes the decree *prima facie* for the benefit of all, unless there is a direction by the Court or in the decree itself which permits execution for the benefit of the executing creditor alone. Any amount received by the executing creditor whether in Court or outside the Court during the pendency of the execution application must execute for the benefit of all the joint decree-holders. A. I. R. 1928 Mad. 800=112 Ind. Cas. 410. Court has power to pass proper orders to protect the interest of all the decree-holders where some only out of many joint decree-holders apply for execution. A. I. R. 1926 Cal. 811=30 C. W. N. 562=96 Ind. Cas. 692; A. I. R. 1937 Pat. 253. Where no objection has been raised by other decree-holders in the executing Court, objection cannot be raised in appeal. A. I. R. 1926 Mad. 1198=24 L. W. 711=97 Ind. Cas. 375. Although portion of a decree can be legally transferred decree must be executed as a whole and not piece-meal. 15 P. R. 1917=39 Ind. Cas. 654; see also A. I. R. 1926 Oudh 605=2 Luck. 259=3 O. W. N. 160=97 Ind. Cas. 896; 4 Pat. L. J. 575=1919 Pat. 349=53 Ind. Cas. 803; A. I. R. 1928 Cal. 759=33 C. W. N. 192=115 Ind. Cas. 513; A. I. R. 1934 Mad. 330; 1936 A. M. L. J. 32; 130 Ind. Cas. 403=A. I. R. 1931 Lah. 5; A. I. R. 1934 Pesh. 40; but see 1 Pat. L. T. 426=58 Ind. Cas. 212. This rule allows one of several decree-holders to apply on behalf of all joint decree-holders. Judgment-debtor cannot object that steps, have not been taken to safeguard the interest of the other decree-holders when they themselves have made no complaint. 54 Ind. Cas. 924. A decree jointly owned by two persons, although originally passed in favour of one individual only in the presence of, with notice to and on refusal by one joint-owner to join, may properly be executed by the other. 39 C. W. N. 951. In case of a joint decree payment to one of the two joint decree-holders can only, absolve the judgment-debtor in respect of the share of that particular decree-holder. A. I. R. 1935 Nag. 25=31 N. L. R. 271=156 Ind. Cas. 1003. Where out of four joint decree-holders two decree-holders have themselves applied for execution, and the third decree-holder has admitted payment, and the remaining decree-holder has taken no interest in the proceedings, the Court is fully justified in permitting execution by the decree-holders without making any order as to calling the other decree-holder. *Ibid.* In the absence of anything definite to show to the contrary the purchase made by a joint decree-holder, though in his own name, would undoubtedly be in favour of all the persons interested in the joint-bond which had been utilized in the acquisition of the property. All these persons would be beneficially interested in the purchase and would be entitled to recover a share of the properties purchased at auction. Hence where a decree is passed in favour of two brothers and only one of them signs the execution application and purchases property in execution, the other brother is also entitled to a share in the property. A. I. R. 1935 Lah. 484=157 Ind. Cas. 482. If the executing decree-holder is not duly prosecuting the execution of a decree, the part transferee of a decree should be allowed to execute it. A. I. R. 1921 Mad. 599=44 Mad. 919=41 M. L. J. 316=14 L. W. 287=1921 M. W. N. 649=69 Ind. Cas. 337. In case of joint decree, or



the death of one decree-holder, surviving decree-holders are entitled to execute the decree for their own benefit and for the benefit of legal representatives. 43 Ind. Cas. 1008. Where decree is passed in favour of the plaintiff and of certain *proforma* defendants who are co-sharers with the plaintiff, Court can allow execution of the decree at the instance of the *proforma* defendants providing safeguards for the rights of the plaintiff. 44 Ind. Cas. 445. Assignee of one of several decree-holders can execute a decree under this rule. 49 Ind. Cas. 141=(1918) M. W. N. 507. Partition decree is not a joint decree. A. I. R. 1922 Mad. 456=16 L. W. 292=(1922) M. W. N. 518=43 M. L. T. 379=31 M. L. T. 311=70 Ind. Cas. 296. It is not competent to one of several joint decree-holders to grant full discharge of the decree out of Court or to certify to the Court complete satisfaction of the decree without the concurrence of all the decree-holders. A. I. R. 1923 All. 494=46 A. 401=L. R. 4 A. 516=21 A. L. J. 308=74 Ind. Cas. 687; A. I. R. 1929 Lah. 462=119 Ind. Cas. 426; but see A. I. R. 1927 Pat. 329=8 P. L. T. 708=103 Ind. Cas. 75. Court is entitled to examine the pleadings and inform itself as to precise position of the decree-holders and can award proportionate share to them. A. I. R. 1923 All. 494=21 A. L. J. 308=45 A. 401=74 Ind. Cas. 687. Court need not enquire as to who the other decree-holders are before making an order under Order XXI, rule 15. A. I. R. 1925 Pat. 591=7 P. L. T. 25=89 Ind. Cas. 811. Where several persons are holding mortgage decrees jointly and property is sold and purchased by one of them in execution, purchase is for the benefit of all and they are entitled to respective shares in the property. A. I. R. 1924 All. 813=78 Ind. Cas. 814. Where requirements of rule 15 is not complied with by inadvertence or otherwise, defects can be remedied by the Court. A. I. R. 1930 All. 188=(1930) A. L. J. 474=122 Ind. Cas. 179. One of the several decree-holders can execute a decree on behalf of all. It is not necessary to state that the execution has been sought for the benefit of all. The Court may impose conditions, if necessary in the form of provisions of security. A. I. R. 1930 Lah. 603; see also A. I. R. 1928 Cal. 559=56 C. 12=117 Ind. Cas. 677; A. I. R. 1928 Cal. 861=32 C. W. N. 1107=118 Ind. Cas. 337; A. I. R. 1934 Bom. 216. The deposit of pre-emption money within the time fixed by Court is neither a proceeding in execution nor a step-in-aid of it and as such rule 15 does not apply. A. I. R. 1929 All. 953=(1929) A. L. J. 1049=51 A. 998=122 Ind. Cas. 604. A decree in favour of a firm where the names of the partners are not disclosed, is not a joint-decree. A. I. R. 1928 Sind 37=105 Ind. Cas. 892; but see A. I. R. 1934 Mad. 330. Assignee of a part of decree is not entitled to execute decree. A. I. R. 1934 Bom. 59. This rule does not apply where joint decree has been satisfied in part before application for execution. A. I. R. 1934 Cal. 465=38 C. W. N. 163. On report of only one of joint decree-holder's satisfaction of the whole decree cannot be entered. A. I. R. 1934 Mad. 330=57 M. 656=66 M. L. J. 656. Where the final Court's decree is joint this rule applies and the nature of the lower Court's decree is immaterial. 139 Ind. Cas. 397=13 P. L. T. 719=11 Pat. 445=A. I. R. 1932 Pat. 261. One of the surviving decree-holders who were members of the joint family can apply under this section for execution of the whole decree. 140 Ind. Cas. 393=12 Pat. 42=13 P. L. T. 579=A. I. R. 1932 Pat. 359; see also A. I. R. 1933 Pat. 609. Where execution application is made by one of several joint decree-holders and objection is made by other decree-holders that application is a fraud, Court can disallow execution. 140 Ind. Cas. 872=1932 M. W. N. 1333=37 M. L. W. 79=64 M. L. J. 22=56 M. 316=A. I. R. 1933 Mad. 157. Where the decree is in the name of a firm and the partnership has been dissolved, execution can be taken out by some partners. 131 Ind. Cas. 376=A. I. R. 1931 Lah. 537. Omission to mention names of persons interested in the decree does not render proceedings invalid. 135 Ind. Cas. 207=32 P. L. R. 290=A. I. R. 1931 Lah. 600; see also A. I. R. 1933 Lah. 655=14 Lah. 212=139 Ind. Cas. 151=33 P. L. R. 549. Where a decree is in favour of brothers and decree is allotted to one on partition, notice to other brothers is necessary, where execution application is made by the said brother for his own benefit. 145 Ind. Cas. 715=A. I. R. 1933 Lah. 432. A member of the joint Hindu firm in whose favour the decree existed is entitled to apply for execution of the whole decree for the benefit of them all, especially when all the other members of the firm have come forward in Court and stated that they had no objection to the execution of the decree by him. A. I. R. 1934 Pesh. 76. Application for execution by one of the decree-holders with the assent of the other is in accordance with law. A. I. R. 1934 Bom. 216=36 Bom. L. R. 437=58 B. 428.

Order under rule 15 is not appealable. A. I. R. 1924 Mad. 418=70 Ind. Cas. 329.

16. [S. 232.] Where a decree or, if a decree has been passed jointly in favour of two or more persons, the interest of any decree-holder in the decree is transferred by assignment in writing or by operation of law, the transferee may apply for execution of the decree to the Court which passed it ; and the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder :

Application for execution by transferee of decree.  
 Provided that, where the decree or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution :

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

*N. B.*—For local amendments in C. P., Lahore, Peshwer and Rangoon.—*Vide infra.*

**Scope.**—This rule only contemplates the occasion when the assignee from a judgment-creditor comes before the Court to apply for execution for the first time ; it does not apply each time he comes to get the decree executed. A. I. R. 1934 Rang. 101 ; see also 131 Ind. Cas. 171. In case of transfer of decretal rights, original decree-holder can still execute until name of transferee is substituted. A. I. R. 1934 Pesh. 40. Mere declaration of rights cannot take place of assignment of decree. A. I. R. 1934 Mad. 471. Execution application by assignee of decree can be made only to Court passing the decree. A. I. R. 1934 Lah. 648. The provisions contained in rule 16 does not mean that the Court, which passed the decree and to which an application has to be made for execution by a transferee of the decree, ceases to be an execution Court. The application for the transferee must be an application for execution of a decree. 149 Ind. Cas. 218=A. I. R. 1934 All. 445. Assignee is entitled to execution if conditions are satisfied. A. I. R. 1934 Lah. 648. Section 42 is subject to Order 21, rule 16. A. I. R. 1934 Mad. 648. Where execution application by assignee is presented in wrong Court, defect is one of procedure and the judgment-debtor acquiescing by not raising objection cannot challenge legality of proceeding. A. I. R. 1928 Lah. 648.

Assignment must be in writing. Mere record of assignment is not enough. A. I. R. 1934 Lah. 328. Assignee of part of decree is not entitled to execute the decree. A. I. R. 1934 Bom. 59. Judgment-debtor cannot plead payment not recorded in answer to application by transferee under rule 16. A. I. R. 1934 All. 445. Where a deed of transfer of a decree recites an uncertified payment and states that the transferee has to recover the balance remaining due, the judgment-debtor is entitled to the deduction of the uncertified payment. A. I. R. 1936 Mad. 472=1936 M. W. N. 138=161 Ind. Cas. 830. An assignee of a decree by operation of law, by right of succession or inheritance, is entitled to execute the decree under Order 21, rule 16, C. P. Code. 59 B. 417=157 Ind. Cas. 658=37 Bom. L. R. 150=A. I. R. 1935 Bom. 298. A *benamidar* is competent to take out execution of a decree as the transferee thereof. 39 C. W. N. 1073. Under the provisions of Chapter XVII, r. 2 of the Original Side Rules and Orders, a combined application under section 39 and Order 21, r. 16 of the Code, must state sufficient facts, in the petition to show that the applicant is entitled to apply and it is not necessary to set out all the details which are required when applications are made with tabular statements. 39 C. W. N. 951. Order 21, rule 16, does not compel the assignee to come forward and have himself substituted on the record in place of the judgment-creditor. It gives him an option to do so ; he has a right to bring himself on record if he wants to see that his rights are enforced, but he is not bound to do so. A. I. R. 1935 Bom. 331=37 Bom. L. R. 489. The person appearing on the face of the decree as the decree-holder is the only person entitled to execute it ; therefore if a transferee of a decree does not apply under Order 21, rule 16, Civil Procedure Code for execution, the executing Court cannot refuse to allow execution at the instance of the transferor till the transferee is formally recognized by the Court by substitution of his name for that of the original decree-holder. A. I. R. 1935 Nag. 230 ; see also A. I. R. 1935 All. 1001=1935 A. L. J. 1179. An application made in the form of an execution application asking for the assignee to be brought on the record and not making any

other prayer is not an application for execution made in accordance with law and there is nothing in Order 21, r. 16, or any other rule of the Civil Procedure Code to require a transferee of a decree to apply for his name being brought on the record. The only possible application he can make is one for the execution of the decree. A. I. R. 1935 Sind 26. The words "operation of law" cannot apply to a case where a person has become the owner of the decree by some transaction *inter mos*. 71 M. L. J. 161=44 L. W. 336=A. I. R. 1936 Mad. 543. Where a request is made in the application for issue of notice, no separate application for notice to the assignor is required. 1936 A. M. L. J. 79.

Assignment is not enforceable until substitution of names are made. A. I. R. 1921 L. B. 37=11 L. B. R. 163. Legal representatives are transferees of decree by operation of law and hence application for execution must be made to Court passing decree. A. I. R. 1930 Cal. 614=34 C. W. N. 437=129 Ind. Cas. 572; see also A. I. R. 1930 Cal. 614=34 C. W. N. 437=57 C. 1137=129 Ind. Cas. 572. This rule does not apply when the application is by the person in whose name the decree stands, he is entitled to execute the decree though there may be informal transfer of the same. A. I. R. 1931 Lah. 116=31 P. L. R. 981. Only assignee of a decree can execute even though he is a *tenamidur*. A. I. R. 1930 Sind 1=119 Ind. Cas. 542; see also A. I. R. 1929 All. 793=122 Ind. Cas. 687; A. I. R. 1931 Oudh 69=7 O. W. N. 1203=130 Ind. Cas. 343; A. I. R. 1927 Lah. 101=8 Lah. 35=10 Lah. L. J. 133=28 P. L. R. 239=100 Ind. Cas. 545; 1918 M. W. N. 226=7 L. W. 201=43 Ind. Cas. 801; but see 40 M. 296=2 U. P. L. R. Lah. 42=54 Ind. Cas. 944; 35 Ind. Cas. 359=12 Ind. Cas. 657. *Benamidar* assignee for one of the judgment-debtors, must prove his title before he can execute decree. 4 L. W. 534=35 Ind. Cas. 624. Executing Court is competent to substitute name of *benami* assignee. 10 L. B. R. 280=13 Bur. L. T. 173=62 Ind. Cas. 299.

Purchaser of suit property is not assignee of decree and rule 16 does not apply. A. I. R. 1922 All. 98=66 Ind. Cas. 878; see also A. I. R. 1922 Pat. 563=3 Pat. L. T. 625=69 Ind. Cas. 953. Part transfer of decree is valid under rule 16. A. I. R. 1921 Mad. 599=44 M. 919=41 M. L. J. 316=14 L. W. 287=1921 M. W. N. 649=69 Ind. Cas. 337. Purchasers of property after decree are not decree-holder's representatives unless their names are substituted. A. I. R. 1924 Bom. 426=26 Bom. L. R. 833=80 Ind. Cas. 249. Purchaser of suit property pending suit is not assignee of decree, and this rule does not apply. A. I. R. 1924 Cal. 661=51 C. 703=39 C. L. J. 373=28 C. W. N. 626=80 Ind. Cas. 881. If transfer is recognised, further inquiry as to alleged bad faith of transferee is unnecessary. 33 Ind. Cas. 71. An executing Court is bound to allow execution of easement decree to decree-holder transferor if the transferee does not apply for execution. 18 M. L. T. 499=29 M. L. J. 693=2 L. W. 1122=31 Ind. Cas. 542. Purchaser under mere contract of sale does not get title to decree by operation of law. 43 C. 590=43 I. A. 108=14 A. L. J. 527=20 C. W. N. 866=(1916) 1 M. W. N. 403=18 Bom. L. R. 509=24 C. L. J. 67=20 M. L. T. 25=31 M. L. J. 248 (P. C.)=34 Ind. Cas. 69. Non-recognition of assignee does not prevent good title passing to his transferee. 33 Ind. Cas. 558.

Decree-holder can apply for execution so long as transfer of decree is not recognized by Court. 3 L. W. 521=34 Ind. Cas. 791. No application under the rule can be made to execute a preliminary decree, and if made is premature, though final decree and sale are also prayed for. 32 Ind. Cas. 981. Rule 16 does not give power to assignee or any individual decree-holder's rights to apply for execution. 15 P. R. 1917=39 Ind. Cas. 654. Assignee of a mortgage-decree can execute it by getting the mortgaged property sold. 27 C. L. J. 110=41 Ind. Cas. 269. Purchase of decree by pleader for the judgment-debtors, although in trust for his clients, does not release judgment-debtors from liability. 22 C. W. N. 491=27 C. L. J. 388=44 Ind. Cas. 13. A vendee of mortgaged lands pending mortgage suit, before preliminary decree is not assignee of the decree under the rule. 2 Lah. L. J. 1=11 P. W. R. 1920=28 P. L. R. 1920=55 Ind. Cas. 983. Purchaser of property with arrears of rent in mortgage-decree will be deemed to be assignee of rent decrees obtained by mortgagor. 25 C. W. N. 863=57 Ind. Cas. 874. Transfer of decree must be of whole decree and not portion. A. I. R. 1922 All. 101=66 Ind. Cas. 679; 43 M. L. J. 761=16 L. W. 758=31 M. L. T. 463=71 Ind. Cas. 334; but see A. I. R. 1921 Pat. 180=2. P. L. T. 619=6 Pat. L. J. 358=62 Ind. Cas. 30. Real owner can execute decree obtained by trustee on trust being declared invalid, he is deemed as assignee from ex-trust. A. I. R. 1924 Pat. 343=4 P. L. T. 731

=2 Pat. L. R. 27=80 Ind. Cas. 652. Judgment-debtor and decree-holder can question decree-holder's title. A. I. R. 1925 Pat. 443=4 Pat. 120=86 Ind. Cas. 564.

Real owner of assignment cannot execute decree. Person in whose name assignment is made can alone execute. A. I. R. 1925 Mad. 701=48 M. 553=48 M. L. J. 419=21 L. W. 545=88 Ind. Cas. 409. Assignment cannot be effected by release. A. I. R. 1927 Pat. 170=8 Pat. L. J. 163=101 Ind. Cas. 616. Legal representative must apply for execution and not for substitution only even though predecessor's execution application is pending. A. I. R. 1927 All. 165=49 A. 509=25 A. L. J. 249=104 Ind. Cas. 116. Assignment in anticipation of decree is valid. A. I. R. 1927 Nag. 405=106 Ind. Cas. 54. Assignment is enforceable from date of assignment and not from date of substitution of names. A. I. R. 1928 Sind 71=106 Ind. Cas. 54. In case of a transfer, the deed of transfer must be looked at for determining if the decree is transferred. 128 Ind. Cas. 584. Legal representatives brought on record can continue execution application made by the deceased. A. I. R. 1930 Sind 282=123 Ind. Cas. 303. An application by the transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree, and the Court to which the decree has been transferred has no jurisdiction to entertain it. 39 C. W. N. 961. No particular form of assignment is prescribed in the case of decrees either in this rule or in any other provision of law. Anything in writing which transfers a decree and clearly shows that the intention was to assign the decree is sufficient. What is required is an assignment in substance which is in writing. 1936 M. W. N. 553=44 L. W. 336=A. I. R. 1936 Mad. 543=71 M. L. J. 161. In case of Court sale of a decree formal assignment in the sense of document which in form purports to assign the decree is not required by law provided the orders of the Court amount to an assignment of the decree in substance. *Ibid.* Where the assignee of a decree has, at the time of assignment, knowledge of a suit pending at the instance of the assignor's judgment-debtor against the assignors, he purchases the decree subject to the right of the judgment-debtor to claim a set-off when he comes to execute his decree. A. I. R. 1936 Pesh. 33.

Real owner can execute decree obtained in name of *benamidar* after latter's death. A. I. R. 1928 Cal. 835=114 Ind. Cas. 495. A partial transfer of decree is valid and can be executed by assignee. A. I. R. 1928 Mad. 713=27 L. W. 544=109 Ind. Cas. 872 ; A. I. R. 1928 Lah. 70=107 Ind. Cas. 603. The transfer of a money decree is in no way affected on account of the attachment of the decree. A. I. R. 1929 Pat. 1=7 Pat. 726=9 P. L. T. 822=113 Ind. Cas. 673. Assignment if not bogus is not invalid for want of consideration. A. I. R. 1928 Mad. 458=109 Ind. Cas. 617. Recognition of assignment of decree by Court gives fresh starting point of limitation. A. I. R. 1929 Mad. 252=29 L. W. 203=(1929) M. W. N. 78=56 M. L. J. 555=52 M. 590=118 Ind. Cas. 775.

Assignment is enforceable even without substitution of names. Assignee can object to attachment after assignment. A. I. R. 1928 Rang. 25=6 Bur. L. J. 221=136 Ind. Cas. 85. Rule 16 applies only to substitute along with execution. A. I. R. 1928 All. 299=50 A. 621=26 A. L. J. 417=109 Ind. Cas. 412 ; see also A. I. R. 1928 Oudh 30=3 Luck. 126=4 O. W. N. 1025=105 Ind. Cas. 611. Assignment of attached decree is subject to rights of attaching creditor. A. I. R. 1927 Mad. 1025=(1927) M. W. N. 608=105 Ind. Cas. 606. Assignee has to apply for substitution of his name under rule 16 only once and not every time he seeks execution. A. I. R. 1927 Cal. 694=31 C. W. N. 921=104 Ind. Cas. 4. Where after death, of parties to a transfer of decree, heir of real and *benami* assignee claimed to execute decree, Court is competent to decide the question. A. I. R. 1927 Mad. 903=26 L. W. 308=39 M. L. T. 176=1927 M. W. N. 639=53 M. L. J. 568=105 Ind. Cas. 405 ; but see A. I. R. 1927 Mad. 240=98 Ind. Cas. 856.

Rule 16 does not prevent an agreement between the decree-holder and some judgment-debtors to execute decree against rest and pay to them the amount advanced. A. I. R. 1927 Mad. 322=52 M. L. J. 59=99 Ind. Cas. 902. The rights of assignee to benefits pending execution arise when only after substitution and starting of execution. A. I. R. 1927 Rang. 55=4 Rang. 426=5 Bur. L. J. 181=93 Ind. Cas. 309. Purchaser of property included in a decree does not thereby become the assignee decree-holder. A. I. R. 1927 Mad. 240=98 Ind. Cas. 856. Assignment of fractional interest by mortgage or otherwise is valid. A. I. R. 1926 All. 346=48 A.

432=24 A. L. J. 430=92 Ind. Cas. 376. The expression "a decree for payment of money against several persons" signifies a personal decree. A. I. R. 1926 Mad. 1141=51 M. L. J. 443=98 Ind. Cas. 26. Rule 16 is not applicable to the case of transfer of preliminary decree in partition suit. A. I. R. 1926 Mad. 1129=24 L. W. 392=97 Ind. Cas. 754. Decree-holder of the decree-holder does not become a "transferee" of the decree-holder by operation of law within rule 16. A. I. R. 1926 Pat. 320=5 Pat. 511=7 P. L. T. 793=96 Ind. Cas. 446. Rule 16 is not exhaustive of the mode of transfer. A. I. R. 1926 Mad. 381=50 M. L. J. 79=92 Ind. Cas. 1021. Mortgage decree is not a money decree for the purpose of second proviso to rule 16. A. I. R. 1926 Mad. 623=49 M. 508=23 L. W. 515=1926 M. W. N. 224=51 M. L. J. 139=93 Ind. Cas. 58; see also 47 M. 948=47 M. L. J. 434=20 L. W. 465=1924 M. W. N. 747=35 M. L. T. 81=82 Ind. Cas. 948. An objection pleading satisfaction of decree should be made to the Court which passed the decree and cannot be entertained by the Court to which the decree is sent for execution. A. I. R. 1937 Oudh 111. Order 21, rule 2, prevents the execution Court from recognizing an uncertified payment or adjustment and therefore the adjustment cannot be pleaded and proved in an objection taken by the judgment-debtor in pursuance of a notice issued on him under Order 21, rule 16, for the purpose of showing that the decree being satisfied before transfer of the decree, the transferee got nothing by the assignment there being nothing to assign. A. I. R. 1937 Cal. 31.

Pre-emption decree can be executed by pre-emptor even after selling the property to another. A. I. R. 1924 Lah. 615=75 Ind. Cas. 844. Relinquishment of rights under decree by ostensible decree-holder in favour of actual decree-holder is an assignment within the rule. 1933 A. L. J. 248=A. I. R. 1933 All. 188. Transfer by operation of law means transfer on death or by devolution or by succession. 145 Ind. Cas. 792=35 Bom. L. R. 795=57 Bom. 513=A. I. R. 1933 Bom. 367; see also 137 Ind. Cas. 50=54 A. 448=1932 A. L. J. 230=A. I. R. 1932 All. 704. Heir can continue same *darkhast* provided he obtains order under rule 16. 134 Ind. Cas. 720=33 Bom. L. R. 848=A. I. R. 1931 Bom. 423. Where decree is in favour of several persons, assignment of decree by one of them passes only interest of assignor decree-holder. 145 Ind. Cas. 891=A. I. R. 1933 Lah. 473.

**Assignment in writing.**—Assignment of a decree need not be in writing under the Transfer of Property Act though for purposes of execution. O. XXI, r. 16, requires the transfer to be in writing. A. I. R. 1926 Mad. 478=27 L. W. 538=54 M. L. J. 663=51 M. 681=109 Ind. Cas. 563.

**Notice.**—Notice under the rule must be given both to assignor and the judgment-debtor, and judgment-debtor cannot be said to have acquiesced when the appeal against the order of attachment barred on execution application made without necessary notice. 75 P. W. R. 1917=118 P. L. R. 1917=39 Ind. Cas. 952; see also A. I. R. 1921 Pat. 76=(1921) Pat. 1=57 Ind. Cas. 250. Notice under s. 158 (2), B. T. Act, 1885, to assignor does not dispense with notice under the rule. (1921) Pat. 1=1 P. L. T. 666=5 Pat. L. J. 390=57 Ind. Cas. 230. Failure of notice vitiates all proceedings. A. I. R. 1921 Lah. 143=2 Lah. 230=3 Lah. L. J. 434=91 P. L. R. 1921=63 Ind. Cas. 884. In the absence of notice of assignment to debtor payment to original creditor is valid. A. I. R. 1924 Pat. 118=2 Pat. 754=76 Ind. Cas. 55. Though notice is essential for validity of proceedings knowledge of proceedings of substitution dispenses the notice. A. I. R. 1924 Pat. 576=3 Pat. 596=5 Pat. L. T. 451=78 Ind. Cas. 766. Notice under Order XXI, rule 16, does not give fresh period of limitation. A. I. R. 1925 Cal. 23=39 C. L. J. 590=28 C. W. N. 963=84 Ind. Cas. 68. Failure to give notice to subsequent mortgagee judgment-debtor vitiates the whole execution proceedings. A. I. R. 1929 All. 437=117 Ind. Cas. 614; see also A. I. R. 1930 All. 627=(1930) A. L. J. 266=52 A. 858=129 Ind. Cas. 445. Notice issued on defective or invalid execution saves limitation. A. I. R. 1933 Pat. 658.

**Proviso (2).**—Proviso (2) does not apply to mortgage decrees. It operates only when property is sold and personal decree is passed. A. I. R. 1937 Sind 112. The second proviso has no application to the Crown case where the decree-holder acquires a share in the estate of one of the judgment-debtors. The decree-holder is, however, bound to give credit to a proportionate amount of the decree. A. I. R. 1935 Oudh 449=1935 O. W. N. 887.

**17. [S. 245.]** (1) On receiving an application for the execution of a decree,

as provided by rule 11, sub-rule (2), the Court shall ascertain whether such of the requirements of rules 11 to 14 as may be applicable to the case have been complied with : and, if they have not

been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the provisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.

(3) Every amendment made under this rule shall be signed or initialled by the Judge.

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions hereinafter contained, order execution of the decree according to the nature of the application :

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree.

*N. B.*—For Local amendments in Allahabad, C. P., Lahore, Oudh and Rangoon. —*Vide infra.*

**Scope.**—Court can call upon decree-holder to specify approximate value of land to be attached. A. I. R. 1929 Nag. 305=116 Ind. Cas. 65. After application is registered no amendment is possible. But application to file fresh list of properties is not amendment. A. I. R. 1924 Pat. 20=2 Pat. 787=74 Ind. Cas. 144 ; 71 Ind. Cas. 741=3 Pat. 328=4 P. L. T. 99. Words "on receiving an application for execution of a decree" in rule 17 do not preclude Court from allowing amendment at a later stage so that the party does not suffer for Court's mistake. A. I. R. 1924 Mad. 367=45 M. L. J. 651=18 L. W. 739=33 M. L. T. 125=76 Ind. Cas. 750. It is not Court's duty to see that the entry of interest is correct. A. I. R. 1922 Pat. 402=1 Pat. 149=69 Ind. Cas. 200. Supplemental list of properties filed later on is part of the original application. 44 Ind. Cas. 563=22 C. W. N. 540=27 C. L. J. 398. Under the rule the Court is not bound to reject an application not amended as ordered, but only that which was not amended in time, and if amendment is necessary and material. 17 N. L. R. 179=4 N. L. J. 71=63 Ind. Cas. 97 ; see also A. I. R. 1922 All. 446=20 A. L. J. 580=68 Ind. Cas. 175 ; A. I. R. 1928 Mad. 440=27 L. W. 475=112 Ind. Cas. 36. Defects such as Omission to give dates of previous execution petition, costs or date and place of verification, or to file a copy of decree are trivial. A. I. R. 1928 Mad. 440=27 L. W. 475=112 Ind. Cas. 36 ; see also 32 P. W. R. 1919=49 Ind. Cas. 982. Parties should not suffer by Court's failure to check in time entries in execution application. Amendment is retrospective in operation. A. I. R. 1928 Mad. 24=39 M. L. T. 37=54 M. L. J. 154=27 L. W. 796=107 Ind. Cas. 303 ; see also A. I. R. 1930 Oudh 65=6 O. W. N. 1064=5 Luck. 458=124 Ind. Cas. 445 ; 35 Ind. Cas. 876=31 M. L. J. 561=4 L. W. 103. Validity of amendment cannot be challenged by judgment-debtor at later stage of execution proceedings in the same case. A. I. R. 1928 Mad. 440=27 L. W. 475=112 Ind. Cas. 36. Rejection of application saves limitation. A. I. R. 1934 Nag. 117. Execution application signed by pleader but neither signed nor verified by the decree-holder is not one contemplated by law. 135 Ind. Cas. 15=34 M. L. W. 546=61 M. L. J. 516. Where execution application is filed within time but illegally returned for correction, it can be considered as the same application when refiled. 144 Ind. Cas. 288=10 O. W. N. 721=A. I. R. 1933 Oudh 288 ; see also 138 Ind. Cas. 91=11 Pat. 546=13 P. L. T. 318=A. I. R. 1932 Pat. 222. Court can allow amendment of application for execution before proceedings end. 139 Ind. Cas. 840=11 Pat. 508=A. I. R. 1932 Pat. 306. The Court has inherent power under section 151 and section 153 of the Civil Procedure Code to allow an amendment of a petition for execution of a decree in the interest of justice. 39 C. W. N. 1144. Such amendment takes effect from the date of the original presentations of the execution petition. 68 M. L. J. 261=A. I. R. 1935 Mad. 125=41 L. W. 173=1935 M. W. N. 15. Where the decree-holder attached the whole of the judgment-debtor's land and had fixed a low value for the same but the Court on objection of

judgment-debtor found on the evidence that the property was worth more, and ordered only sale of part of land and the decree was being executed only as a money decree : *Held* that the Court did not act without jurisdiction. A. I. R. 1935 Pat. 143=153 Ind. Cas. 1024.

**18. [S. 246.]** (1) Where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then—

(a) if the two sums are equal, satisfaction shall be entered upon both decrees ; and

(b) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum.

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of judgment-debts due by the original assignor as in respect of judgment-debts due by the assignee himself.

(3) This rule shall be deemed to apply unless—

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits ; and

(b) the sums due under the decrees are definite.

(4) The holder of a decree passed against several persons jointly and severally may treat it as a cross-decree in relation to a decree passed against him singly in favour of one or more of such persons.

#### *Illustrations.*

(a) A holds a decree against B for Rs. 1,000. B holds a decree against A for the payment of Rs. 1,000 in case A fails to deliver certain goods at a future day. B cannot treat his decree as a cross-decree under this rule.

(b) A and B, co-plaintiffs, obtain a decree for Rs. 1,000 against C, and C obtains a decree for Rs. 1,000 against B. C cannot treat his decree as a cross-decree under this rule.

(c) A obtains a decree against B for Rs. 1,000. C, who is a trustee for B, obtains a decree on behalf of B against A for Rs. 1,000. B cannot treat C's decree as a cross-decree under this rule.

(d) A, B, C, D and E are jointly and severally liable for Rs. 1,000 under a decree obtained by F. A obtains a decree for Rs. 100 against F singly and applies for execution to the Court in which the joint-decree is being executed. F may treat his joint-decree as a cross-decree under this rule.

**Scope.**—The provisions of the Civil Procedure Code regarding a set-off are contained in rr. 18 and 19, Order 21. It is clear that those rules have been specifically restricted in their application and unless a case can be brought strictly within the terms of those provisions, no set-off can be allowed even under the inherent power of the Court. A. I. R. 1937 Pesh. 83. Principles of proceeding under the rule is the same as under Order VIII, r. 6. A. I. R. 1931 Cal. 23=57 C. 855=129 Ind. Cas. 420. Barred debt cannot be set-off and equity does not help against the rule. 21. C. W. N. 114=40 Ind. Cas. 816. This rule does not provide that all decrees outstanding in the same Court must necessarily be set-off against each other. It merely provides that when two rival applications for execution are pending, execution must be carried out by satisfaction of the smaller decree and partial satisfaction to the same extent of the larger decree. A. I. R. 1935 Lah. 914.\* This rule applies only where both the decrees which are sought to be set off against each other are before the Court for execution (*i. e.*, there must be applications for execution from the holders of the two decrees) and each of the decrees must be capable of execution at the same times by the Court. A. I. R. 1935 Mad. 587. Set-off can be claimed even of attached decree against attaching decree-holder.

A. I. R. 1929 All. 502=117 Ind. Cas. 103. This rule applies only to decrees for execution before the same Court. A. I. R. 1930 Lah. 508=126 Ind. Cas. 516. Mortgage decree for sale under which debt is recoverable only out of the property is not ordinary decree for sale in enforcement of mortgage cannot be set off against personal decree. A. I. R. 1930 Rang. 68=7 Rang 505=120 Ind. Cas. 699; see also 15 A. L. J. 327=39 Ind. Cas. 560; 38 A. 669=14 A. L. J. 776=36 Ind. Cas. 948. Defendant cannot set off his preliminary decree for sale, the amount not being ascertained until accounts are taken. A. I. R. 1931 Cal. 23=57 C. 855=129 Ind. Cas. 420. Pre-emption decree-holder is entitled to deduct costs awarded to him, from deposit made by him. A. I. R. 1922 Lah. 142=2 Lah. 294=4 Lah. L. J. 354=23 P. L. R. 1922=65 Ind. Cas. 250. Decree in proceeding under s. 144 is capable of set-off under the rule. A. I. R. 1925 Cal. 102=28 C. W. N. 988=84 Ind. Cas. 747. Attaching decree-holders are assignees as contemplated by Order XXI, rule 18(2). *Ibid.* Decree for costs awarded to a person by appellate Court if smaller than amount due from him under lower Court's decree, cannot be executed until the latter amount is paid. 46 C. 168=27 C. L. J. 392=45 Ind. Cas. 241. Decree in favour of partners individually can be set-off against decree against firm having same individual as all the partners. A. I. R. 1927 Bom. 255=29 Bom. L. R. 396=104 Ind. Cas. 319. Where there has been an attachment of decree by the judgment-debtor, the decree-holder can still execute his decree after giving set-off judgment-debtor's decree. A. I. R. 1934 Cal. 140. Right of set-off cannot be claimed unless both decrees are before same Court for execution. 145 Ind. Cas. 767=A. I. R. 1933 Mad. 215. Decree to be adjusted by set-off should be capable of execution at time of adjustment. A. I. R. 1933 Lah. 372. A set-off cannot be allowed against the transferee of a decree. 138 Ind. Cas. 285=33 P. L. R. 671=A. I. R. 1932 Lah. 537. If personal remedy is barred this rule ceases to apply. 143 Ind. Cas. 542=14 P. L. T. 189=A. I. R. 1933 Pat. 210. Where there are cross-decrees under Order 21, rule 18, a smaller decree must always be set-off against the larger decree and if the smaller decree is attached by some other decree-holder that other decree-holder has no greater right than the decree-holder whose decree has been attached and the attaching decree-holder cannot claim that he has a right to execute the smaller decree in spite of the existence of a larger decree held by the judgment-debtor. In other words, the rule laid down by Order 21, rule 18, must be first applied before any question can arise for ratable distribution under s. 73. A. I. R. 1937 All. 422. Where there are two execution cases pending before the Court at the same time in respect of cross-decrees, the decree-holder for the larger amount is entitled to set-off the amount of the smaller decree. 38 C. W. N. 1087=59 C. L. J. 500; A. I. R. 1934 Cal. 820=152 Ind. Cas. 889. An agreement between two parties, who had filed cross-suits, was to the effect that after the decrees in their respective suits were passed, the party who was entitled to the larger amount should pursue execution of the decree in his favour to the extent of the excess amount: *Held* that Order 21, rule 18, did not apply and the set-off thereof would not be a set-off as contemplated by the provisions of the C. P. Code but only as agreed to by the parties to the proceedings, where the two suits were proceeding. A. I. R. 1934 Bom. 307=36 Bom. L. R. 643. An attaching decree-holder cannot be treated as an assignee within the meaning of this rule. A. I. R. 1935 Mad. 587=1935 M. W. N. 415=42 L. W. 767=156 Ind. Cas. 477.

Execution in case of cross-claims under same decree.

19. [S. 247.] Where application is made to a Court for the execution of a decree under which two parties are entitled to recover sums of

money from each other, then,—

(a) if the two sums are equal, satisfaction for both shall be entered upon the decree; and,

(b) if the two sums are unequal, execution may be taken out only by the party entitled to the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum, shall be entered upon the decree.

**Scope.**—Two parties referred to in the rule are the parties to suit and do not refer to two different representatives of the same party. A. I. R. 1923 Mad. 638= (1923) M. W. N. 474=44 M. L. J. 590=72 Ind. Cas. 865. Decree in suit cannot be



set off against that for costs awarded to defendant on objection to attachment. A. I. R. 1930 All. 726=127 Ind. Cas. 525. Claim springing from compromise entered into to put an end to all disputes between parties and not contemplating another action is properly within the rule though the decree merely declares rights of parties without directing any act to be done. A. I. R. 1923 Lah. 151=73 Ind. Cas. 318. Amount of costs and *mesne profits* until delivery can be set-off against amount of deposit ordered by pre-emption decree. A. I. R. 1930 All. 413=126 Ind. Cas. 831. Deducting of smaller sum under Order XXI, r. 19, if not made by applicant, can be compelled by Court under s. 151 by ordering refund of the excess. 24 C. W. N. 465=56 Ind. Cas. 783. The executing Court has inherent power to give effect to a claim of set-off, although the case does not come within the strict terms of this rule. 39 C. W. N. 106=60 C. L. J. 281; A. I. R. 1936 Cal. 409; see also A. I. R. 1936 Mad. 626=71 M. L. J. 506=1936 M. W. N. 703.

20. [*New.*] The provisions contained in rules 18 and 19 shall apply  
Cross-decrees and cross- to decrees for sale in enforcement of a mortgage  
claims in mortgage-suits. or charge.

**Scope.**—In order to ascertain whether decrees are cross-decrees or not, the substance of the decree must be looked into and not the form. 143 Ind. Cas. 542=14 P. L. T. 189=A. I. R. 1933 Pat. 210 (2). For principle of set-off it is not necessary that both decrees must be mortgage decrees. *Ibid.* In mortgage decree, this rule applies if personal remedy is legally available. It is not necessary that personal liability should exist under the decree. *Ibid.*; see also 140 Ind. Cas. 378=36 M. L. W. 644=1932 M. W. N. 1187=63 M. L. J. 722=56 M. 339=A. I. R. 1933 Mad. 63. Right of set-off is not lost merely because Court is asked to notify encumbrance of decree. 143 Ind. Cas. 542=14 P. L. T. 189=A. I. R. 1933 Pat. 210. Court has ample discretion under the rule and where it is properly exercised, High Court will not interfere. 132 Ind. Cas. 507=33 Bom. L. R. 370=A. I. R. 1931 Bom. 247. The operation of Order 21, r. 20, C. P. Code, is not limited to cases where both decrees are mortgage decrees or to personal judgments such as may be given under Order 34, r. 6. There may be a set-off of a mortgage decree against a decree for money. 41 C. W. N. 449 (P. C.); A. I. R. 1937 P. C. 39. All that rule 20 lays down is that the provisions of rules 18 and 19 shall apply to cross-mortgage-decrees. There is nothing in the provisions of rule 20 which will warrant the Court in holding that a decree obtained on the footing of a mortgage became a decree for payment of money and therefore it can be set-off against a simple money decree held by the opposite party. A. I. R. 1936 All. 639=1936 A. L. J. 562=162 Ind. Cas. 289. All that rule 20 lays down is that the provisions of rules 18 and 19 shall apply to cross-mortgage decrees *i.e.*, if two contending parties hold mortgage decrees against each other then they will be able to set-off decrees one against the other. 162 Ind. Cas. 289=1936 A. L. J. 562=A. I. R. 1936 All. 639.

21. [S. 230, second para.] The Court may, in its discretion refuse execu-  
Simultaneous execution. tion at the same time against the person and  
property of the judgment-debtor.

**Scope.**—Court can refuse simultaneous execution against person and property but cannot refuse execution against person by insisting first proceeding against property. A. I. R. 1929 Lah. 86=110 Ind. Cas. 185; A. I. R. 1934 Nag. 140. Discretion under the rule also applies in case of attachment before judgment. A. I. R. 1924 Rang. 381=2 Rang. 362=3 Bur. L. J. 159=84 Ind. Cas. 270. The Code gives the decree-holder the right to decide whether he should execute the decree in one way or the other or both. If the Court considers he should not exercise the right in the manner he desires, it must give reasons. It is not enough to say that there is property against which he may proceed and therefore he must proceed against that first. A. I. R. 1934 Nag. 140=150 Ind. Cas. 95.

Notice to show cause again t 22. [S. 248] (1) Where an application  
execution in certain cases. for execution is made—

(a) more than one year after the date of the decree, or

(b) against the legal representative of a party to the decree, "or where an application is made for execution of a decree filed under the provisions of

section 44A."\* the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

*N. B.*—For local amendments in Allahabad, Bombay, C. P., Lahore, Madras, Oudh, Peshwar and Rangoon.—*Vide infra.*

**SCOPE.**—Rule 22 being mandatory reasons for not issuing notice must be stated. (1917) M. W. N. 498=6 L. W. 361=33 M. L. J. 539=40 Ind. Cas. 670 ; see also 44 C. 954=21 C. W. N. 776=24 C. L. J. 523=38 Ind. Cas. 493. Notice must be issued by Court executing the decree and not by Court transferring it. 43 C. 903=20 C. W. N. 889=23 C. L. J. 645=36 Ind. Cas. 602 (F. B.) ; 26 C. W. N. 292=63 Ind. Cas. 116. Notice not complying with rule 22 is not binding on judgment-debtor. 32 Ind. Cas. 744. To give jurisdiction to effect sale in execution notice must be served. A. I. R. 1921 Cal. 476=35 C. L. J. 9=64 Ind. Cas. 25 ; see also 25 C. W. N. 972=64 Ind. Cas. 476 ; A. I. R. 1921 Mad. 523=14 L. W. 638=63 Ind. Cas. 903 ; 3 U. P. L. R. (Pat) 33=2 P. L. T. 401=6 P. L. J. 319=61 Ind. Cas. 823 ; 74 Ind. Cas. 202=(1919) Pat. 386 ; *contra* 5 O. L. J. 551=48 Ind. Cas. (39) ; 27 C. L. J. 528=46 Ind. Cas. 221 ; 45 Ind. Cas. 699 ; 26 C. L. J. 130=22 C. W. N. 390=41 Ind. Cas. 853. This section requires only opportunity being given to the judgment-debtor to show cause against execution and so judgment-debtor actually appearing in the case cannot plead want of notice. 53 C. L. J. 329=35 C. W. N. 9=131 Ind. Cas. 702. Provision is mandatory only when application is being first taken out. A. I. R. 1929 Mad. 275=30 L. W. 995=117 Ind. Cas. 705 ; *contra* 87 Ind. Cas. 531=6 P. L. T. 295=5 Pat. 1. Notice to adult legal representative on record, where others are minors is sufficient under the rule. A. I. R. 1929 Mad. 275=30 L. W. 995=117 Ind. Cas. 705. If Judge records no reasons for not issuing process by overlooking provisions of rule 22 omission to issue notice renders proceedings void for want of jurisdiction. A. I. R. 1929 Rang. 161=7 Rang. 110=117 Ind. Cas. 245 ; see also. A. I. R. 1929 Mad. 718=30 L. W. 230=119 Ind. Cas. 43. Valid notice must give sufficient time for judgment-debtor to come and oppose application. A. I. R. 1928 Mad. 1052=116 Ind. Cas. 363.

Omission to issue notice under sub-rule (1) renders subsequent proceedings void and sub-rule (2) does not cure defect. A. I. R. 1928 Cal. 60=55 C. 96=46 C. L. J. 579 ; A. I. R. 1926 Cal. 539=91 Ind. Cas. 711 ; 102 Ind. Cas. 239=25 A. L. J. 507=49 A. 830=A. I. R. 1928 All. 74 ; A. I. R. 1924 Mad. 431=47 M. 288=49 M. L. J. 104=34 M. L. T. 37=80 Ind. Cas. 92 ; A. I. R. 1935 Rang. 42=155 Ind. Cas. 959 ; but see 74 Ind. Cas. 202=(1919) Pat. 386 ; A. I. R. 1924 Oudh. 120=26 O. C. 288=73 Ind. Cas. 241 ; A. I. R. 1922 Mad. 93=45 M. 875=(1922) M. W. N. 173=42 M. L. J. 422=70 Ind. Cas. 611 ; 69 M. L. J. 862=42 L. W. 943. A sale cannot be challenged as void on the ground of want of notice under this rule. The sale is not void but is only voidable. 39 C. W. N. 510=A. I. R. 1935 Cal. 356. Where proceedings are continuation of previous execution, notice is not essential. A. I. R. 1928 Cal. 241. Order deciding question of service or non-service of notice under rule 22, is one under s. 47 and second appeal lies. A. I. R. 1926 Pat. 397=8 P. L. T. 28=97 Ind. Cas. 798 ; see also 91 Ind. Cas. 711=A. I. R. 1926 Cal. 539. Notice under r. 22 is for judgment-debtor to show cause against execution and also to give him opportunity to satisfy the decree and so failure to serve notice on one of the judgment-debtors ceasing to have interest in the property does not vitiate execution proceed-

\* The words within quotations have been inserted by Act VIII of 1937.

ings in view of Art. 182 of the Limitation Act. A. I. R. 1926 Cal. 86=88 Ind. Cas. 1039. Sale after judgment-debtor's death without bringing on record representatives is a nullity. A. I. R. 1926 Mad. 138=22 L. W. 828=50 M. L. J. 662=92 Ind. Cas. 308; but see 32 C. W. N. 418=115 Ind. Cas. 520; A. I. R. 1924 Mad. 130=18 L. W. 577=45 M. L. J. 413=47 M. 63=75 Ind. Cas. 46. In a case where the decree-holder was not aware of the insolvency proceedings against the judgment-debtor, an execution sale of the latter's properties after the order of adjudication cannot be held to have been a nullity by reason of non-service of notice under this rule. 39 C. W. N. 424. Where the assignee of a decree files an application for execution and sends a notice to the assignor and judgment-debtor under Order 21, r. 22, but not under rule 16 and the judgment-debtor does not let in evidence challenging the assignment, the assignee is entitled to proceed with the execution without proving in the first place the assignment in his favour. 149 Ind. Cas. 1003=A. I. R. 1934 Pat. 9. Court's jurisdiction to entertain an application for execution is not destroyed because of an error of giving wrong address on the notice under Order 21 rule 22 to the judgment-debtors, specially where the decree-holder is not shown to have proceeded *mala fide* and gives the same address as in the plaint and where the judgment-debtor has made no attempt to avail the *ex parte* decree against him and the execution sale on such notices cannot be treated as void. A. I. R. 1934 Pat. 274=13 Pat. 467=149 Ind. Cas. 828. The mere fact that no order sheet states that the various notices required by the Code had been taken out and had been served does not prevent the judgment-debtor attempting to show that the provisions of the Code had not been complied with. A. I. R. 1934 Pat. 211=15 Pat. L. T. 505=152 Ind. Cas. 467. Where a judgment-debtor was a major at the time of the alleged service of the notice under Order 21, rule 22, but was treated as a minor throughout the proceedings and there is no service upon him as major, there is irregularity relating to service of notice. The same is also the case if after unsuccessful attempt to serve notice on the natural guardian no further attempts are made to effect service on the minor. *Ibid.* Where a Court proceeds to execute a decree which is declaratory and issues an order of attachment even though the judgment-debtor has not appeared and objected on notice under Order 21, rule 22, he is not debarred from objecting to execution subsequently as the Judge has no jurisdiction *ab initio* to proceed with the execution of the decree which is merely declaratory and not executory A. I. R. 1934 Pesh. 64. Notice under rule 22 is not needed where judgment-debtor has been given opportunity to show cause against sale being had. 188 P. L. R. 1920=5 Lah. L. J. 67=55 Ind. Cas. 816. Notice under Order XXI, rule 56, may be sufficient notice under Order XXI, rule 22. A. I. R. 1921 Lah. 384=5 Lah. L. J. 67. Reason demands that to revive decree notice should be given under this rule. 33 M. L. J. 533=40 M. 1127=40 Ind. Cas. 608. Plea of legal representative not served with notice not taken during suit but after execution sale had become complete and in appellate Court cannot nullify sale. 4 Pat. L. J. 645=52 Ind. Cas. 125. Court transferring decree cannot issue notice under Order XXI, r. 22. A. I. R. 1922 Cal. 3=26 C. W. N. 292=63 Ind. Cas. 116. Application under this rule is to facilitate execution. A. I. R. 1922 Cal 44=35 C. L. J. 82=65 Ind. Cas. 571. Execution sale is not binding on true legal representative if notice under Order XXI, r. 22, has been served on some third person as legal representative of judgment-debtor. A. I. R. 1921 Bom. 385=45 B. 1186=23 Bom. L. R. 514=63 Ind. Cas. 248. Service of notice on minor, where his guardian *ad litem* is dead and who was one of the co-defendants is good notice under this rule. A. I. R. 1921 Cal. 476=35 C. L. J. 9=64 Ind. Cas. 25. Each execution application made more than one year after first order need not be preceded by notice. A. I. R. 1921 Pat. 111=2 Pat. 916=4 P. L. T. 721=74 Ind. Cas. 838. Party attaining majority during suit is not entitled to fresh notice of execution proceedings. A. I. R. 1925 Mad. 158=78 Ind. Cas. 12.

Application to set aside sale for want of notice under rule 22 is governed by Art. 181, Limitation Act. A. I. R. 1926 Pat. 397=8 P. L. T. 28=97 Ind. Cas. 798. Issue of notice under the rule gives fresh start for limitation even though application be not according to law. A. I. R. 1927 Lah. 106=9 Lah. L. J. 76=28 P. L. R. 93=100 Ind. Cas. 475; see also 34 Ind. Cas. 280=19 O. C. 17. Order 22 does not apply to transferee of decree. A. I. R. 1925 Oudh. 448=12 O. L. J. 146=2 O. W. N. 723=87 Ind. Cas. 21. Sale is not void where wrong address is given

of the judgment-debtor on the notice. A. I. R. 1934 Pat. 274. Where judgment-debtor although major is treated as minor, there is no irregularity for non-service on him. A. I. R. 1934 Pat. 211. Judgment-debtor can show that the provision of the rule has not been complied with even where order sheet states issue of notice and service thereof. A. I. R. 1934 Pat. 211. Where legal representative all the while was aware of the execution proceeding, no notice need be issued. 143 Ind. Cas. 299=11 Rang. 79=A. I. R. 1933 Rang. 52. Failure to issue notice to legal representative after death of judgment-debtor renders sale null and void. *Ibid* ; see also 144 Ind. Cas. 14=A. I. R. 1933 Pesh. 41 ; 133 Ind. Cas. 670=35 C. W. N. 220=53 C. L. J. 46=A. I. R. 1931 Cal. 555 ; A. I. R. 1932 Cal. 381=54 C. L. J. 591 ; A. I. R. 1933 Pesh. 71 ; A. I. R. 1933 Mad. 224 ; A. I. R. 1932 Pat. 199=138 Ind. Cas. 99=13 P. L. T. 323=11 Pat. 241. Person challenging correctness of official act must prove his allegation. Burden of proving non service is on the judgment-debtor. 36 C. W. N. 242=A. I. R. 1932 Cal. 627=140 Ind. Cas. 732 ; see also 138 Ind. Cas. 99=13 P. L. T. 323=11 Pat. 241=A. I. R. 1932 Pat. 199. Sub-rule (2) is not mandatory and omission to record reason for dispensing with notices is irregularity not invalidating order made. A. I. R. 1932 Bom. 509=34 Bom. L. R. 987 ; 35 C. W. N. 228=58 C. 940=A. I. R. 1931 Cal. 443. Where notice has not been issued to some of the judgment-debtors the sale cannot be set aside in its entirety but only to the extent of share of unserved ones. 35 C. W. N. 220=53 C. L. J. 46=58 C. 825=A. I. R. 1931 Cal. 555. Although a decree not drawn up on a non-judicial stamped paper is invalid and incapable of execution, it is validated with effect from its original date whereby order of the Court which made the decree, a non-judicial stamp of the requisite value is affixed to the decree as drawn up and defaced and the names of the parties and the cause-title are written upon it. If the Judge when ordering the non-judicial stamp to be affixed makes a note thereof on the original decree and puts down his initials thereon within a date of such affixing, the decree must be taken as a decree passed on the latter date. Even, in the latter case the decree be taken as validated with effect from its original date, no notice under Order 21, rule 22 (a), would be necessary when the decree is sought to be executed more than a year after that date, if in a prior execution case started within a year, the judgment-debtor appeared and took the objection that the decree was incapable of execution because of not having been drawn up on a non-judicial stamp. 38 C. W. N. 118. Where a decree is passed against father and son and the son dies before the institution of the execution proceedings and the execution is taken out against the father not as heir of his son but against him personally, notice under this rule is not necessary. 162 Ind. Cas. 482=A. I. R. 1936 Pat. 253.

23. [S. 249.] (1) Where the person to whom notice is issued under the

Procedure after issue of notice. last preceding rule does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks fit.

Sub-section (2)—*Vide* 5 B. L. R. App. 65=14 W. R. 155 ; 5 Ind. Cas. 546 ; 8 A. 301.

#### *Process for Execution.*

24. [Ss. 250, 251.] (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

(2) Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before which it shall be executed.

*N. B.*—For local amendments in Allahabad, Bombay, C. P., Rangoon and Sind.—*Vide infra*.

**Scope.**—Condition precedent not being complied with disentitles decree-holder from executing decree. A. I. R. 1924 Rang. 375=3 Bur. L. J. 163=85 Ind. Cas. 352. Execution warrant without date before which it is to be executed is bad warrant. One person cannot execute warrant directed to another. Resistance of bad warrant is no offence. 1 Pat. L. J. 550=36 Ind. Cas. 871. It is mandatory to seal with seal of Court warrant of attachment. Non-compliance renders warrant illegal. 3 Pat. L. J. 636=49 Ind. Cas. 171. Execution of warrant after date of its return is acting out of jurisdiction. A. I. R. 1924 Nag. 68=19 N. L. R. 183=25 Cr. L. J. 223=76 Ind. Cas. 655. Warrant issued by *Sheristader* "by order" must be presumed to be legal. A. I. R. 1923 Cal. 584=37 C. L. J. 331=27 C. W. N. 1042=73 Ind. Cas. 328. Where date for attachment is fixed, subsequent attachment is not lawful. 144 Ind. Cas. 32=1933 A. L. J. 1=55 A. 119=A. I. R. 1933 All. 46.

**25. [S. 243.]** (1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if

Endorsement on process. the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability, and shall record the result.

*N. B.*—For local amendments in Allahabad, Madras and Oudh.—*Vide infra*.

**Notes.**—Officer means peon and not nazir. 40 C. 849=17 C. W. N. 841=19 Ind. Cas. 706. The peon derives his authority from the Court. *Ibid*.

#### *Stay of Execution.*

**26. [Ss. 239, 240.]** (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose conditions upon, judgment-debtor. Power to require security from, or impose conditions upon, judgment-debtor. the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit.

*N. B.*—For local amendments in Allahabad, C. P., Lahore, Oudh, Peshwar and Rangoon.—*Vide infra*.

**Scope.**—The executing Court has no power to stay execution after appeal is filed. 35 A. 119=11 A. L. J. 83. Stay order is not subject to appeal as under s. 47. A. I. R. 1924 All. 808=46 A. 733=22 A. L. J. 706=83 Ind. Cas. 1035. Judgment-debtor's property being attached in execution of decree, and he applying for adjudication, execution may be stayed till disposal of application. A. I. R. 1926 Sind 199=19 S. L. R. 35=76 Ind. Cas. 380. Unconditional stay order should never be issued. A.I.R. 1925 Mad. 908=21 L. W. 635=88 Ind. Cas. 439. Furnishing security may empower Court to make stay order. A. I. R. 1925 Lah. 552=7 Lah. L. J. 343=26 P. L. R. 634=91 Ind. Cas. 772. Where Court takes security for *mesne* profits not determined,

must take it for indefinite amount. A. I. R. 1924 Lah. 161=112 Ind. Cas. 689. Court need not accept security of person whose property is situate out of Court's jurisdiction. *Ibid.*

27. [S. 241.] No order of restitution or discharged under rule 26 shall prevent the property or person of a judgment-debtor from being re-taken in execution of the decree sent for execution.

28. [S. 242.] Any order of the Court by which the decree was passed, or Order of Court which passed decree or of appellate Court of such Court of appeal as aforesaid, in relation to the execution of such decree, shall be binding upon the Court to which the decree was sent for applied to. execution.

Notes.—*Vide* 27 Ind. Cas. 597 ; A. I. R. 1936 Pesh. 97=162 Ind. Cas. 416.

29. [S. 243] Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided.

*N. B.*—For local amendment in Allahabad.—*Vide infra.*

**Scope.**—Where execution is stayed under this rule, order operates till disposal by Court making order and not till disposal of appeal. 134 Ind. Cas. 939=35 C. W. N. 540=58 C. 1113=A. I. R. 1932 Cal. 19. Where judgment-debtor applied to set aside *ex parte* decree and the Court stayed execution till further orders on judgment-debtor's application, but the decree was not set aside, the decree-holder can apply for execution within three years of final decision of judgment-debtor's application on appeal. *Ibid.* This rule has no application to granting of *interim* injunction and applicant cannot be asked to furnish security. A. I. R. 1933 Nag. 153. Court to which decree is transferred has power to stay execution A. I. R. 1934 Cal. 4. Execution Court is empowered to order stay of execution of *ex parte* decree for fraud. A. I. R. 1923 Lah. 574=75 Ind. Cas. 419. This rule applies to cases not coming under Order XXI, r. 2 (3) joined with s. 47. A. I. R. 1923 Cal. 645=27 C. W. N. 575=72 Ind. Cas. 38. This order refers only to execution proceedings. A. I. R. 1930 Lah. 961=129 Ind. Cas. 204. Execution proceedings may not be in Court in which suit is pending. A. I. R. 1931 Bom. 247=33 Bom. L. R. 370=132 Ind. Cas. 507. For applicability of this rule application to stay execution must be made to Court passing decree. A. I. R. 1930 All. 121=122 Ind. Cas. 182. Words "pending suit has been decided" mean appeal, and exhausting all rights of appeal. A. I. R. 1928 Cal. 722=55 C. 512=32 C. W. N. 181=107 Ind. Cas. 79. High Court will not interfere Court's discretion, if properly exercised, A. I. R. 1931 Bom. 247=33 Bom. L. R. 370=132 Ind. Cas. 507 ; see also A. I. R. 1929 Sind 110=116 Ind. Cas. 101. A stay Order under Order 21, rule 29, is purely a matter of discretion. When an order is purely discretionary, the Appellate Court, as a rule will not interfere with the discretion of the Judge who passed it. A. I. R. 1935 Rang. 151 ; 159 Ind. Cas. 495=A. I. R. 1935 Rang. 389. Rule 29, is permissive. A discretionary power cannot be exercised in such a way as to override an imperative duty. A. I. R. 1935 Rang. 151=13 Rang. 351=156 Ind. Cas. 521. Order 21, rule 29, embraces every kind of suits which is maintainable. There is no limitation in the rule. Once it is conceded that a suit is maintainable, the procedure laid down in rule 29 is at once attracted. The object of the rule is that, should a plaintiff in a pending suit succeed therein, then there can be an adjustment of the decree or claim by that plaintiff against the decree obtained against him in the other suit in the same Court without it being necessary for the successful plaintiff in the pending suit to take out execution proceedings. Execution in the other suit is stayed so that the rights of the party can be adjusted. In cases where it is likely that the decree-holder in the other suit may take steps which might deprive the plaintiff in the pending suit of the fruits of any decree which he obtains, an order staying the execution in the other suit should be made. The rule is not an imperative one ; and the Court has a discretion either to grant the relief asked for, namely, stay the execution of the decree or to refuse it. This

rule is also applicable where plaintiff has brought a suit against another who is an assignee decree-holder of a decree obtained against the plaintiff. A. I. R. 1936 Mad. 102=70 M. L. J. 120=1936 M. W. N. 349=43 L. W. 493=160 Ind. Cas. 563.

### *Mode of Execution.*

30. [S. 254. Every decree for the payment of money, including a decree for the payment of money as the alternative to some other relief, may be executed by the detention in the civil prison of the judgment-debtor, or by the attachment and sale of his property or by both.

**Scope.**—Rule 30 is not exhaustive. A. I. R. 1926 Oudh 616=1 Luck. 569=3 O. W. N. 749=98 Ind. Cas. 33. This rule applies to simple money-decree not charging property. A. I. R. 1924 Pat. 258=2 Pat. 768=73 Ind. Cas. 598. Court issuing notice to surety under s. 145 proviso accompanied by warrant for his arrest is legal. A. I. R. 1927 Lah. 131=93 Ind. Cas. 518. Whether execution to be against person or property of judgment-debtor, judgment-creditor is to decide. Court may refuse execution against both but not against person in first place. A. I. R. 1936 Lah. 110=6 Lah. 548=93 Ind. Cas. 54 ; see also A. I. R. 1935 All. 179. No doubt cases may occur in which simultaneous execution by two or more methods might be reasonable and possible ; but where there is already sufficient security for the realization of the decretal amount and the procedure of the decree-holder savours rather of harassment than a genuine desire to realize the decretal amount the Court may in its discretion refuse the relief against the person of the judgment-debtor. A. I. R. 1935 Pat. 21=160 Ind. Cas. 685.

31. [S. 259.] (1) Where the decree is for any specific movable, or for any share in a specific movable, it may be executed by the seizure, if practicable, of the movable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment debtor, or by the attachment of his property, or by both.

(2) Where any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Court may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of movable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease.

**N.B.**—For local amendments in Allahabad, C. P., Lahore, Oudh, Peshwar and Rangoon.—*Vide infra.*

**Scope.**—For the application of the rule, *vide* 22 W. R. 36 ; 23 Ind. Cas. 828 ; 39 M. 1=29 M. L. J. 342=(1915) M.W.N. 644=30 Ind. Cas. 840 (F. B.). Where the decree is under Order XX, rule 10, the procedure of rule 31 is not to be followed. A. I. R. 1927 Cal. 652=31 C. W. N. 850=55 C. 26=103 Ind. Cas. 740.

32. [S. 260. R. S. C. O. 42, r. 30.] (1) Where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced

\*[in the case of a decree for restitution of conjugal rights by the attachment of his property, or, in the case of a decree for the specific performance of a contract or for an injunction] by his detention in the civil prison, or by the attachment of his property, or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court, by the detention, in the civil prison of the directors or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application.

(4) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

#### *Illustration.*

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution proceedings.

*N. B.*—For local amendments in Allahabad, C. P., Lahore, Oudh, Peshwar and Rangoon.—*Vide infra.*

**Scope.**—Order to furnish account in preliminary decree does not amount to injunction under Order XXI, r. 32. 3 Pat. L. J. 106=44 Ind. Cas. 737=19 Cr. L. J. 385=44 Ind. Cas. 737. Court can execute decree against person or property but cannot ask security bond. 19 M. L. T. 132=3 L. W. 161=(1916) 1 M. W. N. 147=32 Ind. Cas. 698. Mode of executing decree for injunction is provided by Order XXI, rule 32. Appointment of Commissioner, nor Police help is necessary. 40 A. 648=16 A. L. J. 700=48 Ind. Cas. 26. Disobeying decree for injunction comes under rule 32, cl. 5. A. I. R. 1921 Lah. 376=25 P. L. R. 1921=59 Ind. Cas. 594. No suit lies for compensation for breach of terms of compromise decree. Order XXI, rule 32 and rule 34 apply. 24 M. L. T. 34=(1918) M. W. N. 333=7 L. W. 663=45 Ind. Cas. 689; see also (1930) M. W. N. 809. Cl. 5, rule 32, does not apply to prohibitory injunction. A. I. R. 1934 Cal. 402. In a decree for specific performance of contract for sale, Court can as well grant possession of property. 131 Ind. Cas. 529=12 P. L. T. 636=A. I. R. 1931 Pat. 179. Attachment ceases after one year. 156 Ind. Cas. 814=41 L. W. 694=1935 M. W. N. 301=A. I. R. 1935 Mad. 413=68 M. L. J. 461. Under this rule if the judgment-debtor wilfully refused to obey the decree, the only remedy open to the decree-holder is to proceed to attach the property of the judgment-debtor. The Court cannot compel the wife against whom a decree, for restitution of conjugal rights has been passed to go and live with her husband. 150

\* These words were inserted by s. 2 of the Code of Civil Procedure (Amendment) Act, 1923 (29 of 1923).



Ind. Cas. 307=35 P. L. R. 655. Where a decree for injunction has been passed in the presence of the defendants and there has been no disobedience of the injunction on their part, the time for enforcing it not having arrived, the plaintiff is not entitled to ask the Court to issue a notice or to make an order embodying the injunction and have it served on the defendants. Order 21, rule 32, does not provide for the issue of such notice or order. It may be that the Court has jurisdiction to issue such notice or order in proper circumstances but the party himself is not entitled to ask the Court to issue it. A. I. R. 1936 Mad. 706=1936 M. W. N. 773=164 Ind. Cas. 668=44 L. W. 308=71 M. L. J. 286. Where decree was against father for injunction and father died during execution proceeding, the decree can be enforced against son under s. 50 by proceeding under Order 21, rule 32. 134 Ind. Cas. 968=33 Bom. L. R. 1118=A. I. R. 1931 Bom. 482. Sale of property under Order 21, rule 32 (3), is for a person's wilful failure to obey the decree of Court and cannot be set aside under Order 21, rule 89, which is not applicable. 141 Ind. Cas. 713=56 C. L. J. 140=A. I. R. 1930 Cal. 96. Court cannot change a decree for restitution for conjugal rights into decree for payment of money. A. I. R. 1937 Rang. 126. It is futile to argue that the only remedy of a decree-holder is to bring a separate suit for damages, where no judgment-debtor deliberately chooses to disobey the injunction issued by the Court, permanently prohibiting him from holding a fair on certain lands. Order 21, rule 32, specifically provides for the execution of a decree for injunction. 154 Ind. Cas. 744=1935 A. L. J. 416=A. I. R. 1935 All. 480.

33. [New.] (1) Notwithstanding anything in rule 32, the Court, either at the time of passing a decree \* [against a husband] for the restitution of conjugal rights or at any time afterwards, may order that the decree † [shall be executed in the manner provided in this rule].

(2) Where the Court has made an order under sub-rule (1), ‡ it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment-debtor shall, to its satisfaction, secure to the decree-holder such periodical payments.

(3) The Court may from time to time vary or modify any order made under sub-rule (2) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revive the same either wholly or in part as it may think just.

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment of money.

**Scope.**—Under Order XXI, r. 33, where wife is leading un-chaste life, order against detention in jail should not be made. A.I.R. 1923 Lah. 595=75 Ind. Cas. 24. Instead of sending wife to jail for disobeying decree for restitution of conjugal rights passed against her she should be precluded from getting maintenance. A. I. R. 1924 Lah. 244=73 Ind. Cas. 716. Decree for restitution of conjugal rights against wife should declare husband's rights and should order other defendants not to prevent wife from going to her husband. 59 Ind. Cas. 887. Disobedience of decree for restitution of conjugal rights passed against wife should not entail imprisonment. 44B. 972=22 Bom. L. R. 1097=59 Ind. Cas. 361. Discretion in passing order under Order XXI, r. 33, is not generally subject to revision. 78 Ind. Cas. 190= A. I. R. 1924 All. 836.

\* These words were inserted by s. 3 of the Code of Civil Procedure (Amendment) Act, 1923 (29 of 1923).

† These words were substituted for the words "shall not be executed by detention in prison" by *Ibid.*

‡ The words "and the decree-holder is the wife" were omitted by *Ibid.*

34. [Ss. 261, 262.] (1) Where a decree is for execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit.

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely:—

“C. D., Judge of the Court of (or as the case may be), for A. B., in a suit by E. F. against A. B.”, and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

(6) The Court, or such officers as it may appoint in this behalf, shall cause the document to be registered if its registration is required by the law for the time being in force or the decree-holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration.

**Scope.**—Execution of compromise decree for execution of *patta*, comes under this rule. A. I. R. 1926 Cal. 975=95 Ind. Cas. 179; see also 61 Ind. Cas. 535. Defendant can execute decree for specific performance under Order XXI, rule 34. A. I. R. 1923 Bom. 26=24 Bom. L. R. 496=46 B. 990. Execution of decree for specific performance is one in continuation of suit. 14 N. L. R. 176=48 Ind. Cas. 188. Decree for transfer of shares can be executed in case of default. 41 Ind. Cas. 77.

35. [S. 263.] (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

**Delivery of possession—second application.**—Where after delivery of possession made in execution of a final decree for partition, a party cannot get actual possession of his share, Court should order for fresh delivery of possession. A. I. R. 1934 Cal. 793=38 C. W. N. 832=152 Ind. Cas. 764. But where a decree

for *khas* possession is once executed under Order 21, rule 35, and the decree-holder acknowledges receipt of possession to the exclusion of others, a subsequent execution petition on the allegation, that he get only symbolical possession in the prior proceedings is not maintainable. Whatever other remedy may be open, a second execution does not lie. 60 C. L. J. 286.

**Delivery of possession.**—Land if in actual possession of judgment-debtor, actual and not formal possession must be given. A. I. R. 1924 Lah. 301=71 Ind. Cas. 885. Under sub-section (1) a person can apply to be put in actual possession. 45 Ind. Cas. 7. Failure to comply with the procedure laid down in this rule is fatal to the delivery of possession. 2 Lah. L. J. 202=55 Ind. Cas. 19. Delivery of possession can be made to any person orally authorised by the decree-holder. Power-of-attorney is not necessary. 13 N. L. R. 87=18 Cr. L. J. 689=40 Ind. Cas. 689. Adverse possession does not run where actual possession is given. A. I. R. 1924 All. 844=79 Ind. Cas. 1047. Formal delivery of possession amounts to actual delivery. A. I. R. 1923 Nag. 237=6 N. L. J. 157=72 Ind. Cas. 318. Delivery of extensive area can be made under rule 36 but will be regarded as one under rule 35. A. I. R. 1923 Pat. 76=3 P. L. T. 628=71 Ind. Cas. 999. Order *ex parte* for delivery of possession should not be made. A. I. R. 1923 Pat. 597=4 P. L. T. 508=1 Pat. L. R. 393=76 Ind. Cas. 49=79 Ind. Cas. 188. Where land is in actual possession of the judgment-debtor, sub-section (1) applies. 140 Ind. Cas. 530=33 P. L. R. 1082=A. I. R. 1933 Lah. 22. Judgment-debtor's consent is not necessary. *Ibid.* Code prescribes two modes of delivery of possession based on nature of property concerned. 142 Ind. Cas. 246=11 Pat. 165=13 P. L. T. 121=A. I. R. 1932 Pat. 145. Failure to apply for removal of obstruction within 30 days does not debar application to obtain fresh warrant for possession under rule 35. 146 Ind. Cas. 11=35 Bom. L. R. 1033=A. I. R. 1933 Bom. 457 (F. B.). Decree in ejectment against lessee at the instance of lessor is also, binding upon sub-tenant who can be evicted under Order 21, rule 35. 137 Ind. Cas. 139=35 C. W. N. 1132=54 C. L. J. 493=59 C. 739=A. I. R. 1932 Cal. 241. Where in a decree for *khas* possession only symbolical possession is obtained during execution, decree-holder cannot subsequently and as second instalment ask for *khas* possession. 131 Ind. Cas. 698=35 C. W. N. 12=A. I. R. 1931 Cal. 427; see also 29 M. L. J. 509=32 Ind. Cas. 44; 26 P. L. R. 1917=20 P. R. 1917=22 P. W. R. 1917=39 Ind. Cas. 753. Order 21, rule 35, sub-rule (1), C. P. Code, contemplates actual possession, while sub-rule (2) contemplates symbolical possession. Where there is no specification of land with reference to numbers, symbolical delivery of possession can be given to the decree-holder under Order 21, rule 35 (2), in as much as an actual delivery of possession is not possible in such a case. A. I. R. 1937 Oudh. 275.

**Joint possession.**—Rule 35 (2) is applicable to decree for joint possession. A. I. R. 1921 Lah. 236=3 Lah. L. J. 138=43 P. L. R. 1921=59 Ind. Cas. 770. A person entitled to possession of immovable property jointly with others is entitled to a decree for joint possession. Whether he was originally in possession or not matters little. A. I. R. 1922 All. 314=44 A. I. R. 1921 A. L. J. 780=63 Ind. Cas. 802; see also A. I. R. 1922 All. 162=44 A. I. R. 1921 A. L. J. 783=63 Ind. Cas. 806; A. I. R. 1928 All. 472=51 A. I. R. 1927 A. L. J. 992=112 Ind. Cas. 143. Rule 35 alone applies in case of joint-holding. A. I. R. 1926 Lah. 668=27 P. L. R. 617=97 Ind. Cas. 170. Symbolical joint possession prevents adverse possession from running against decree-holder. A. I. R. 1921 Lah. 719=108 Ind. Cas. 396; see also 160 Ind. Cas. 1037=1936 A. L. J. 80=A. I. R. 1936 All. 85. The passing of a decree for joint possession and handing over of symbolical possession in pursuance thereof under Order 21, r. 35, C. P. Code terminates all claims to adverse title previously put forward by the defendants. But the fact that the person in possession continues to be in enjoyment of the property just after the formality under Order 21, rule 35, is over does not to all intents and purposes amount to an immediate dis-possession of the decree-holder after he has been put in possession. The decree-holder must under Art. 142, Limitation Act, come within 12 years to recover possession again and if he does not his suit is barred A. I. R. 1936 Pesh. 7=160 Ind. Cas. 441.

In giving joint possession to a party in execution of a decree, the procedure prescribed by Order 21, rule 35 (2), must be strictly followed. Joint possession under a decree granting joint possession, can only be delivered in the particular manner prescribed by the legislature in Order 21, rule 35 (2). It is not within the

competency of any body to attempt to give joint possession in any other manner, and if the *partwari* or any other person takes upon himself to deliver such joint possession in a manner contrary to the express language of the legislature, their action would not have any legal effect. Such possession is not effective for the purposes of limitation and does not provide a fresh starting point for limitation. A. I. R. 1936 Lah. 749.

**Symbolical possession.**—Non-accompaniment of warrant for delivery of possession cannot give symbolical delivery. A. I. R. 1923 Lah. 693=5 Lah. L. J. 507=74 Ind. Cas. 1. Delivery of symbolical possession through mistake operates for parties as actual possession. A. I. R. 1923 Pat. 76=3 Pat. L. T. 628=71 Ind. Cas. 999. Where symbolical possession is delivered in suit for *khas* possession by decree-holder, symbolical possession gives fresh cause of action. A. I. R. 1926 Cal. 1172=96 Ind. Cas. 481; see also A. I. R. 1926 Lah. 35=26 P. L. R. 546=89 Ind. Cas. 596; A. I. R. 1927 Mad. 847=53 M. L. J. 339=105 Ind. Cas. 243; A. I. R. 1925 Mad. 140=49 M. L. J. 303=86 Ind. Cas. 439. Informal delivery of possession does not stop adverse possession. A. I. R. 1929 Lah. 545=11 Lah. L. J. 146=118 Ind. Cas. 391. In case of delivery of symbolical possession where *khas* possession is to be delivered the remedy is open by fresh suit. A. I. R. 1931 Cal. 427=35 C. W. N. 12=131 Ind. Cas. 698. Where the judgment-debtor is in actual possession and delivery of symbolical possession is made, the proper course is to institute suit. A. I. R. 1927 Nag. 36=97 Ind. Cas. 705. Procedure of delivery of possession purely symbolical must be strictly followed. 26 P. L. R. 1917=20 P. R. 1917=22 P. W. R. 1917=39 Ind. Cas. 753. Where persons concerned were made aware of the delivery of possession in the course of execution proceedings there has been substantial compliance. 2 Lah. L. J. 563=68 Ind. Cas. 182. Where symbolical possession is given to the decree-holder under Order 21, rule 35, C. P. Code, without affixing any warrant on the property but by a beat of drum only and the judgment-debtor acquiesced in such procedure the validity of the delivery of possession cannot be affected by such informality and the possession delivered therefore is valid and binding as against him. A. I. R. 1937 Oudh 275. Where delivery of the immovable property with standing crops was prayed for in execution and delivery of the land only was given and not of crops, remedy is to apply again for effective possession of the whole and not delivery of the crops. A. I. R. 1927 Mad. 71=97 Ind. Cas. 567. Where symbolical possession was delivered to auction purchaser in accordance with the provision of the law, a fresh start for the computation for limitation commences from the date of the delivery of such possession. A. I. R. 1928 Oudh 8=3 Luck. 130=4 O. W. N. 1005=105 Ind. Cas. 781.

### 36. [S. 264.] Where a decree is for the delivery of any immovable property

Decree for delivery of immovable property when in occupancy of tenant.

in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property and proclaiming to the occupant by beat of drum or other customary mode at some convenient place, the substance of the decree in regard to the property.

**Scope.**—Rule 36 covers delivery of the property in the rightful possession of a mortgagee, but such delivery is merely a notice to the mortgagee that the decree-holder is entitled to redeem. 22 O. C. 278=54 Ind. Cas. 269. Where the property is in the possession of the tenant and the provisions of rule 36 has not been complied with, possession is not legally transferred. 33 P. W. R. 1917=41 Ind. Cas. 752. This rule applies only to a case of exclusive possession of a person not bound by the decree and entitled to remain in possession. A. I. R. 1926 Lah. 668=27 P. L. R. 617=97 Ind. Cas. 170. Under this rule only symbolical possession is given. A. I. R. 1925 Rang. 98=3 Bur. L. J. 263=85 Ind. Cas. 501. In order to constitute proper delivery of possession all the formalities must be strictly observed. A. I. R. 1925 Lah. 264=6 Lah. L. J. 522=26 P. L. R. 27=84 Ind. Cas. 733; see also A. I. R. 1922 Bom. 2=24 Bom. L. R. 499=46 B. 932=68 Ind. Cas. 91; A. I. R. 1921 Lah. 236=3 Lah. L. J. 138=43 P. L. R. 1921=59 Ind. Cas. 770. Erroneous delivery of symbolical possession operates as actual possession against the judgment-debtor and his representatives. A. I. R. 1923 Pat. 76=3 P. L. T. 628=24 Cr. L. J. 279=71 Ind. Cas. 999.

*Arrest and detention in the Civil Prison.***37. [S. 245B.]** (1) Notwithstanding anything in these rules, where an

Discretionary power to permit judgment-debtor to show cause against detention in prison.

application is for the execution of a decree for the payment of money by the arrest and detention in the civil prison of a judgment-debtor who is liable to be arrested in pursuance of the application, the Court "shall" \* instead of issuing a

warrant for his arrest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison.

"Provided that such notice shall not be necessary if the Court is satisfied, by affidavit, or otherwise, that, with the object or effect of delaying the execution of the decree, the judgment debtor, is likely to abscond or leave the local limits of the jurisdiction of the Court."†

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree-holder so requires, issue a warrant for the arrest of the judgment-debtor :

**Scope.**—Where warrant and notice to appear are issued simultaneously, warrant is illegal. 142 Ind. Cas. 887=1932 A. L. J. 1073=A. I. R. 1932 All. 692 ; see also 142 Ind. Cas. 160=11 Pat. 743=13 P. L. T. 502=A. I. R. 1932 Pat. 315. Notice is necessary before arrest is ordered. A. I. R. 1929 Sind 51=89 Ind. Cas. 401. Previous attachment is not necessary for an application of arrest. A. I. R. 1925 Lah. 379=7 Lah. L. J. 165=26 P. L. R. 494=89 Ind. Cas. 138. The mere fact that an appeal is pending is no reason for not enforcing execution by arrest of judgment-debtor. A. I. R. 1924 Lah. 360=73 Ind. Cas. 766. In mortgage decree, executing Court is not competent to direct the arrest of judgment-debtor. A. I. R. 1930 Lah. 103=31 P. L. R. 143=121 Ind. Cas. 293. In the absence of protection order by the Insolvency Court, an adjudged insolvent can be arrested. A. I. R. 1929 Bom. 135=31 Bom. L. R. 201=118 Ind. Cas. 791 ; 49 A. 201=100 Ind. Cas. 320=A. I. R. 1927 All. 418 ; A. I. R. 1930 Lah. 1070=31 P. L. R. 456=128 Ind. Cas. 314. For a proper case of refusal of arrest, *vide* A. I. R. 1934 Lah. 166. The fact that the judgment-debtor does not reside within the territorial jurisdiction of the Court is not a sufficient reason for refusing to issue a warrant for his arrest. Court should fix a date for its return in such a case. 3 Pat. L. J. 95=44 Ind. Cas. 296. Order issuing a warrant for arrest of a judgment-debtor in execution of a decree is appealable as a decree under s. 96. A. I. R. 1924 Lah. 360=73 Ind. Cas. 766. Where the whole of the property of the judgment-debtor is under attachment and it is not shown that he has other means of satisfying the decree the order of the executing Court refusing the arrest of the judgment-debtor is justified. A. I. R. 1934 Lah. 166.

**38. [S. 337.]** Every warrant for the arrest of a judgment-debtor shall

Warrant for arrest to direct judgment-debtor to be brought up.

direct the officer entrusted with its execution to bring him before the Court with all convenient speed, unless the amount which he has been ordered to pay, together with the interest thereon and the costs (if any) to which he is liable, be sooner paid.

*N. B.*—For local amendment in Rangoon.—*Vide infra*.

**39. [Ss. 339, 340.]** (1) No judgment-debtor shall be arrested in execu-

Subsistence-allowance.

tion of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks sufficient for the subsistence of the judgment-debtor from the time of his arrest until he can be brought before the Court.

(2) Where a judgment-debtor is committed to the civil prison in execution of a decree, the Court shall fix for his subsistence such monthly allowance, as he may be entitled to according to the scales fixed under section 57 or,

\* Substituted by Act XXI of 1936.

† Inserted by Act XXI of 1936.

where no such scales have been fixed, as it considers sufficient with reference to the class to which he belongs.

(3) The monthly allowance fixed by the Court shall be supplied by the party on whose application the judgment-debtor has been arrested by monthly payments in advance before the first day of each month.

(4) The first payment shall be made to the proper officer of the Court for such portion of the current month as remains unexpired before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be made to the officer-in-charge of the civil prison.

(5) Sums disbursed by the decree-holder for the subsistence of the judgment-debtor in the civil prison shall be deemed to be costs in the suit :

Provided that the judgment-debtor shall not be detained in the civil prison or arrested on account of any sum so disbursed.

*N. B.*—For local amendments in Allahabad, C. P., Lahore, Madras, Oudh, Peshwar and Rangoon.—*Vide infra.*

**Scope.**—subsequent remittances to jail authorities by money order is application to Court and is step-in-aid of execution. 140 Ind. Cas. 498=1932 M. W. N. 1198=63 M. L. J. 792=36 M. L. W. 738=56 Mad. 320=A. I. R. 1933 Mad. 83.

\*“40. (1) When a judgment-debtor appears before the Court in obedience

to a notice issued under r. 37, or is brought before the Court after being arrested in execution of a decree for the payment of money, the Court shall proceed to hear the decree-holder and take all such evidence as may be produced by him in support of his application for execution, and shall then give the judgment-debtor an opportunity of showing cause why he should not be committed to the civil prison

(2) Pending the conclusion of the inquiry under sub-rule (1) the Court may, in its discretion, order the judgment-debtor to be detained in the custody of an officer of the Court or release him on his furnishing security to the satisfaction of the Court for his appearance when required.

(3) Upon the conclusion of the inquiry under sub-rule (1) the Court may, subject to the provisions of section 51 and to the other provision of this Code, make an order for the detention of the judgment-debtor in the civil prison and shall in that event cause him to be arrested if he is not already under arrest :

Provided that in order to give the judgment-debtor an opportunity of satisfying the decree, the Court may, before making the order of detention, leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding fifteen days or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) When the Court does not make an order of detention under sub rule (3) it shall disallow the application and, if the judgment-debtor is under arrest, direct his release.”

**Scope.**—An executing Court cannot decline to issue a warrant of arrest without a finding under Order XXI, rule 40. Before issuing warrants it is proper to inform the judgment-debtors, that they can avoid arrest by presenting a petition in insolvency. A. I. R. 1926 Lah. 110=27 P. L. R. 229=94 Ind. Cas. 279. Judgment-debtor cannot apply to the Court for an enquiry into his pauperism after the issue of a warrant against him without notice and before his arrest. He should surrender himself in Court and move it to pass an order under rule 40 (3). A. I. R. 1929 Sind 110=116 Ind. Cas. 101. Order of release cannot be passed where decree-holder proves that the judgment-debtor has concealed or removed his property. A. I. R. 1929 Pat. 728=118 Ind. Cas. 312. As regards the effect of insolvency of the judgment-debtor,

\* This section has been substituted by Act XXI of 1936 for original rule 40 as well as those substituted under s. 122.

*vide* A. I. R. 1931 Lah. 121=32 P. L. R. 311=131 Ind. Cas. 208 ; A. I. R. 1930 Lah. 1070=31 P. L. R. 456=128 Ind. Cas. 314 ; A. I. R. 1929 Lah. 776=116 Ind. Cas. 178. The security to be furnished by judgment-debtor must be proper. A. I. R. 1928 Cal. 62=54 C. 782=106 Ind. Cas. 66. Contract on the basis of a surety-bond becomes operative from the date of its acceptance unless there is something contrary to the bond. A. I. R. 1928 Mad. 469=51 M. 61=54 M. L. J. 267=27 L. W. 662=1928 M. W. N. 47=108 Ind. Cas. 68. Execution should be stayed in cases where the order would be running to the judgment-debtor and when it is not detrimental to the interests of the decree-holder to stay the proceedings. A. I. R. 1927 Mad. 42=20 L. W. 175=48 M. 494=84 Ind. Cas. 134. Where all the property of the judgment-debtor is sold in execution and he is unable to pay off the decretal amount or any portion of it, it is improper to order his imprisonment. A. I. R. 1922 Lah. 259=4 Lah. L. J. 266=79 Ind. Cas. 551 ; see also A. I. R. 1934 Lah. 217. Judgment-debtor cannot be excused from arrest unless he comes to Court. 144 Ind. Cas. 255=14 P. L. T. 271=A. I. R. 1933 Pat. 248. Detention to be valid need not be in writing. 142 Ind. Cas. 242=1932 M. W. N. 1222=A. I. R. 1933 Mad. 278.

### *Attachment of Property.*

Examination of judgment-debtor as to his property. 41. [S. 267.] Where a decree is for the payment of money, the decree-holder may apply to the Court for an order that—

- (a) the judgment-debtor, or
- (b) in the case of a corporation, any officer thereof, or
- (c) any other person,

be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree ; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents.

**Scope.**—Application for the examination of the judgment-debtor can be made at any stage of the execution proceedings. 34 Ind. Cas. 287. Garnishee should admit or deny debt in express terms. A. I. R. 1933 Sind 350. Attachment does not *per se* create or confer a title. It only prevents an alienation of the property during the subsistence of the attachment. A. I. R. 1930 All. 552=(1930) A. L. J. 984=125 Ind. Cas. 28. There is no rule under which a copy of the petition by which a garnishee had denied the claim of the judgment-debtor, would be required to be given by him to the decree-holder. 151 Ind. Cas. 679=A. I. R. 1934 Lah. 560. In a suit for recovery of money due on settled accounts, an application was filed for appointing of Receiver and for an order directing the defendant to produce certain account books not connected with the suit, in order that the plaintiff, if he gets a decree, may be in a better position to realise his decree-debt. The Court ordered the production, but the defendant refused, whereupon the Court passed an order compelling him to produce them failing which a complaint was to be laid for disobedience of Court's order : *Held* that Order 39, rule 1 (b), did not apply and that even if it applied it was overridden by the special provisions *viz*, Order 21, rule 41, which comes into effect only after the passing of the decree, and that the order should be set aside. A. I. R. 1934 Mad. 199=57 M. 635=66 M. L. J. 498.

42. [S. 255.] Where a decree directs an inquiry as to rent or *mesne* profits or any other matter, the property of the judgment-debtor may, before the amount due from him has been ascertained, be attached, as in the case of an ordinary decree for the payment of money.

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined.

**Scope**—This rule does not apply to a preliminary decree passed in a suit for partnership account. A. I. R. 1926 Sind 178=93 Ind. Cas. 306 ; see also A. I. R. 1929 Mad. 641=52 M. 563=57 M. L. J. 264. An equity into the state of accounts under s. 52, C. P. Code, with a view to ascertain the liability of the trustee is covered by this rule. 41 Ind. Cas. 89. Plaintiff cannot compel defendant to produce accounts not connected with suit so that he may be in better position to realise his decree-debt if decree is obtained in suit. A. I. R. 1934 Mad. 199. The words "any

other matter" in rule 42 cannot include a preliminary decree directing the taking of accounts in a partnership suit, in as much as the rule deals expressly with the decrees for *mesne* profits and rents. 40 C. 1393 (1396).

43. [S. 269.] Where the property to be attached is movable property other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

*N. B.*—For local amendments in Lahore, Madras and Peshwar,—*Vide infra*.

**Scope.**—The word "seize" means taking possession forcibly or in pursuance of a warrant or legal process. Attachment must be deemed to have been effected by the seizure and removal of the articles from the defendant's house. 1930 M. W. N. 487. Actual seizure of cattle to be attached does not require physical contact. A. I. R. 1930 Mad. 670=(1930) M. W. N. 347=32 L. W. 23=31 C. L. J. 1086=126 Ind. Cas. 601. Attaching officer is responsible for the due custody of the property attached. A. I. R. 1926 All. 406=48 A. 510=24 A. L. J. 561=95 Ind. Cas. 828. The liability of a person who is put in custody of movable property attached in execution on executing a security bond and undertaking to produce it whenever required but fails to produce it when ordered is not affected by rule 43. A. I. R. 1924 All. 220=19 A. L. J. 247=62 Ind. Cas. 719 ; see also 47 Ind. Cas. 956=16 N. L. R. 178 ; 51 Ind. Cas. 653=74 P. L. R. 1919=60 P. R. 1919 ; 65 Ind. Cas. 134=12 L. W. 329=(1920) M. W. N. 784=39 M. L. J. 472. Removal of property attached by attaching officer is illegal. A. I. R. 1928 Cal. 815=56 C. 460=48 C. L. J. 288=33 C. W. N. 174=113 Ind. Cas. 572. Money paid by a judgment-debtor under a warrant of attachment of his movable property are assets held by the Court. A. I. R. 1926 Bom. 242=28 Bom. L. R. 237=93 Ind. Cas. 852. When warrant is addressed to a person in his official capacity, it cannot be executed by another person. A. I. R. 1929 Mad. 188=112 Ind. Cas. 566. Where attachment is removed under this rule, attachment is not restored by the mere force of the decree passed in a suit under r. 63 of Order XXI. A. I. R. 1936 Rang. 247=8 Rang. 491=126 Ind. Cas. 223. Section 145 applies to enforce surety-bond executed under Order 21, rule 43. 142 Ind. Cas. 368=1932 M. W. N. 1296=A. I. R. 1933 Mad. 219. The proper procedure for decree-holder to enforce liability of surety is to proceed in execution. *Ibid.* Limitation for enforcing liability of surety is three years from the date of decree. *Ibid.* *Suppardar* of property attached is always responsible to *amin* and cannot hand over property to judgment-debtor without direction of *amin*. A. I. R. 1934 All. 357.

44. [New.] Where the property to be attached is agricultural produce, the attachment shall be made by affixing a copy of the warrant of attachment,—

(a) where such produce is a growing crop, on the land on which such crop has grown, or

(b) where such produce has been cut or gathered, on the threshing floor or place for treading out grain or the like or fodder-stack on or in which it is deposited,

and another copy on the outer door or on some other conspicuous part of the house in which the judgment debtor ordinarily resides or, with the leave of the Court, on the outer-door or on some other conspicuous part of the house in which he carries on business or personally works for gain or in which he is known to have last resided or carried on business or personally worked for gain ; and the produce shall thereupon be deemed to have passed into the possession of the Court.

*N. B.*—For local amendment in Bombay.—*Vide infra*.



**Notes.**—An attachment not made in accordance with this rule is not valid. A.I.R. 1935 Rang. 186=156 Ind. Cas. 697 ; see also 29 S. L. R. 190. An attachment which is not in accordance with the provisions of this rule, would no doubt not operate to transfer possession of the property to the Court. But the presumption of law is that anything which is done by the officer of the Court is properly done until the contrary is shown. A. I. R. 1936 All. 364=1936 A. L. J. 283=162 Ind. Cas. 653.

**45. [New.]** (1) Where agricultural produce is attached, the Court shall make such arrangements for the custody thereof as it may deem sufficient and, for the purpose of enabling the Court to make such arrangements, every application for the attachment of a growing crop shall specify the time at which it is likely to be fit to be cut or gathered.

(2) Subject to such conditions as may be imposed by the Court in this behalf either in the order of attachment or in any subsequent order, the judgment-debtor may tend, cut, gather and store the produce and do any other act necessary for maturing or preserving it ; and if the judgment-debtor fails to do all or any of such acts, the decree-holder may, with the permission of the Court and subject to the like conditions, do all or any of them either by himself or by any person appointed by him in this behalf, and the costs incurred by the decree-holder shall be recoverable from the judgment-debtor as if they were included in, or formed part of the decree.

(3) Agricultural produce attached as a growing crop shall not be deemed to have ceased to be under attachment or to require re-attachment merely because it has been severed from the soil.

(4) Where an order for the attachment of a growing crop has been made at a considerable time before the crop is likely to be fit to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, in its discretion make a further order prohibiting the removal of the crop pending the execution of the order of attachment.

(5) A growing crop which from its nature does not admit of being stored shall not be attached under this rule at any time less than twenty days before the time at which it is likely to be fit to be cut or gathered.

*N. B.*—For local amendments in Bombay, Lahore and Rangoon.—*Vide infra.*

**Scope.**—Rule 45 does not apply in the case of attachment of agricultural produce in the hands of third party. A. I. R. 1921 Sind 95=15 S. L. R. 128=64 Ind. Cas. 1007. This rule applies when crops are in the possession of judgement-debtor otherwise not. A. I. R. 1929 Lah. 200=112 Ind. Cas. 849.

Attachment of debt, share and other property not in possession of judgment-debtor.

**46. [S. 268.]** (1) In the case of—

(a) a debt not secured by a negotiable instrument,  
 (b) a share in the capital of a corporation,  
 (c) other movable property not in the possession of the judgment-debtor, except property deposited in, or in the custody of any Court, the attachment shall be made by a written order prohibiting,—

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court ;

(ii) in the case of the share, the person in whose name the share may be standing from transferring the same or receiving any dividend thereon ;

(iii) in the case of the other movable property except as aforesaid, the person in possession of the same from giving it over to the judgment-debtor.

(2) A copy of such order shall be affixed on some conspicuous part of the Court-house, and another copy shall be sent in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the other movable property (except as aforesaid), to the person in possession of the same.

(3) A debtor prohibited under clause (i) of sub-rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

*N. B.*—For local amendment in Rangoon.—*Vide infra.*

**Scope.**—Attachment of property movable or immovable outside the jurisdiction of Court can be made except under rule 48. A. I. R. 1929 Lah. 645=118 Ind. Cas. 908. Attachment crystallises the rights of the parties at a given point of time, and no new interest can be created to defeat it. Attachment does not amount to a specific charge but is the basis of all the judgment-creditor's rights to assert his debtor's interest. A. I. R. 1924 Cal. 744=51 C. 548=39 C. L. J. 418=83 Ind. Cas. 233. Rule 46 (3) operates quite independent of the circumstances under which the payment is made, or the motive which may have influenced the making of it. A. I. R. 1921 All. 81=43 A. 272=19 A. L. J. 41=60 Ind. Cas. 881. Property vesting in trustees and payable to children of constituents on death, cannot be attached. 134 Ind. Cas. 558=33 Bom. L. R. 720=A. I. R. 1931 Bom. 300. Executing Court need not determine if debt attached is really due. 135 Ind. Cas. 543=1931 M. W. N. 259=A. I. R. 1931 Mad. 570. Where mortgaged property is taken over by Court of Wards, debt secured by such mortgage is not mortgage debt. Jurisdiction to attach and sell this debt vest in Court within whose jurisdiction, the manager of Court of Wards resides. 137 Ind. Cas. 377=11 Pat. 473=13 P. L. T. 466=A. I. R. 1932. Pat. 148. Attachment by a prohibitory Order of the nature contemplated by Order 21, r. 46 of the C. P. Code can be made in respect of a share of a debt due to the judgment-debtor by a third person. It is not necessary that the debt contemplated by section 60 or Order 21, r. 46 should be due to the judgment-debtor solely. 41 C. W. N. 410; A. I. R. 1937 Cal. 199. Where debt is attached in execution and the *garnishee* totally denies the existence of the debt, and consequently of any obligation on his part to the judgment-debtor, if the Court disallows his objection, to an attachment against him of the alleged debt, he cannot institute a suit to establish his right which he claims to the property under Order 21, r. 63. Because according to him the property is non-existent. A. I. R. 1936 Mad. 152=70 M. L. J. 20=1936 M. W. N. 54=43 L. W. 68=59 M. 966=160 Ind. Cas. 534. But where a *garnishee* denies the debt and objects to the jurisdiction of the Court to compel him to deposit the debt, but does not ask to have the matter investigated and there is no investigation or decision on the point raised by him, and the Court orders sale of the debt for whatever it is worth the garnishee can raise the matter in the subsequent suit by the purchaser. A. I. R. 1936 Nag. 218. Where the report of service of the notice stated that as the peon was informed that the person to be served with the notice had gone out he attached it to the house, held that in the absence of the evidence of the persons present during the alleged service of notice it was not proved to have been properly served. A. I. R. 1934 Pat. 619=152 Ind. Cas. 795. Under this rule, the executing Court has no jurisdiction to pass any prohibitory order unless either the debt to be attached is within the territorial jurisdiction of that Court or the person against whom it is claimed resides within its jurisdiction. A. I. R. 1934 Nag. 167=30 N. L. R. 92=148 Ind. Cas. 176; see also A. I. R. 1934 Sind 135=151 Ind. Cas. 879. The mere order to make an attachment does not amount to an actual attachment. The attachment is not complete until it has been effected in the manner prescribed by the rules *i.e.*, a copy of the order prohibiting the debtor from making payment of the debt until the further order of the Court has been sent to the debtor. A. I. R. 1934 Pat. 619=152 Ind. Cas. 795.

**Debt**—Unpaid portion of loan by mortgagee is not debt and cannot be attached. A. I. R. 1934 All. 449. Executing Court can pass a prohibitory order where either the debt on the *garni hee* is within the jurisdiction. A. I. R. 1934 Nag. 167. Where third party admits debt he can be ordered to deposit it in Court. 35 Ind. Cas. 469=10 Bur. L. T. 6; see also 33 Ind. Cas. 169. Order of attachment of debt is no bar to suit for recovery. 5 O. L. J. 766=49 Ind. Cas. 88. In case of

attachment of debt, objection that no debt is due is allowed. A. I. R. 1922 All. 384. Right to sue for damages arising out of a breach of contract is not a debt. A. I. R. 1925 Sind 98=78 Ind. Cas. 409. Attaching creditors can only obtain that the judgment-debtors can honestly give them. A. I. R. 1924 Cal. 1068=40 C. L. J. 228=84 Ind. Cas. 1022. In case of denial of debts Receiver may be appointed to sue and recover. 10 Bur. L. T. 6=35 Ind. Cas. 469; A. I. R. 1926 Rang. 175=4 Rang. 100=97 Ind. Cas. 247; A. I. R. 1924 Nag. 98=20 N. L. R. 11=78 Ind. Cas. 601; A. I. R. 1927 All. 41=97 Ind. Cas. 467; 97 Ind. Cas. 780=A. I. R. 1926 Mad. 1011=24 L. W. 333. Court having jurisdiction can pass a prohibitory order for attachment of money under r. 46. A. I. R. 1929 Nag. 210=107 Ind. Cas. 663. *Othi* debts are also debts. A. I. R. 1931 Mad. 38=1930 M. W. N. 719=33 L. W. 189=129 Ind. Cas. 255. Payment of debt into Court under rule 43 is as effectual as payment to the party. A. I. R. 1924 Nag. 98=20 N. L. R. 11=78 Ind. Cas. 601. Deposit by a judgment-debtor with an Association of membership can be attached. 102 Ind. Cas. 418=A. I. R. 1927 Bom. 365=29 Bom. L. R. 416. Debts due to the estate of a deceased person of the judgment-debtor is co-heir, are not proper subject for *garnishee* proceedings. 39 M. L. J. 91=28 M. L. T. 34=57 Ind. Cas. 854. Sites of debt is the debtor's place of residence as a general rule. Place where a debt is payable is an exception. 143 Ind. Cas. 211=35 Bom. L. R. 799=57 C. L. J. 487=37 C. W. N. 825=65 M. L. J. 37=1933 M. W. N. 105=60 I. A. 211=1933 A. L. J. 629=A. I. R. 1933 (P.C.) 150; see also 137 Ind. Cas. 483=56 B. 349=34 Bom. L. R. 17=1932 Bom. 206. Unpaid portion of loan by mortgagee does not constitute debt and as such cannot be attached under the Civil Procedure Code. A. I. R. 1934 All. 449=1934 A. L. J. 713; A. I. R. 1934 All. 448=147 Ind. Cas. 773; but see 1934 M. W. N. 631=A. I. R. 1934 Mad. 498=66 M. L. J. 695.

**Share.**—Where the shares are sold in execution of a decree and the sale is confirmed, the duty of Court ends. It is for the company either to recognize the transfer or refuse to recognise. A. I. R. 1928 Mad. 241=42 M. L. J. 449=46 M. 537=15 L. W. 470=(1922) M. W. N. 332=70 Ind. Cas. 659=30 M. L. T. 231. Service of prohibitory order on the attorney of the Managing Director of a private company is a proper service. A. I. R. 1928 Rang. 36=3 Rang. 385=107 Ind. Cas. 860.

**Movable property.**—Simple hypothecation bond is a movable property. A. I. R. 1930 Oudh 473=7 O. W. N. 944=121 Ind. Cas. 274; so also is a debt under a usufructuary mortgage-deed. (1929) M. W. N. 138; see also A. I. R. 1931 Pat. 63=133 Ind. Cas. 265; A. I. R. 1928 Mad. 648=111 Ind. Cas. 218; 138 Ind. Cas. 819=35 M. L. W. 257=A. I. R. 1932 Mad. 283. Simple mortgage bond or a charge is a movable property. A. I. R. 1924 All. 976=22 A. L. J. 840=46 A. 917=80 Ind. Cas. 890; A. I. R. 1926 Mad. 903=51 M. L. J. 95=1926 M. W. N. 569=95 Ind. Cas. 447=6 O. L. J. 49=21 O. C. 400=50 Ind. Cas. 157; 37 C. W. N. 439=57 O. L. J. 205=60 C. 782. Agricultural produce is not movable property under this rule but attachment of agricultural produce in the hands of third party should be made under this rule. A. I. R. 1921 Sind 95=15 S. L. R. 128=64 Ind. Cas. 1007. Mortgage debt is to be attached under rule 46 and not under rule 51. 144 Ind. Cas. 175=A. I. R. 1933 Rang. 61. Mortgage debt can be attached by the Court within whose jurisdiction the mortgage bond is found. 143 Ind. Cas. 785=57 C. L. J. 205=60 C. 782. Provisions of this rule do not empower executing officer to seal up premises other than those used by judgment-debtor for containing goods which are attempted to be seized. 139 Ind. Cas. 834=A. I. R. 1932 Pat. 279.

**Sub-section (3).**—Payment contemplated in sub-section (3) is payment into the attaching Court so as to be available for the attaching decree holder and not payment into the particular Court even where the payment is earmarked for some other purpose. 161 Ind. Cas. 473=43 L. W. 713=1936 M. W. N. 147=A. I. R. 1936 Mad. 251=71 M. L. J. 243.

47. [New.] Where the property to be attached consists of the share or interest of the judgment-debtor in movable property belonging to him and another as co-owners, the attachment shall be made by a notice to the judgment-debtor prohibiting him from transferring the share or interest or charging it in any way.

**Scope.**—No more than interest of the judgment-debtor in joint family property can be attached; see also 138 Ind. Cas. 548=36 M.L.W. 402=55 Mad. 1041=63 M. L. J. 142=1932 M. W. N. 457=A. I. R. 1932 Mad. 538; 137 Ind. Cas. 672=54 C. L. J. 488=59 C. 808=A. I. R. 1932 Cal. 408; but see A. I. R. 1936 Mad. 560=70 M. L. J. 717=1936 M.W.N. 728=43 L. W. 760=163 Ind. Cas. 480.

**48. [New.]** (1) Where the property to be attached is the salary or allowances of a public officer or of a servant of a railway company or local authority, the Court, whether the judgment-debtor or the disbursing officer is, or is not within the local limits of the Court's jurisdiction, may order that the amount shall, subject to the provisions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct; and, upon notice of the order of such officer as "the Central Government or the Provincial Government may by notification in their official Gazette" \* appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be.

(2) Where the attachable proportion of such salary or allowances is already being withheld and remitted to a Court in pursuance of a previous and unsatisfied order of attachment, the officer appointed by "the Central Government or the Provincial Government as the case may be,"† in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment.

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub-rule (2), shall, without further notice or other process, bind "the Central Government or the Provincial Government"‡ or the railway company or local authority, as the case may be, while the judgment-debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian revenues or the funds of a railway company carrying on business in any part of British India or local authority in British India and "the Central Government or the Provincial Government"‡ or the railway company or local authority, as the case may be, shall be liable for any sum paid in contravention of this rule.

**Local Amendments in Burma.**—In sub-section (1) for the words "the Central Government or the Provincial Government may by notification in the official Gazette" read "the Government may by notification in the Gazette". In sub-section (2) for the words "the Central Government or the Provincial Government, as the case may be" substitute "the Government" and in sub-section (3) for the words "the Central Government or the Provincial Government" substitute "the Government" and for "British India" read "British Burma."—

**N. B.**—For local amendment in Madras.—*Vide infra*.

**Scope.**—This rule has no application in the case of persons who are in private service. A. I. R. 1929 Nag. 333=120 Ind. Cas. 209. Where decree is transferred to a Court other than the Court which passed the decree, transferee Court has power to attach under rule 48. A. I. R. 1927 Oudh. 112=13 O. L. J. 174=6 O. W. N. 1144=1 Luck. 46=91 Ind. Cas. 1043. Payments to be made to a Railway Contractor for work done is neither salary nor allowance of a servant of a railway company. A. I. R. 1928 Nag. 210=107 Ind. Cas. 663. Pay or pension for the month is due on the last day of the month and is liable to be attached on that day. A. I. R. 1930 Rang. 161=126 Ind. Cas. 643. No revision lies from order refusing attachment of

\* Substituted by G. I. Order of 1937 for the words "the Government may by notification in the *Gazette of India* or in the local official Gazette as the case may be,"

† Substituted for the word "the Government" by G. I. Order of 1937.

pay under Order 21, rule 48. 144 Ind. Cas. 897=35 Bom. L. R. 360=A. I. R. 1933 Bom. 185. Pay of staff-sergeant is not attachable under Civil Court's decree. A. I. R. 1934 Bom. 31.

**49. [New.]** (1) Save as otherwise provided by this rule, property belonging to a partnership shall not be attached or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm as such.

(2) The Court may, on the application of the holder of a decree against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a Receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed or made if a charge had been made in favour of the decree-holder by such partner, or as the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being directed, to purchase the same.

(4) Every application for an order under sub-rule (2) shall be served on the judgment-debtor and on his partners or such of them as are within British India.

(5) Every application made by any partner of the judgment-debtor under sub-rule (3) shall be served on the decree-holder and on the judgment-debtor, and on such of the other partners as do not join in the application and as are within British India.

(6) Service under sub rule (4) or sub-rule (5) shall be deemed to be service on all the partners, and all orders made on such applications shall be similarly served.

**Local amendment in Burma.**—For British India read British Burma.—*Vide* G. B. Order of 1937.

**Scope.**—A decree against an individual partner can be made under rule 49. 23 C. W. N. 500=29 C. L. J. 280=51 Ind. Cas. 597. Interest of the partner in the partnership property can vest in the Receiver. 141 Ind. Cas. 128=1932 A. L. J. 516=A. I. R. 1932 All. 468. Assignee of one partner cannot sue the other partners for accounts. Even where a Receiver has been appointed under this rule, such Receiver cannot sue other partners for accounts but can only receive profits of judgment-debtor partner. 133 Ind. Cas. 40=10 Pat. 792=12 Pat. 361=A. I. R. 1932 Pat. 15. The provisions of this rule is imperative. A sale of partnership property in execution of a decree, which is not passed against the firm or the partners thereof, is therefore invalid and inoperative. 60 C. L. J. 454 ; see also A. I. R. 1935 Cal. 275.

**50. [R. S. C. O. 48A. r. 8.]** (1) Where a decree has been passed against a firm execution of decree against a firm may be granted—

(a) against any property of the partnership ;

(b) against any person who has appeared in his own name under rule 6, or rule 7 of Order XXX or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner ;

(c) against any person who has been individually served as a partner with a summons and has failed to appear :

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract Act, 1872. \*

\* IX of 1872.

(2) Where the decree-holder claims to be entitled to cause the decree to be executed against any person other than such a person as is referred to in sub-rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed, such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined.

(3) Where the liability of any person has been tried and determined under sub-rule (2), the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(4) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and answer.

**Scope.**—Order XXI, rule 50, should be read subject to provisions of order 30. 138 Ind. Cas. 314=34 Bom. L. R. 617=A. I. R. 1932 Bom. 334; see also A. I. R. 1927 Bom. 581=51 B. 986=29 Bom. L. R. 1296=105 Ind. Cas. 305. Where a person is a partner can be determined by the executing Court. A. I. R. 1929 Lah. 228=115 Ind. Cas. 536; see also A. I. R. 1930 Cal. 53=56 C. 704=121 Ind. Cas. 403. This rule is applicable where a decree against the firm is sought to be executed against person alleged to be a partner. A. I. R. 1930 Lah. 243=120 Ind. Cas. 611. Rule 50 (2) is limited to the case of a partner living at the date of the decree. A. I. R. 1925 Sind 298=87 Ind. Cas. 992; see also A. I. R. 1931 All. 65=1930 A. L. J. 1913; 52 M. 885=A. I. R. 1929 Mad. 733 (F. B.); 105 Ind. Cas. 305=29 Bom. L. R. 1296=51 B. 986=A. I. R. 1927 B. 581. Order XXX does not militate against Order XXI, rule 50. A. I. R. 1925 Sind 293=19 S. L. R. 1=86 Ind. Cas. 1013. This rule also applies to awards against firms, they having the force of a decree A. I. R. 1925 Sind 293=19 S. L. R. 1=86 Ind. Cas. 1013; see also A. I. R. 1929 Sind 28=23 S. L. R. 422=112 Ind. Cas. 126; 62 C. 833=61 C. L. J. 515. Application for leave to execute a decree under Order XXI, r. 50 (2), does not amount to a suit within the language of s. 38, Presidency Small Cause Courts Act. A. I. R. 1930 Bom. 412=32 Bom. L. R. 1009=120 Ind. Cas. 17.

Legal representatives of a deceased partner dying before the institution of a suit but after the cause of action arose can be proceeded against in execution of a decree passed against the firm under r. 50 (2). A. I. R. 1927 Sind 130 (F. B.)=100 Ind. Cas. 204. Rule 50 (2) requires the execution against individual partner cannot be issued unless he has been duly served and has had an opportunity of disputing his liability as a partner if he so desire. A. I. R. 1926 Cal. 271=53 C. 214=39 C. W. N. 11=91 Ind. Cas. 824. The enquiry under Order 21, r. 50 (2) is limited to the question as to whether the persons sought to be made liable under the decree as partners are partners; it is not intended to affect the legal representatives of the partner. 41 C. W. N. 566. The question whether any or all persons served with notices of the award or of its filing in Court are partners in the firm, can only be litigated when an application under Order 21, rule 50 is made against persons alleged to be partners in the firm and permission is sought to enforce the award against them. 29 S. L. R. 292=A. I. R. 1936 Sind. 121=164 Ind. Cas. 1015. The term "partner" within the meaning of the second part of Order 21, rule 50, includes "legal representative" and it is open to a decree-holder to raise and to have decided in execution proceedings against the firm the liability of the legal representative of a deceased. A. I. R. 1936 Sind 211=30 S. L. R. 6=165 Ind. Cas. 826. When the decree is against a limited liability company, no order under this rule can be passed against the share-holders. 164 Ind. Cas. 513. The Court to decide whether leave to execute a decree against an individual partner within the provision of sub-rule, (2) of rule 50 of Order 21 should be granted is the Court which passed the decree and not the Court to which the decree is transferred for execution. A. I. R. 1936 Sind 138=30 S. L. R. 88=164 Ind. Cas. 1011; see also A. I. R. 1936 Sind 11. An application under sub-rule (2) is an application in execution of a decree and can be made at any time during which the decree remains capable of being executed. A. I. R. 1936 Sind 138; A. I. R. 1935 Sind 12=154 Ind. Cas. 839. An application for leave under Order 21, rule 50 (2), falls under Art. 182 and not Art. 181 of the Limitation Act. A. I. R. 1936 Sind 138; see also A. I. R. 1935

Mad. 926. Special leave is not necessary where a judgment-debtor has appeared in his own name under Order XXX, rr. 6 and 7 or has admitted that he is a partner or is served with summons as a partner. A. I. R. 1926 Sind 51=89 Ind. Cas. 401. Where a decree has been passed against the firm, all the members being served individually, they can be proceeded against individually in execution even if the firm is declared insolvent and in absence of application under Order XXI, r. 50. A. I. R. 1925 Lah. 379=9 Lah. L. J. 165=26 P. L. R. 494=89 Ind. Cas. 138. Where decree against a firm is sought to be executed against an alleged partner, who denies the liability, issue as to his liability must be first tried. A. I. R. 1927 Bom. 447=51 B. 794=29 Bom. L. R. 921=103 Ind. Cas. 256. Sons of deceased partner though not themselves partners, are liable to the extent of their father's assets in their hands for partnership debts. A. I. R. 1927 Sind 247=107 Ind. Cas. 221.

Where decree against a firm mentions some members especially it does not exclude the liability of other partners. The only difference between the two is that in the latter case action under r. 50 is necessary. A. I. R. 1925 Sind 317=18 S. L. R. 146=86 Ind. Cas. 435. Where the firm was dissolved before decree and plaintiff knew of it before instituting proceedings, only firm's property can be proceeded against. A. I. R. 1924 Bom. 366=26 Bom. L. R. 388=80 Ind. Cas. 773. In the case of transfer of a decree, the term "the Court which passed the decree" includes the transferee Court for the purpose of rule 50 (2). 43 A. 394=19 A. L. J. 187=3 U. P. L. R. All. 36=61 Ind. Cas. 401. Whether execution should proceed against judgment-debtor is to be adjudicated not under Order XXI, r. 50 (1), but under Order XXI, r. 50 (2), although notices are served on him during the course of arbitration proceedings as a managing partner of a firm. A. I. R. 1929 Lah. 228=115 Ind. Cas. 536.

If a decree-holder seeks to execute a decree against a partner personally he should proceed under rule 50. 136 Ind. Cas. 728=33 P. L. R. 240; see also A. I. R. 1933 Lah. 591. Holder of award can enforce under Order 21, r. 50 (2) by applying to High Court. 35 Bom. L. R. 941=A. I. R. 1933 Bom. 433; see also 134 Ind. Cas. 1026=13 Lah. 327=33 P. L. R. 598=A. I. R. 1931 Lah. 736. In case of decree against a firm the decree-holder can pursue any of the three courses regardless of their order. 141 Ind. Cas. 453=34 P. L. R. 190=A. I. R. 1933 Lah. 472. Executing Court can determine liability of partner not served with notice in suit. 140 Ind. Cas. 519=34 Bom. L. R. 1112=A. I. R. 1932 Bom. 516; see also 134 Ind. Cas. 1026=13 Lah. 327=33 P. L. R. 598=A. I. R. 1931 Lah. 736. Application for execution against partner individually implies application for leave to execute decree against partner. 134 Ind. Cas. 1026=13 Lah. 327=33 P. L. R. 598=A. I. R. 1931 Lah. 736. *Ex parte* order granting leave to apply for execution is neither the decree nor has it the force of a decree. A. I. R. 1929 All. 390=(1929) A. L. J. 553=115 Ind. Cas. 865; see also A. I. R. 1929 Bom. 386=53 B. 839=31 Bom. L. R. 995=120 Ind. Cas. 833; but see A. I. R. 1930 Lah. 825=126 Ind. Cas. 562. Liability of contesting partner cannot be determined by Deputy Registrar empowered to grant leave under r. 50. A. I. R. 1925 Rang. 317=4 Bur. L. J. 116=91 Ind. Cas. 778. Proceedings in which leave is applied for to execute the decree under rule 50 (2) is application in execution. 134 Ind. Cas. 1026=13 Lah. 327=33 P. L. R. 598=A. I. R. 1931 Lah. 738. Leave must be obtained from Court which passed the decree and not from the Court executing the decree. 141 Ind. Cas. 61=13 P. L. T. 751=11 Pat. 580=A. I. R. 1932 Pat. 323.

Leave of Court is necessary before attachment can issue against property in hands of Receiver appointed by Court. 130 Ind. Cas. 836=12 P. L. T. 318=A. I. R. 1931 Pat. 204. For scope of the words "or who has been adjudicated to be partner" in cl. (1) (b), *vide*. 140 Ind. Cas. 40=26 S. L. R. 228=A. I. R. 1932 Sind 194. There is no warrant for placing a restricted construction on clause (b), sub-rule (1) of rule 50. A defendant may be allowed within his rights to enter an appearance under protest and to refuse to take any further part in the proceedings but if he once pleads his non-liability and asks the Court to frame an issue on the point, he cannot then be allowed to turn round after the issue is decided against him and urge that all proceedings in the trial Court and this matter subsequent to his appearance under protest were without jurisdiction and that he was still entitled to claim the benefit of sub-rule (2). A. I. R. 1935 Lah. 520=157 Ind. Cas. 1025. Decree against members of firm requires execution against them and not merely against firm. 143 Ind. Cas. 228=A. I. R. 1933 Pesh. 63. Under Order 21, rule 50,

clause (2), a person who appears in answer to the notice issued to him may admit that he is a partner in the firm against whom a decree is passed but at the same time he cannot urge that that decree is not binding on the firm in which he admits to be a partner. If he wants to dispute the decree he should take proceedings in the suit to have the decree set aside. But he cannot do so in execution proceedings under rule 50, clause (2). A. I. R. 1934 Sind 135=151 Ind. Cas. 749.

51. [S. 270.] Where the property is a negotiable instrument not deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual seizure, and the instrument shall be brought into Court and held subject to further orders of the Court.

**Scope.**—Notice to the debtor that he should not pay the money due under the promissory-note does not operate as an effective attachment. A. I. R. 1928 Mad. 940=1928 M. W. N. 456=56 M. L. J. 70=28 L. W. 565; see also A. I. R. 1923 Mad. 317=86 M. 415=44 M. L. J. 206=17 L. W. 314=(1923) M. W. N. 19=72 Ind. Cas. 189. For effective attachment actual seizure is necessary. *Ibid.*

52. [S. 272] Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held subject to the further orders of the Court from which the notice is issued:

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any assignment, attachment or otherwise, shall be determined by such Court.

**Scope.**—Section 52 deals not only with money deposited in Court in pursuance of a decree but also with money which comes into the hands of an officer of the Court in various ways. A. I. R. 1935 Sind 214. Under Order XXI, r. 52, property in the custody of any Court can be attached. A. I. R. 1930 Mad. 4. Two or more judgment-debtors can attach the same property. *Ibid.* This rule applies only where the property to be attached is actually in the custody of a public officer the effect of the attachment being that the alienation of the fund is prevented subject to the further order of the Court and that it confers no title on the judgment-creditor. 44 C. 1072=25 C. L. J. 595=21. C. W. N. 887=41 Ind. Cas. 516; see also 14 A. L. J. 236=33 Ind. Cas. 723. Property in the hands of a Receiver or of an official Assignee can also be attached with the permission of the Court. A. I. R. 1930 Mad. 4; see A. I. R. 1925 Bom. 344=49 B. 638=22 Bom. L. R. 545; 130 Ind. Cas. 836=12 P. L. T. 318=A. I. R. 1931 Pat. 204. Money in custody of Court is not assets in attaching Court unless such money is ordered to be credited to attaching Court. 144 Ind. Cas. 252=37 M. L. W. 366=65 M. L. J. 347=A. I. R. 1933 Mad. 342 (2); see also 35 C. W. N. 517. Custody Court has no power to make ratable distribution unless it happens to be the attaching Court as well. 37 C. W. N. 820=A. I. R. 1933 Cal. 814. This rule has no application where Receiver has been appointed to realise rents and profits. 144 Ind. Cas. 142=60 C. 345=A. I. R. 1933 Cal. 417. Question relating to the money in the hands of the Receiver can be tried only by the Court appointing the Receiver and by no other. 1 Pat. L. J. 449=35 Ind. Cas. 589. Decree-holder attaching fund of the judgment-debtor in another Court, is entitled to be paid in priority to the subsequent creditors attaching the fund afterwards. 42 M. 692=(1919) M. W. N. 623=26 M. L. T. 82=50 Ind. Cas. 925; see also A. I. R. 1927 Bom. 394=29 Bom. L. R. 665=106 Ind. Cas. 113; A. I. R. 1927 Bom. 405=29 Bom. L. R. 689. Order under rule 52 is a judicial order and as such is binding upon the parties concerned. A. I. R. 1925 Cal. 354=82 Ind. Cas. 240. Executing Court must decide the question (if it is in issue) as to the ownership of property even if the same question was involved in another pending suit, inasmuch as rule 52 does not override s. 47. A. I. R. 1927 All. 574=102 Ind. Cas. 179. *Suppaddar* is not



public officer. A. I. R. 1934 All. 357. Property in the hands of a Receiver can be attached without the permission of the Court. A. I. R. 1934 Rang. 174=149 Ind. Cas. 774. Where a creditor putting property to sale in execution of his decree and purchasing it, while an attachment before judgment is in force, omits to give notice according to Order 21, rule 52 to the Court attaching the property before judgment, and the property is again sold in execution of the decree in that suit, the decree-holder purchasing the property and omitting to give notice under Order 21, rule 52, is not entitled to any damage against the other decree-holder, as the decree-holder by omitting to take action under Order 21, rule 52 prejudices the other decree-holder. A. I. R. 1936 Cal. 112 ; see also A. I. R. 1936 Rang. 83. The expression "further orders of the Court" in Order 21, rule 52, is wide enough to cover any order that the Court may make. 156 Ind. Cas. 409=A. I. R. 1935 Pat. 201. Where a precept is received for the attachment of property in the custody of the Court, the attachment takes effect from the date when it is received by the Court holding the property. A. I. R. 1935 Lah. 914.

**53. [S. 273] (1)** Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made,—

(a) If the decrees were passed by the same Court, then by order of such Court, and,

(b) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until—

(i) the Court which passed the decree sought to be executed cancels the notice, or

(ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

(2) Where a Court makes an order under clause (a) of sub-rule (1), or receives an application under sub-head (ii) of clause (b) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-rule (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-rule (1), the attachment shall be made, by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way ; and, where such decree has been passed by any other Court, also by sending to such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached ; and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force.

*N. B.*—For local amendments in Allahabad, C. P., Lahore, Madras, Peshwar and Rangoon.—*Vide infra.*

**Scope**—Procedure to be followed in execution when money-decree is attached is given by rule 53. A. I. R. 1924 Rang. 21=2 Bur. L. J. 151=76 Ind. Cas. 679. Holder of decree for payment of money can transfer decree attached and the transfer is not affected by attachment. A. I. R. 1929 Pat. 1=7 Pat. 726=9 P. L. T. 822=113 Ind. Cas. 673. This rule applies only where mortgaged property is sought to be sold in execution of money decree and not where it is ordered to be sold to satisfy mortgage decree by terms of decree itself. 50 Ind. Cas. 448. Attached decree must be executed and the net proceeds to be applied towards satisfaction of decree sought to be executed. It cannot be sold. 45 C. 343=22 Bom. L. R. 1304=59 Ind. Cas. 541; see also 48 Ind. Cas. 183=4 Pat. L. J. 336=5 Pat. L. W. 191. Transaction between judgment-debtor and decree-holder cannot be affected if notice is not given. A. I. R. 1921 Mad. 135=13 L. W. 34=61 Ind. Cas. 815; see also (1918) M. W. N. 874=24 M. L. T. 495=9 L. W. 32=48 Ind. Cas. 109. Adjustment of decree after its attachment does not bind attaching creditor whether notice is issued to judgment-debtor or not. (1918) M. W. N. 874=24 M. L. T. 495=9 L. W. 32=48 Ind. Cas. 109. Proper course for decree-holder attaching decree for maintenance charging immovable property is to apply for its execution. 23 M. L. T. 355=47 Ind. Cas. 630. Under Order 21, rule 53, an attachment of a decree for payment of money is complete as soon as a notice under clause (b), rule 53, is served on the Court which passed the decree sought to be attached. Any private transfer made contrary to such attachment is void as against all claims enforceable under the attachment. A. I. R. 1937 All. 63. A preliminary decree for accounts in a suit for dissolution of partnership, on the face of it is not a decree for payment of money. The amount due to the judgment-debtor is not ascertained sum of money. The final decree in a suit for accounts of the partnership may be either for the payment of money by the plaintiff to the defendant and vice-versa. Hence such a decree cannot be attached and sold under rule 53. A. I. R. 1937 Cal. 4.

A person who attaches a decree before judgment must be deemed to be the representative of the holder of the attached decree by virtue of sub-section (3) and is therefore, a person entitled to make an objection in the executoin proceeding of the decree. A. I. R. 1935 All. 125. When a decree in favour of a judgment-debtor is attached in execution of a decree against him it is open to the judgment-debtor as judgment-creditor of his decree to execute that decree even during the pending of the attachment, subject to the condition that the amount realized by him by the execution of that decree would not be paid to him but would have to be deposited in Court for the benefit of his judgment-creditor. A. I. R. 1935 Bom. 416=159 Ind. Cas. 170=37 Bom. L. R. 747. Order 21, rule 53 (1) (b) (ii) relates not to the date of cessation of the attachment but only to the manner in which the attachment is to be effected. A. I. R. 1935 Lah. 194=37 P. L. R. 196=155 Ind. Cas. 315=15 Lah. 910. The attachment of the decree does not cease when the proceedings in execution of that attached decree, are dismissed in default of the Court which had received notice under Order 21, rule 53 from the Court which passed the decree. The attachment still subsists, having been made by the order of the Court which passed the decree and not by the order of the Court which passed the attached decree and will be deemed to be withdrawn only when the decree has been satisfied through Court or when satisfaction has been certified to the Court. *Ibid.*

Person attaching decree becomes a representative of the holder of the attached decree and is entitled to take money out of the Court and certify payments. A. I. R. 1930 All. 659=129 Ind. Cas. 382; see also 46 Ind. Cas. 384=44 P. R. 1919=86 P. W. R. 1918=85 P. L. R. 1918; 64 Ind. Cas. 780=A. I. R. 1921 Cal. 580=35 C. L. J. 109. Adjustment between judgment-debtors and decree-holder in decree sought to be attached is prohibited but not between the judgment-debtors and the person attaching such decree. A. I. R. 1924 Pat. 696=5 P. L. T. 631=79 Ind. Cas. 920. Where decree covered by rule is attached and executed as if it were other than that covered by it, there is only irregularity and sale of such decree is not vitiated. A. I. R. 1925 All. 264=85 Ind. Cas. 660. Where A, in execution of his decree for money against B attaches decree held by B against A for sale in enforcement of mortgage, monies brought into Court by C, from time to time for satisfying B decree operates as satisfaction of both decrees, *pro tanto* and interest ceases to run not only under B's decree but also under A's decree from date of respective deposits. A. I. R. 1921 Cal. 580=35 C. L. J. 109=64 Ind. Cas. 780. Notice to judgment-debtor of attached decree is not necessary before attachment comes into force. Clause 6 of rule 53

means that Court will not recognize payment or adjustment only after the judgment-debtor under the attached decree receives notice of the order of attachment and that payment or adjustment made in ignorance of such attachment should be regarded as payment or adjustment properly made under the decree to the rightful person. A. I. R. 1927 Mad. 728=50 M. 677=53 M. L. J. 150=26 L. W. 103=103 Ind. Cas. 502. This rule does not prohibit the holder of a decree for payment of money from transferring the decree attached. The transferee pending attachment can well apply for execution under Order 21, rule 16 of the Code. A. I. R. 1921 Pat. 1=7 Pat. 726=9 P. L. T. 822=113 Ind. Cas. 673; see also A. I. R. 1927 Nag. 132=23 N. L. R. 20=99 Ind. Cas. 635. Preliminary decree directing taking of partnership accounts involving payment of partner's share in money is decree for payment of money within this rule. A. I. R. 1929 Mad. 641=52 M. 563=29 L. W. 823=57 M. L. J. 264=115 Ind. Cas. 343. Decree in regard to immovable property is not immovable property. 44 Ind. Cas. 252=16 N. L. R. 72. Attaching decree-holder is not bound by compromise between parties of attached decree during proceedings for further leave to appeal if judgment-debtor had notice of attachment. 141 Ind. Cas. 625=1932 A. L. J. 792=A. I. R. 1922 All. 82; see also 141 Ind. Cas. 125=35 C. W. N. 955=59 C. 1464=A. I. R. 1933 Cal. 39. Attaching creditor cannot proceed under Order 21, rule 53, where judgment-debtor becomes insolvent. 145 Ind. Cas. 605=29 N. L. R. 303=A. I. R. 1933 Nag. 229. Where preliminary decree in partition suit is attached, procedure under rule 53 (4) is to be followed. 133 Ind. Cas. 181=53 C. 934=A. I. R. 1931 Cal. 80; see also 10 O. W. N. 664=A. I. R. 1933 Oudh 349. Money decree cannot be sold. The procedure laid down in the rule should be followed. 141 Ind. Cas. 37=12 Pat. 36=13 P. L. T. 612=A. I. R. 1932 Pat. 349. Where an *ex parte* decree in favour of the judgment-debtor is attached and subsequently the *ex parte* decree is set aside but finally the judgment-debtor obtains a decree after contest, the attachment of the attaching decree-holder revives with the passing of the contested decree. A. I. R. 1933 Rang. 346. Where decree is attached, adjustment of such decree, if not certified cannot be recognized. 145 Ind. Cas. 525=11 Rang. 420=A. I. R. 1933 Rang. 239. Where order and attachment is valid, it is immaterial whether adjustment is prior or subsequent to attachment. 134 Ind. Cas. 506=9 Rang. 140=A. I. R. 1931 Rang. 185. Decree-holder attaching maintenance decree can sell property charged. A. I. R. 1934 Nag. 83. Attached decree can be executed either by decree-holder or attaching decree-holder but only in the first instance for benefit of attaching decree-holder. A. I. R. 1934 Lah. 142; see also A. I. R. 1934 Cal. 140. Attachment of decree is not step-in-aid of execution of such decree. A. I. R. 1934 Cal. 234. When a decree is attached in execution of another decree, the former decree can be executed either by the attaching decree-holder or by the decree-holder in the attached decree but only in the first instance for the benefit of the attaching decree-holder, and nothing can be paid to the judgment-debtor of the attaching decree-holder till the decree be executed of which the other decree has been attached has been satisfied. A. I. R. 1934 Lah. 142=36 P. L. R. 147. A preliminary decree for accounts in a suit for dissolution of partnership is not a decree for the payment of money within the meaning of this rule and is therefore not attachable and saleable in execution. 40 C. W. N. 1393. As regards right to ratable distribution in case of attachment of decree by several decree-holders, *vide* 40 C. W. N. 1249.

Sub-section (6).—*Vide* A. I. R. 1937 All. 63; 15 L. R. 703 (Rev.).

54. [S. 247] (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer, or charge.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house, and also where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

N. B.—For local amendments in Allahabad, Bombay, C. P., Lahore, Oudh, Peshwar and Rangoon.—*Vide infra*.

**Scope.**—Attachment is meant to place property in *custodia legis* and its effect is to prohibit alienation by judgment-debtor. A. I. R. 1927 Mad. 190=24 L. W. 836=99 Ind. Cas. 656. It does not give any title. A. I. R. 1929 Bom. 200=31 Bom. L. R. 345=116 Ind. Cas. 271; see also A. I. R. 1926 Mad. 42=22 L. W. 274=49 M. L. J. 656=90 Ind. Cas. 1037. Court is not in possession of the property attached under rule 54. A. I. R. 1926 Sind 199=19 S. L. R. 35=76 Ind. Cas. 380. Occupancy right created during attachment of property is invalid as prohibited by rule 54. 13 R. D. 429. Mere order does not complete attachment until followed up by procedure laid down in Order XXI, r. 54. A. I. R. 1929 Bom. 395=53 B. 851=31 Bom. L. R. 1111=123 Ind. Cas. 510; A. I. R. 1927 Mad. 450=99 Ind. Cas. 989; see also A. I. R. 1931 Pat. 58=9 Pat. 860=12 P. L. T. 398=129 Ind. Cas. 142; A. I. R. 1929 All. 846=122 Ind. Cas. 679; 1928 Pat. 600=8 Pat. 1=9 P. L. T. 523=111 Ind. Cas. 797; 104 Ind. Cas. 340=A. I. R. 1927 Cal. 885; A. I. R. 1925 Lah. 583=7 Lah. L. J. 501=26 P. L. R. 726=88 Ind. Cas. 321; 77 Ind. Cas. 879=A. I. R. 1923 Lah. 671; A. I. R. 1923 Lah. 423=5 Lah. L. J. 200=72 Ind. Cas. 452; 70 Ind. Cas. 527; 34 Ind. Cas. 34; 39 Ind. Cas. 34; A. I. R. 1934 Cal. 251. Where a decree is for possession by partition of property, it is not even a preliminary decree for partition and hence if such a decree is to be attached, one has to proceed under Order 21, rule 53, and attachment under Order 21, rule 54, is invalid as it deals with attachment of immovable property. A. I. R. 1937 Pesh. 13. The attachment of a mortgage debt operates not only on the debt but also in the security, which fastens itself to the debt; the security therefore follows the debt. Even granting that the interest of the mortgagee is immovable property, that interest arises from the debt and is ancillary to it; therefore there is no further necessity to attach the security as immovable property, when the debt has already been attached. Hence where a mortgage debt of an anomalous mortgagee is attached, no fresh attachment of right is necessary. A. I. R. 1934 Mad. 498=66 M. L. J. 695=1934 M. W. N. 631=39 L. W. 792. No property can be declared to be attached unless first the order for attachment has been issued, and secondly, in execution of that order the other things prescribed by the rules in the Code have been done. A. I. R. 1934 Rang. 207. Issue of a prohibitory order under sub-rule (1) does not mean or include a service of a copy of the order on the judgment-debtor or defendant as the case may be. All that is required under rule 54 is making of a prohibitory order by the Court after the procedure has been followed, and then the proclamation of that order in the manner laid down in sub-rule (2). A. I. R. 1936 Rang. 403=164 Ind. Cas. 1044. Where a single parcel of land with buildings thereon is to be attached, the attachment is validly made within the terms of sub-rule (3), if a copy of the order of attachment is affixed on some one part of the property. *Ibid.* But where an order of attachment is proclaimed by a beat a drum and a copy of the same affixed on the property attached but no copy is affixed to the notice board of the Court as required by rule 54 (2), the attachment cannot be regarded as complete. 63 C. L. J. 560=40 C. W. N. 1338. Where property is attached, a judgment-debtor is not entitled to transfer it to another. A. I. R. 1935 Lah. 71=16 Lah. 328=157 Ind. Cas. 806. All the other formalities having been observed, mere failure to post copy of attachment order in office of Collector does not make attachment invalid. A. I. R. 1923 Nag. 78=69 Ind. Cas. 563; but see 152 Ind. Cas. 630=35 P. L. R. 735. Where there is ample evidence that the land was attached, in the absence of direct evidence to the contrary, it must be presumed that all the necessary formalities, including the fixing of a copy of the order of attachment in the Collector's office, were duly complied with and that attachment was validly made. 67 M. L. J. 641=11 O. W. N. 1158=40 L. W. 396=36 P. L. R. 285=60 C. L. J. 261=39 C. W. N. 89=A. I. R. 1934 P. C. 217=67 M. L. J. 641 (P. C.). Interest of mortgagee is interest in land. A. I. R. 1929 Cal. 227=33 C. W. N. 44=56 C. 224=117 Ind. Cas. 854; but see A. I. R. 1924 Mad. 217=46 M. 736=(1923) M. W. N. 463=45 M. L. J. 263=75 Ind. Cas. 869. Mortgagor's equity of redemption is immovable property. A. I. R. 1921 Cal. 801=33 C. L. J. 7=62 Ind. Cas. 167. Undivided share of co-percener is attachable. 10 L. W. 449=53 Ind. Cas. 336. Only when proclamation is made *i. e.*, when copy of order is fixed as in rule 54, the attachment is complete. 42 M. 844=37 M. L. J. 375=26 M. L. T. 281=10 L. W. 391=(1919) M. W. N. 678 (F. B.)=53 Ind. Cas. 207. Proclamation is only ministerial act. 42 M. 1=35 M. L. J. 387=48 Ind. Cas. 232; but see 53 Ind. Cas. 237=42 M. 844 (F. B.). It is not necessary to beat drum at the time of sale, proclamation of sale by beat of drum being sufficient. 2 U. P. L. R. (All) 147=56 Ind. Cas. 523. Rights obtained

subsequent to attachment is void as against claims under it under s. 54, C. P. Code. 55 Ind. Cas. 481=7 O. L. J. 1=23 O. C. 18. Identification must be proved when fact of attachment is in question. A. I. R. 1925 Rang. 84=3 Bur. L. J. 287=85 Ind. Cas. 303. Where compromise decree in mortgage suit does not provide for going through formality of attachment, there is no objection to executing decree without attaching property. A. I. R. 1921 Pat. 320=2 P. L. T. 38=58 Ind. Cas. 299. Mortgage debt is to be attached under rule 46 and not under rule 54. 144 Ind. Cas. 175=A. I. R. 1933 Rang. 61. *Bona fide* transferee without notice is not affected by attachment. A. I. R. 1933 Rang. 198. In case of resistance to proclamation by beat of drum proclamation in loud voice adjacent to property for attachment is sufficient. 136 Ind. Cas. 335=8 O. W. N. 1353=A. I. R. 1932 Oudh 76. Where Judge ordering attachment fell ill and notice was issued in form ordered by Judge but by signed by Court reader for Judge, this does not prevent attachment from being effective. 134 Ind. Cas. 506=9 Rang. 140=A. I. R. 1931 Rang. 185. Decree-holder can attach property of the judgment-debtor in the custody of Receiver appointed in another suit with the leave of the Court under this rule. 144 Ind. Cas. 142=60 C. 345=A. I. R. 1933 Cal. 417.

Removal of attachment after satisfaction of decree.

55. [S. 275.] Where—

- (a) the amount decreed with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or
- (b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or
- (c) the decree is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immovable property, the withdrawal shall, if the judgment-debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

*N. B.*—For local amendments in Allahabad and Oudh.—*Vide infra*.

**Scope.**—This rule does not exhaust the circumstances under which an attachment may be removed. That rule merely states that under certain circumstances when the decree is satisfied, the attachment shall be deemed to be withdrawn. But there are other circumstances, under which an attachment may be withdrawn and rule 60 of Order 21, itself makes mention of one of such circumstances. A. I. R. 1937 Cal. 390. Raising of attachment cannot be practical and merely by parties' consent out of Court without application and Court's order thereon. A. I. R. 1927 Mad. 648=30 M. L. T. 310=101 Ind. Cas. 591. Payment of instalment for which attachment was effected ends attachment which cannot continue for instalment not then due. A. I. R. 1928 Nag. 65=105 Ind. Cas. 799. Attachment is not withdrawn for part satisfaction of decree. 15 Ind. Cas. 677=10 A. L. J. 165. Court's losing territorial jurisdiction does not end attachment. A. I. R. 1929 Mad. 852=30 L. W. 649=125 Ind. Cas. 90. From r. 55 no distinction can be drawn between money voluntarily paid by judgment-debtor and money realised through attachment and both of them are assets under s. 73. A. I. R. 1930 Sind 300=128 Ind. Cas. 686; but see 36 B. 156=13 Bom. L. R. 1193. Confirmation of trial Court's decree in second appeal, reversing that in the first appeal, revives attachment deemed ended by first appellate decision under Order XXI, rule 55.5 O. L. J. 647=48 Ind. Cas. 386. Dismissal of execution petition for default *ipso facto* takes away attachment. 38 Ind. Cas. 300=21 M. L. T. 88=5 L. W. 204; see also 44 Ind. Cas. 566=(1917) M. W. N. 816; 35 Ind. Cas. 240=3 L. W. 601. Where the decree is reversed an attachment shall be deemed to be withdrawn. A. I. R. 1937 Lah. 169. *Quaere*: Whether the words "amount decreed" in Order 21, r. 55, C. P. Code, also includes the amount of any other decree against the judgment-debtor in respect of a valid claim for ratable distribution may be made, or means only the amount due under the decree actually under execution and for which the property attached is advertised for sale. A. I. R. 1934 Pat. 685=13 Pat. 446; see also A. I. R. 1934. All. 896. It is doubtful whether a payment under this rule can be regarded as assets held by the Court under s. 73, C. P. Code. *Ibid*. Money deposited to prevent sale is involuntary payment. A. I. R. 1934 Pat. 605. Where an attachment is released owing to the reversal of the decree, it should not be

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deemed to have been revived on the passing of the decree, once again after remand, and to relate back to the date of the original attachment. 163 Ind. Cas. 892.

**56. [S. 277.]** Where the property attached is current coin or currency notes, the Court may, at any time during the continuance of the attachment, direct that such coin or notes, or a part thereof sufficient to satisfy the decree, be paid over to the party entitled under the decree to receive the same.

**57. [New.]** Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further the application for execution, it shall either dismiss the application or for any sufficient reason adjourn the proceedings to a future date. Upon the dismissal of such application the attachment shall cease.

*N. B.*—For local amendments in C. P., Oudh, Peshwar and Rangoon,—*Vide infra*.

**Scope.**—This rule does not apply to attachment before judgment under Order 38, r. 5. 42 M. L. J. 24 M. L. T. 346=(1918) M. W. N. 606=35 M. L. J. 387=8 L. W. 369=48 Ind. Cas. 232 ; see also 14 Ind. Cas. 345=16 C. L. J. 86 ; 22 Ind. Cas. 351=26 M. L. J. 215 ; A. I. R. 1924 All. 860=22 A. L. J. 823=80 Ind. Cas. 106 ; A. I. R. 1929 C. 465=56 C. 416=119 Ind. Cas. 113 ; A. I. R. 1928 Mad. 940=1928 M. W. N. 466=56 M. L. J. 70=28 L. W. 565=111 Ind. Cas. 887 ; A. I. R. 1929 B. 321=31 Bom. L. R. 652=53 B. 543=119 Ind. Cas. 769 ; 83 Ind. Cas. 91=47 M. 483 ; 79 Ind. Cas. 144=A. I. R. 1924 Mad. 494 (F. B.) ; 134 Ind. Cas. 972=55 B. 693=A. I. R. 1931 Bom. 550=33 Bom. L. R. 1130. This rule does not apply unless there is default of decree-holder. A. I. R. 1926 All. 734=48 A. 698=24 A. L. J. 901=97 Ind. Cas. 102 ; A. I. R. 1933 Pat. 609. Dismissal of execution releases the attachment. A. I. R. 1934 Lah. 395. The phrase "attachment shall cease" shall apply only to subject-matter of execution application. 134 Ind. Cas. 972=55 B. 693=33 Bom. L. R. 1130=A. I. R. 1931 Bom. 550. Section 57 does not apply where there has been no application for attachment and sale of property. 134 Ind. Cas. 972=55 B. 693=33 Bom. L. R. 1130=A. I. R. 1931 Bom. 550. Attachment of attached decree does not terminate on dismissal in default of the decree of attaching decree-holder. 132 Ind. Cas. 667=A. I. R. 1931 Lah. 705. Mortgage of property after attachment is ceased and before attachment is valid. A. I. R. 1933 Rang. 169. But mortgage effected after execution proceedings were merely shelved and not dismissed for default, is ineffective. 107 Ind. Cas. 574. Dismissal of application for decree-holder's failure to give security makes attachment before judgment, if that be the only attachment, ceases. A. I. R. 1929 Bom. 455=31 Bom. L. R. 1101=122 Ind. Cas. 847 ; see also A. I. R. 1930 Bom. 16=31 Bom. L. R. 1209=122 Ind. Cas. 836 ; A. I. R. 1930 Mad. 303=121 Ind. Cas. 845. Legal consequences of dismissal of execution is that the attachment ceases in spite of contrary order. A. I. R. 1930 Mad. 414=120 Ind. Cas. 863 ; A. I. R. 1929 Nag. 82 ; A. I. R. 1930 Rang. 325=128 Ind. Cas. 591. When the previous attachment closes, no fresh sale can take place without a fresh attachment and an alienation between the cessation of the first attachment and the effecting of the second is not void. A. I. R. 1937 Lah. 169. Where the decree-holder makes default to proceed with the execution, attachment ceases. 40 L. W. 883=67 M. L. J. 801. Where a Court dismissed an execution application even at the request of the decree-holder, the legal consequence of such dismissal is that the attachment is released and a temporary alienation of the land by Court without fresh attachment is void. 150 Ind. Cas. 1053=A. I. R. 1934 Lah. 395. In order to have the effect of putting an end to an attachment the dismissal under rule 57 should be due to the decree-holder's default. 40 L. W. 263. The word "default" used in Order 21, rule 57, C. P. Code, is not restricted to default of appearance but means a failure to do what the decree-holder was bound to do, that is, to go on with the application and to have the property sold. A. I. R. 1934 Lah. 697=35 P. L. R. 604. Where the Court passes order consigning execution to record room, the order is not tantamount to dismissal of the application for execution nor it has the effect of terminating the prior attachment. A. I. R. 1936 Lah. 873.

Order closing petition and directing giving of better details, is not dismissal. A. I. R. 1928 Mad. 398=106 Ind. Cas. 138 ; see also A. I. R. 1935 Mad. 212=68 M.

L. J. 265=41 L. W. 325=156 Ind. Cas. 525. "Default" used in this rule is besides that of appearance and includes also one of failure to proceed including request to strike off. A. I. R. 1924 Lah. 645=75 Ind. Cas. 824 ; see also 67 Ind. Cas. 543=3 Lah. 7=A. I. R. 1922 Lah. 108 ; 41 A. 157=49 Ind. Cas. 113=17 A. L. J. 52 ; see also 41 A. 157=17 A. L. J. 52=49 Ind. Cas. 113 ; A. I. R. 1926 Mad. 980=50 M. 67=51 M. L. J. 219=(1926) M. W. N. 890=26 L. W. 878=97 Ind. Cas. 1008. Attachment of decree does not cease by dismissal of application to execute it. A. I. R. 1927 Mad. 1025=(1927) M. W. N. 680=105 Ind. Cas. 606. Under the old Code attachment did not necessarily cease with dismissal of execution application. 23 C. W. N. 608=29 C. L. J. 411=51 Ind. Cas. 972. The new rule is not retrospective in effect and does not take away right acquired under old Code to attachment continuing. 31 Ind. Cas. 911. Dismissal of application for execution ends attachment. A. I. R. 1923 Bom. 30=45 B. 942=24 Bom. L. R. 442=76 Ind. Cas. 895. But conduct of decree-holder should also be considered in determining whether striking off *darkhast* took away attachment. *Ibid.* Order continuing attachment, in proper case under the rule though improper, is binding on parties. A. I. R. 1925 All. 456=87 Ind. Cas. 349 ; see also 65 Ind. Cas. 91=20 A. L. J. 113=44 A. 274=A. I. R. 1922 All. 62. Dismissal though based on Court's suggestion to withdraw, removes attachment as against third party such as objector. A. I. R. 1925 Mad. 1113=48 M. L. J. 616=(1925) M. W. N. 406=87 Ind. Cas. 635. Private sale made after suspension of execution subsequently revived, is invalid, as revival is retrospective. A. I. R. 1926 All. 734=48 A. 698=24 A. L. J. 901=97 Ind. Cas. 102.

Attachment ceases on dismissal by Collector to which the rule applies. A. I. R. 1923 Nag. 18=68 Ind. Cas. 643 ; see also 64 Ind. Cas. 420=4 N. L. J. 118=18 N. L. R. 152=A. I. R. 1922 Nag. 267. Dismissal on decree-holders agreeing to give time, makes attachment cease. A. I. R. 1923 Pat. 446=4 P. L. T. 418=71 Ind. Cas. 831. Default of decree-holder in appearance at sale or to bid is not within the rule. A. I. R. 1923 Mad. 703=45 M. L. J. 315=(1923) M. W. N. 529=75 Ind. Cas. 491. Attachment continues if execution is discontinued not by decree-holder's default but on account of a claim case. 46 C. 64=27 C. L. J. 145=44 Ind. Cas. 249 ; see also 23 O. C. 166=7 O. L. J. 337=57 Ind. Cas. 509. Generally attachment cannot be either made or unmade by mere writing and signing of dismissal order without its communication, but where it can be so removed it can also be revived, or continued under inherent power of s. 151 where Court has power to revive. A. I. R. 1922 Nag. 367=18 N. L. R. 152=4 N. L. J. 118=64 Ind. Cas. 420. Attachment of property made prior to setting aside of sale on ground other than decree-holder's default, revives on a fresh execution petition being put in Court. 3 Pat. L. J. 310=(1918) Pat. 343=45 Ind. Cas. 589. Whether order of attachment is subsisting depends on the facts of each case ; and presumption is that it is in force unless withdrawn or dealt with on merits. 31 Ind. Cas. 911. Dismissal of an application on the sale being stayed, pending of an appeal, has not the effect of removing the attachment. 35 Ind. Cas. 240 ; see also 15 Ind. Cas. 42 ; 9 Ind. Cas. 558.

### *Investigation of Claims and Objections.*

58. [S 278.] (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects, as if he was a party to the suit :

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postpone it pending the investigation of the claim or objection.

*N.B.*—For local amendments in Allahabad, C. P., Lahore and Oudh.—*Vide infra.*

**Scope and object.**—The procedure referred to in this rule is merely permissive. A stranger whose property has been seized under an attachment may apply under this rule but his failure to do so does not in any way affect his right to take any other legal alternative. 18 Ind. Cas. 949=17 C. W. N. 541=(1913) M. W. N. 406=13 M. L. T. 406=11 A. L. J. 417=17 C. L. J. 472=15 Bom. L. R. 472=184 P. L. R. 1913=40 I. A. 56=40 C. 598 (P.C.). Objection by stranger to suit alone is governed by rule 58 and party's or his legal representative's objection goes under s. 47. A. I. R. 1929 Pat. 141=10 P. L. T. 95=8 Pat. 717=115 Ind. Cas. 695; A. I. R. 1928 Rang. 29=5 Rang. 659=107 Ind. Cas. 856; A. I. R. 1928 Cal. 94=54 C. 1064=107 Ind. Cas. 357; A. I. R. 1927 Oudh 120=4 O. W. N. 102=2 Luck. 145=103 Ind. Cas. 464; A. I. R. 1926 Mad. 355=91 Ind. Cas. 414; A. I. R. 1927 Lah. 895=28 P. L. R. 121; A. I. R. 1925 Pat. 482=3 Pat. L. R. 90=87 Ind. Cas. 743; A. I. R. 1925 Oudh 618=28 O. C. 175=85 Ind. Cas. 997; A. I. R. 1924 Mad. 889=47 M. L. J. 720=20 L. W. 864=1928 M. W. N. 551=84 Ind. Cas. 265; A. I. R. 1924 Lah. 589=75 Ind. Cas. 747; A. I. R. 1923 Bom. 381=25 Bom. L. R. 440=73 Ind. Cas. 419. Order under r. 58 if not challenged by regular suit operates as *res judicata*. A. I. R. 1923 Mad. 562=44 M. L. J. 588=72 Ind. Cas. 558. An order dismissing an objection of whatever kind under this rule comes under Order 63. (1930) A. L. J. 1322=130 Ind. Cas. 200; see also A. I. R. 1931 Oudh 1 (F.B.)=7 O. W. N. 1173=131 Ind. Cas. 77. A mortgagee in possession brought a claim under Order 21, rule 58, in respect of his mortgagee rights objecting to the sale of the property: *Held* that Order 21, rule 58 and rule 68, were inapplicable in as much as the mortgagee objecting to the sale was claiming merely in respect of his mortgagee rights which were not threatened and equity of redemption was only brought for sale, there being no fight between the judgment creditor and mortgagee in respect of property. A. I. R. 1937 Pat. 63 (F.B.). Where a sale has actually taken place, the executing Court has no jurisdiction to entertain a claim or objection filed under Order 21, rule 58. A. I. R. 1937 Cal. 390. A Court cannot dismiss an objection filed under Order 21, r. 58, C. P. Code, summarily on the supposed ground that there is an unnecessary delay without giving an opportunity to the objector or his counsel to explain the delay. A. I. R. 1937 Oudh 268. While proceedings by way of attachment are not appropriate to mortgage decrees, claims and objections to the attachment can be made under this rule, if the decree-holder applies for and obtains an order for attachment and the property is attached. On dismissal of his objection, the objector is entitled to bring a suit for declaration of his title under Order 21, rule 63. A. I. R. 1937 Lah. 360. An objection under Order 38, rule 8 to attachment of property attached before judgment need not be made before judgment as there is nothing in the rule to show that the claim must be preferred before judgment. Such objection even though preferred under Order 21, rule 58, in proceedings in execution of the decree, can be entertained by the Court, the procedure to be followed in objection under Order 38, rule 8 or in objection under Order 21, rule 58, in respect of claim to property attached in execution being the same. A. I. R. 1937 Pat. 245. Where the application of the petitioner's father under Order 21, rule 58, is dismissed and the order has become conclusive, the petitioner who derives his rights from him is bound by the order. A. I. R. 1934 Lah. 193=36 P. L. R. 89=149 Ind. Cas. 1059; see also A. I. R. 1934 Cal. 258=149 Ind. Cas. 926=58 C. L. J. 487. Where the Court rejects claim under rule 58 on the ground that the claimant has no *locus standi*, the rule of one year's limitation under Art. 11 of the Limitation Act applies. 150 Ind. Cas. 40. In a suit under r. 63 validity of attachment also can be challenged. A. I. R. 1927 Mad. 450=99 Ind. Cas. 989; see also 100 Ind. Cas. 298=A. I. R. 1927 Lah. 190. Where attachment is withdrawn after objection, rule 63 does not apply. A. I. R. 1930 All. 177=1930 A. L. J. 594=122 Ind. Cas. 865. Enquiry under rule 58 is summary, and suit under s. 63 is in the nature of appeal. A. I. R. 1926 Nag. 197=90 Ind. Cas. 196; see also A. I. R. 1924 Lah. 367=13 P. W. R. 1923=71 Ind. Cas. 45; A. I. R. 1923 Pat. 152=1 P. L. R. 51=3 P. L. T. 832=70 Ind. Cas. 332; 41 M. 849=35 M. L. J. 231=24 M. L. T. 134=8 L. W. 197 (F. B.)=47 Ind. Cas. 1000; 6 L. W. 518=42 Ind. Cas. 554. Order XXI, r. 58, is not applicable to decree on mortgage by sale. A. I. R. 1930 Mad. 712=125 Ind. Cas. 559; see A. I. R. 1929 Lah. 760=116 Ind. Cas. 882; A. I. R. 1929 Lah. 167=117 Ind. Cas. 815; A. I. R. 1926 Nag. 423=22 N. L. R. 94=97 Ind. Cas. 178; A. I. R. 1924 Oudh 394=11 O. L. J. 240=83 Ind. Cas. 869; A. I. R. 1922 Pat. 408=1 Pat. 159=70 Ind. Cas. 306. But Order XXI, rules 58 and 63 apply to mortgagee without possession preferring an objection. 11 Lah. 369=31 P. L. R. 352=120 Ind. Cas. 679; see also A. I. R. 1927 Pat. 51=97 Ind. Cas. 255. Objection by the judgment-debtor as trustee for third person is under



Order XXI, r. 58. A. I. R. 1930 Nag. 293=13 N. L. J. 205=27 N. L. R. 10=128 Ind. Cas. 401. Property under attachment claimed under a deed of sale if not proved cannot be released from attachment. A. I. R. 1930 Cal. 390=34 C. W. N. 254=127 Ind. Cas. 670. This rule affords summary remedy and persons seeking remedy under rule 58 must abide by advantages and disadvantages of the remedy. 11 Lah. 369=31 P. L. R. 752=120 Ind. Cas. 679. Objections to execution must be made at the earliest opportunity and cannot be allowed to be brought piece-meal unless they cannot be brought at once. A. I. R. 1930 Mad. 303=121 Ind. Cas. 845. Question of possession and not of title should be decided. A. I. R. 1929 Nag. 66=115 Ind. Cas. 167; A. I. R. 1928 Mad. 163=54 M. L. J. 321=27 L. W. 536=108 Ind. Cas. 67; 103 Ind. Cas. 12=A. I. R. 1927 Nag. 286=10 N. L. J. 155; 13 Bur. L. T. 214=64 Ind. Cas. 66; A. I. R. 1925 Mad. 588=(1925) M. W. N. 599=48 M. L. J. 603=21 L. W. 230=87 Ind. Cas. 189. But question of title can be incidentally enquired into. A. I. R. 1927 Sind 114=98 Ind. Cas. 888; see also A. I. R. 1929 Pat. 283=119 Ind. Cas. 909; A. I. R. 1929 Mad. 383=119 Ind. Cas. 33. Court is entitled to go into the question of *benami*. A. I. R. 1929 Pat. 273=119 Ind. Cas. 909. Objection on the ground of adjustment need not be made separately. A. I. R. 1929 All. 79=113 Ind. Cas. 760.

Rule does not apply to rent-decree by virtue of s. 170 of B. T. Act. A. I. R. 1926 Pat. 213=3 Pat. L. R. 341=7 Pat. L. T. 717=95 Ind. Cas. 303; see also A. I. R. 1929 Pat. 195=10 P. L. T. 118=117 Ind. Cas. 203; 3 Pat. L. R. 329=7 Pat. L. T. 625=95 Ind. Cas. 293. Enquiry under s. 58, is summary and suit under s. 63 is in the nature of appeal. A. I. R. 1926 Nag. 197=90 Ind. Cas. 196. Order under r. 58, even against a mortgage-decree-holder is inclusive if no suit is brought. A. I. R. 1926 Mad. 593=93 Ind. Cas. 335. An order dismissing a claim as too late has to be set aside within one year. A. I. R. 1928 Mad. 525=110 Ind. Cas. 567; see also 66 P. R. 1916=117 P. W. R. 1916=35 Ind. Cas. 321. Objection by the judgment-debtor to attachment on the ground that the attached property is a trust property, must be made under Order XXI, r. 58 and not under s. 47. 38 Ind. Cas. 152. Where the Court having no jurisdiction takes possession of the property attached in execution, proviso to rule 58 (1) applies. 41 Ind. Cas. 446. Attachment being unnecessary in a mortgage decree for sale, r. 58 does not apply. 23 P. W. R. 1918=58 P. R. 1918=113 P. L. R. 1918=44 Ind. Cas. 986; see also 2 U. P. L. R. (Lah) 90=55 Ind. Cas. 895=2 Lah. L. J. 348; 139 Ind. Cas. 452=1932 M. W. N. 1287=A. I. R. 1932 Mad. 716; but see A. I. R. 1936 Pesh. 53. Investigation on application under rule 58 (1) may be refused on the ground of deliberate delay. But if investigation has once been made, Order under r. 60 or 61 must be passed, dismissal after investigation being illegal. (1916) 2 U. B. R. 136=11 Bur. L. T. 41=39 Ind. Cas. 345. Order of dismissal of an objection under rule 58 even on the ground that the objector did not produce any evidence, and no suit being brought on the same in time is conclusive. 40 A. 325=16 A. L. J. 256=44 Ind. Cas. 1005. Order dismissing father's objection being conclusive, the son is bound by the order. A. I. R. 1934 Lah. 193. In a decree against legal heir, objection by executor that decree cannot be executed against him is one under s. 47 and not under Order 21, rule 58. A. I. R. 1934 Cal. 258. If two persons one of whom is a party to the suit and the other not a party prefer a claim under Order 21, rule 58, the party to the suit must proceed by way of appeal by virtue of s. 47 and the non-party by way of suit by virtue of Order 21, rule 63. A. I. R. 1934 Mad. 435=67 M. L. J. 36=57 M. 822=40 L. W. 144. Where claim is rejected under rule 58, the order is conclusive unless set aside by a regular suit provided by rule 63. A. I. R. 1936 Lah. 761. In some case nature of title of the person in possession may be inquired. A. I. R. 1936 Rang. 306=14 Rang. 516=164 Ind. Cas. 608. Although claims to property attached before judgment should be investigated, if made, according to the procedure laid down by Order 21, r. 58, it does not follow that a person who has a claim to such property is bound to make an objection before the decree; and a claim preferred within a reasonable time after the decree and the application for execution is not "designedly or unnecessarily delayed" within the meaning of proviso of Order 21, rule 58, Civil Procedure Code. A. I. R. 1935 Nag. 222=31 N. L. R. 426=158 Ind. Cas. 353. When once a person is found to be in possession under Order 21, rule 58, the Court has jurisdiction to go behind that possession and enter into a question of title. The Court is not precluded from entering into the question of whether the possession of the person actually found in possession is the possession of the judgment-debtor or not. A. I. R. 1935 Pat. 267=155 Ind. Cas. 419.

Where objector is in possession of property, decree-holder must prove that the property belongs to the judgment-debtor. 19 O. W. N. 1017=A. I. R. 1933 Oudh 473. Rules 58 and 63 must be read as part of whole scheme on point of attachment and sale. 137 Ind. Cas. 603=34 Bom. L. R. 206=A. I. R. 1932 Bom. 210; see also 133 Ind. Cas. 318=1931 A. L. J. 856=53 A. 918=A. I. R. 1931 All. 608. Remedy of unsuccessful claimant is by suit. 36 C. W. N. 1034=56 C. L. J. 250=141 Ind. Cas. 100=A. I. R. 1933 Cal. 233; see also A. I. R. 1934 Rang. 230; 148 Ind. Cas. 334. Objection can be taken under s. 44, Evidence Act that decree against him was passed without jurisdiction. 136 Ind. Cas. 353=1931 A. L. J. 653=53 A. 747=A. I. R. 1931 All. 689. Court cannot dismiss objections summarily on supposed ground of delay without giving objector or his pleader opportunity to explain delay. 145 Ind. Cas. 444=1933 A. L. J. 1177=A. I. R. 1933 All. 751. In case of objection to attachment of property under rule 58, Magistrate is bound to investigate claim. 144 Ind. Cas. 883=1933 A. L. J. 265=A. I. R. 1933 All. 135; A. I. R. 1931 Rang. 310. Where attached property has already been transferred, the proper remedy is for the transferee to object under Order 21, rule 58. 138 Ind. Cas. 847=54 A. 874=1932 A. L. J. 603=A. I. R. 1932 All. 551; see also 139 Ind. Cas. 785=1932 A. L. J. 125=A. I. R. 1932 All. 263. Objections dismissed for default can be restored under s. 151. 143 Ind. Cas. 584=24 N. L. R. 176=A. I. R. 1933 Nag. 176. If attachment constitutes infringement of rights of real owner he can pay money under protest and seek proper remedy to have the same back. 135 Ind. Cas. 24=34 M. L. W. 309=A. I. R. 1931 Mad. 753. Claim under rule 58 put in after sale is not infructuous. 134 Ind. Cas. 809=55 M. 251=61 M. L. J. 584=A. I. R. 1931 Mad. 782; see also 145 Ind. Cas. 142=27 S. L. R. 256=A. I. R. 1933 Sind 198. Where attachment is by Revenue Court in execution of rent-decree, objection to attachment is entertainable. 139 Ind. Cas. 452=1932 M. W. N. 1287=37 M. L. W. 655=A. I. R. 1932 Mad. 716. In a rent-decree objector claiming title to tenure cannot come under Order 21, rule 58. 142 Ind. Cas. 40=13 P. L. T. 643=11 Pat. 790=A. I. R. 1933 Pat. 32. Where decree-holder did not object to oral objections to attachment without application in writing, he cannot subsequently urge that no written application was submitted. 143 Ind. Cas. 702=A. I. R. 1933 Sind 126. Where order under rule 58, is passed without consideration of evidence, High Court will interfere in revision. 142 Ind. Cas. 628=14 P. L. T. 70=A. I. R. 1933 Pat. 158. But where the unsuccessful party to an objection proceeding can still bring a suit to establish his right to attach the property, it is not necessary for the High Court to interfere in revision. A. I. R. 1934 Rang. 212. In case of objection under this rule, Court should investigate into claim and should not partly admit objection and dismiss execution. 145 Ind. Cas. 736=A. I. R. 1933 Lah. 421. Where objection is disallowed and sale held under mortgage-decree, suit need not be brought within one year. 141 Ind. Cas. 252=33 P. L. R. 1033=A. I. R. 1933 Lah. 75. Mere attachment does not give reversioner right to sue for declaration that it shall not affect his reversionary rights. 136 Ind. Cas. 265=13 Lah. 524=33 P. L. R. 46=A. I. R. 1932 Lah. 179. After final decree for sale of property under Order 34, rule 5, objection under Order 21, r. 58 to sale of property cannot be entertained. 143 Ind. Cas. 246=33 P. L. R. 868=A. I. R. 1932 Lah. 618. Court attaching debt cannot inquire into existence of truth of debt. 136 Ind. Cas. 337=61 M. L. J. 863=34 M. L. W. 906=1932 M. W. N. 280=A. I. R. 1932 Mad. 169. Small Cause Court is incompetent to attach or decide objection to attachment of immovables. A. I. R. 1924 Cal. 193=28 C. W. N. 16=80 Ind. Cas. 300. Claim petition dismissed for default can be restored to file. A. I. R. 1924 Mad. 715=47 M. 651=47 M. L. J. 13=34 M. L. T. 309=19 L. W. 685=79 Ind. Cas. 818=1924 M. W. N. 479. A claim or objection under Order XXI, r. 58, must result in an order passed either under r. 60 or r. 61 and r. 63 applies to an order made either under r. 60 or 61. A. I. R. 1925 Oudh 154=27 O. C. 308=81 Ind. Cas. 1013. Objection by representative of judgment-debtor claiming separate title is to be decided under Order XXI, r. 58 and not under s. 47. A. I. R. 1924 All. 183=75 Ind. Cas. 1053. Sale determines attachment and no jurisdiction is left to investigate objection. A. I. R. 1924 Pat. 76=4 P. L. T. 544=74 Ind. Cas. 87. Order of re:usal to investigate claim entitles the claimant to bring a suit. A. I. R. 1923 All. 435=45 A. 438=21 A. L. J. 342=74 Ind. Cas. 102. Assignee of decree can object to its attachment under rule 58 even before his name is substituted. A. I. R. 1928 Rang. 25=5 Rang. 595=6 Bur. L. J. 221=106 Ind. Cas. 853. In objection by vendee, decree-holder must show sale is fraudulent. A. I. R. 1927 P. C. 237=29 Bom. L. R. 1481=46 C. L. J. 349=32 C. W. N. 28=53 M. L. J. 388 (P. C.)=105 Ind. Cas.

788. Claim to property should be investigated if inconsistent with continuance of of unqualified attachment. A. I. R. 1927 All. 593=49 A. 903=25 A. L. J. 609=102 Ind. Cas. 792. The party against whom an adverse order is passed in claim proceedings and has become final by his failure to bring a suit under rule 63 is not precluded from going behind that order in a subsequent suit by him based on an entirely different title. 60 C. 1406=149 Ind. Cas. 410=A. I. R. 1934 Cal. 356. Where an objection preferred in execution under Order 21, rule 58, has been accepted *ex parte* in the decree-holder's default, the order objecting the objector's claim is conclusive within the meaning of rule 63 and the decree-holder's only remedy is by way of a separate suit. A. I. R. 1936 Pesh. 115; see also A. I. R. 1936 Lah. 830. No appeal lies against such an order. A. I. R. 1936 Lah. 830; see also A. I. R. 1936 Sind 2. But an order of the executing Court refusing to entertain objections under rule 58 is not one under Order 21, rule 61, so as to give a right of suit under Order 21, rule 63 to the objectors and objectors are not precluded from going in revision against the order on the ground that another remedy *i. e.*, one by way of suit, under Order 21, rule 63, is open to him. 164 Ind. Cas. 1012=A. I. R. 1936 Pesh. 185. Where the property in possession of judgment-debtor has been attached and sold in execution and another puts in a claim, possession being *prima facie* evidence of title, it will be just in such a case to go into question of possession only. A. I. R. 1935 Rang. 161=156 Ind. Cas. 586. Where all that the claimant has is merely the interest of a tenant paying rent to the judgment-debtor (whether the tenant is a tenant at will or from year to year or occupancy tenant) such a person's possession is regarded as judgment-debtor's possession and there is no attachment to be released. A. I. R. 1935 Mad. 547=68 M. L. J. 518=58 Mad. 936=157 Ind. Cas. 173=1935 M. W. N. 420. The only method by which a third person can object to an attachment is to file objections after the attachment has been made. He can come to Court and his objections are under the provisions of rule 58, Order 21. There is nothing in the Civil Procedure Code which allows a third party to come forward with objections before an attachment has been made. A. I. R. 1935 All. 343=1935 A. L. J. 344=156 Ind. Cas. 801.

59. [S. 279.]. The claimant or objector must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached.

Scope—Order 21, rule 58 read with r. 59 gives right of claim only to those who had interest in and possession of the property under attachment on the day when the attachment was effected. Rule 58 is no doubt general, but rule 59 makes it clear that the investigation is to be confined to possession on the date of the attachment. Therefore when the interest of a claimant accrued after the attachment, he is not a person who could come under rule 58. A. I. R. 1934 Pat. 511. The "interest" has relation with possession, not title. In order to succeed he must show that person in possession holds it on his behalf. 146 Ind. Cas. 9=A. I. R. 1933 Nag. 297. Rules apply to investigation of claims in attachment before judgment. 146 Ind. Cas. 9=A. I. R. 1933 Nag. 297. No enquiry as to decree-holder's right to execute decree can be made under rule 59. A. I. R. 1929 Rang. 152=7 Rang. 132=117 Ind. Cas. 578. If in an enquiry under Order XXI, r. 59, no evidence as to possession is adduced by claimant to attached property, the question of title only should be dealt with by the Court. 32 Ind. Cas. 34. Apart from rule 59 where in the property can be released on the ground that person has some interest in the property which cannot be attached. A. I. R. 1921 Pat. 409=2 P. L. T. 240=61 Ind. Cas. 922. Nowhere is the Court given power to declare in a course of proceedings under Order 21, rules 59, 60 and 63 that a person who has applied for removal of attachment is subject to a decree which was not passed against him. A. I. R. 1935 Rang. 11. In order to become an order under Order XXI, there is an enquiry and adjudication though summary, of the rights of the parties. A. I. R. 1929 Mad. 69=56 M. L. J. 199=(1929) M. W. N. 174=29 L. W. 537=115 Ind. Cas. 504; A. I. R. 1923 Rang. 195=1 Rang. 276=2 Bur. L. J. 134=76 Ind. Cas. 677; 10 Bur. L. T. 14=39 Ind. Cas. 275. Mere attachment does not give interest in property attached within the meaning of rule 59. A. I. R. 1935 Nag. 171=31 N. L. R. 301=158 Ind. Cas. 199. The interest referred to the Order 21, rule 59, is not necessarily an interest in law in the sense that that expression is urged in s. 54. A. I. R. 1935 Mad. 193=68 M. L. J. 67=41 L. W. 739.

**60. [S. 280.]** Where upon the said investigation the Court is satisfied that for the reason stated in the claim or Release of property from attachment objection such property was not, when attached, in the possession of the judgment-debtor or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the judgment-debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property wholly or to such extent as it thinks fit from attachment.

**Scope.**—Where objector is found to be in possession, attachment should be removed. A. I. R. 1933 Rang. 259. Mistake upon fact or law on merits occasioned by not directing proper attention to rule 60 can be revised by the High Court. A. I. R. 1929 Cal. 225=49 C. L. J. 51=115 Ind. Cas. 362. Order under rule 60 releasing the attached property is liable to be set aside by a regular suit. 33 C. L. J. 201=25 C. W. N. 544=62 Ind. Cas. 348. Order allowing claim under r. 58 cannot be made conditional to certain payment to decree-holder on ground that claimant had undertaken in deed of conveyance giving him title to pay the amount as part of consideration, if he is in possession on his own account under title of conveyance from judgment-debtor. Claim should be allowed unconditionally. 44 Ind. Cas. 1007. Appeal does not lie against an order allowing objection under rule 60 that the attached property in possession of judgment-debtor did not belong to him but to a *Math.* A. I. R. 1928 All. 392=50 A. 801=26 A. L. J. 477=113 Ind. Cas. 171. A person in actual possession in his own account before attachment though not proving title can claim under Order XXI, rules 50 and 60 for declaration that property is not saleable in execution against judgment-debtor. Court has in such cases to investigate fact of possession at the time of attachment. A. I. R. 1928 All. 668=110 Ind. Cas. 365. Questions of title arising incidentally as to whether judgment-debtor was in possession of the property as trustee or agent for another have got to be determined under rr. 60 and 61 to that extent. A. I. R. 1924 Cal. 744=51 C. 548=39 C. L. J. 418=83 Ind. Cas. 233; 75 Ind. Cas. 1053=A. I. R. 1924 All. 183=L. R. 4 A. 447 (Civ.). Where in a claim petition, it was found that the claimant had some interest and there was no decision as to possession and nature of the interest of the claimant, the order disallowing the claim was illegal and subject to revision by the High Court. 60 Ind. Cas. 616. If a claim is made by the decree-holder that the persons are only in possession on behalf of the judgment debtor, the Court should investigate the claim of title. A. I. R. 1934 Rang. 212. Where property belonging to another person then the judgment-debtor is wrongly attached and the attachment is raised on a claim preferred by that person, the latter has the right to have the property restored to him in *status quo ante* the attachment and that right can in no way be whittled down by the subsequent deterioration or loss of the properties attached. A. I. R. 1936 Nag. 257.

**61. [S. 281.]** Where the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Court shall disallow the claim.

**Notes.**—Extent of investigation under rule 58 depends upon circumstances. High Court should not interfere in revision with decision under rule 61 as party aggrieved by order under r. 58 or rule 61 has his remedy under s. 63. A. I. R. 1930 Pat. 394=125 Ind. Cas. 575; see also A. I. R. 1922 Cal. 166=64 Ind. Cas. 713=26 C. W. N. 126. Third party whose claim is dismissed but attachment is subsequently raised is not bound to sue within a year of order and his subsequent suit is not time-barred. 45 B. 561=22 Bom. L. R. 1446=59 Ind. Cas. 774. An order under Order XX, rule 61, is got an order *in rem* 38 M. L. W. 813=1933 M. W. N. 1357=A. I. R. 1933 Mad. 879. If necessary, a Judge can go into the question of the validity of a registered or other document, if this entailed a consideration of the *bona fides* of the

sale or the legal effect of the deed of conveyance including the circumstances of the registration. A. I. R. 1935 Rang. 395.

62. [S. 282.] Where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to such mortgage or charge.

Continuance of attachment subject to claim of incumbrancer.

**Scope.**—Where Court is satisfied that property is subject to mortgage or lien enabling to continue or to dissolve attachment this rule applies but if attachment is to be continued it should be done subject to mortgage or lien. To an application by mortgagee that attachment should be subject to his mortgage this rule is not applicable. 41 B. 64=18 Bom. L. R. 782=36 Ind. Cas. 627; see also A. I. R. 1931 Oudh. 157=8 O. W. N. 179=131 Ind. Cas. 767. Mortgagee in possession at time of attachment can claim removal of attachment under r. 60. Only equity of redemption in such cases can be attached and sold. A. I. R. 1924 Oudh 404=11 O. L. J. 239=81 Ind. Cas. 648. Section 62 applies in cases of mortgagee without possession. A. I. R. 1924 Oudh 384=11 O. L. J. 240=83 Ind. Cas. 869. Only the result of Court's action under rule 62 will be notified to public in sale proclamation under rule 66, cl. (2) and intending purchaser will look only to such entry in sale proclamation irrespective of the basis. A. I. R. 1925 Oudh 154=27 O. C. 308=81 Ind. Cas. 1013; see also 3 O. L. J. 422=36 Ind. Cas. 732; A. I. R. 1930 Oudh 362=126 Ind. Cas. 389; 47 C. 446=30 C. L. J. 496=24 C. W. N. 289=55 Ind. Cas. 189. On continuing attachment subject to mortgage, purchaser takes only mortgagor's right of redemption. 12 Bur. L. T. 43=51 Ind. Cas. 580; see also 82 Ind. Cas. 771=19 N. L. R. 15. Purchaser before claiming possession must pay off incumbrance subject to which the property was purchased. 50 Ind. Cas. 909. Order that "proceedings are dropped" recorded after withdrawing objection petition under rule 62 is not one under the rule and is not final under r. 63 but is equivalent to order under O. 23, r. 1. A. I. R. 1925 Nag. 2=20 N. L. R. 106=7 N. L. J. 170=79 Ind. Cas. 1002. Benefit of notified mortgage turning out invalid goes to purchaser from whom judgment-debtor cannot claim refund of amount alleged to be due on mortgage, and purchaser is free to contest validity when attached by mortgagee. A. I. R. 1921 Cal. 435=34 C. L. J. 333=25 C. W. N. 942=66 Ind. Cas. 694; see also 44 B. 860=22 Bom. L. R. 640=58 Ind. Cas. 217. The Code makes a clear distinction between a case where property is sold subject to mortgage as under Order 21, rule 62 and a case in which the notice of an alleged encumbrance is given in the proclamation of sale as under Order 21, rule 66. In the former case the Court is satisfied of the existence of the mortgage and sells only the judgment-debtor's equity of redemption and the purchaser has to redeem the property. In the latter case the purchaser buys the property with notice of the mortgage subject to such risk as the notice might involve; in other words the executing Court does not decide whether the mortgage subsists or not and the purchaser is not precluded from questioning the validity of the mortgage. A. I. R. 1933 Mad. 1183=38 L. W. 813=65 M. L. J. 819=1933 M. W. N. 1357=A. I. R. 1933 Mad. 879. When a Civil Court in execution proceedings holds under Order 21, rule 62, that the property sought to be sold is subject to mortgage or charge in favour of some person not in possession, it does so only after it has held an enquiry into the matter and has satisfied itself that that is the fact. A. I. R. 1935 Oudh. 23=11 O. W. N. 1475=10 Luck. 343.

63. [S. 283.] Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

*N. B.*—For local amendments in Lahore and Rangoon.—*Vide infra*.

**Scope**—This rule applies to every order against a party to a claim preferred or an objection made under rule 58, whether the order was passed after contest and enquiry or for default and without investigation. 11 Lah 369=31 P. L. R. 752=120 Ind. Cas. 679; see also 113 Ind. Cas. 77=A. I. R. 1931 Oudh. 1=7 O. W. N. 1173=131 Ind. Cas. 77; 2 Bur. L. J. 173=76 Ind. Cas. 841; A. I. R. 1928 All. 327=26 A. L. J. 794=116 Ind. Cas. 81. Where order dismissing objections to attachment under rule 58 has been made and subsequently the attachment itself is set

aside and the property in question is not sold, the order of dismissal of objections is vacated and hence the failure of the judgment-debtor to institute a suit under rule 63 cannot make the order dismissing objection final. A. I. R. 1937 Lah. 169. Where an objection by an alienee of certain property to attachment in execution is dismissed and he files a suit for a declaration, the burden of proof is upon him to show that the alienation is not a fraudulent alienation, that it was made *bona fide* and for consideration. A. I. R. 1937 Nag. 1; see also A. I. R. 1937 Rang. 252. But if he proves his purchase by producing a duly registered sale-deed which contains recitals of consideration, the onus is shifted on to the defendant who has to prove that the consideration is altered by inadequate means and sale is fraudulent. A. I. R. 1937 Nag. 9. Where there has been a claim under Order 21, rule 58, C. P. Code, a suit for a bare declaration will always lie under Order 21, rule 63, and even where the goods have been sold before the suit is filed, the plaintiff is not bound either in law or practice to claim any consequential relief, for once he has obtained his declaration he is not barred by the provisions of Order 21, rule 2 from filing a subsequent suit for recovery of the value of the property or the auction price or whatever it may be, he sues for. A. I. R. 1937 Rang. 249; see also A. I. R. 1937 Rang. 133; A. I. R. 1928 Rang. 34. Where in the execution proceedings there was no order under rule 61, rule 63 does not apply. A. I. R. 1937 Nag. 149. It is not obligatory on a plaintiff in a suit under Order 21, rule 63 to prove the whole of the claim raised by him in objection under Order 21, rule 58. If he realises that part of his claim the objection cannot be sustained, and he is entitled to omit it when bringing a suit under Order 21, rule 63. A. I. R. 1936 Pesh. 206. The absence of judgment-debtor from the suit for declaration gives rise to prolonged litigation unless the judgment-debtor is brought on the record in the suit for declaration. The mere fact that he was impliedly a party to the removal of attachment proceedings will not make the decree in the declaratory suit binding upon him. A. I. R. 1936 Rang. 56=161 Ind. Cas. 950. A summary order of dismissal of objections under Order 21, rule 58, C. P. Code is vacated if the attachment itself is subsequently released owing to the reversal of the decree, and the property in question is not sold. Such an order does not, therefore, become final by reason of failure to institute a suit under Order 21, rule 63. 163 Ind. Cas. 892. This rule has application to a case of attachment before judgment. A. I. R. 1929 Cal. 225=49 C. L. J. 151=115 Ind. Cas. 362. In a suit under r. 63 the plaintiff has to establish his title. 41 M. 205=34 M. L. J. 295=45 Ind. Cas. 703; 43 M. 760=39 M. L. J. 350=28 M. L. T. 170=12 L. W. 475=(1920) M. W. N. 572 (F. B.)=59 Ind. Cas. 947; 42 Ind. Cas. 438=33 M. L. J. 316=6 L. W. 588. A suit under rule 63 is not merely in the nature of appeal. The words "establish the right" in the rule, cover not only a mere suit but also one for consequential relief, *i. e.*, recovery of the value of the land when sold prior to the order on the claim petition. 40 M. 733=31 M. L. J. 394=(1916) 2 M. W. N. 207=4 L. W. 300=20 M. L. T. 353=36 Ind. Cas. 445. A suit under rule 63 is a continuation of claim proceedings. A. I. R. 1925 Nag. 82=22 N. L. R. 67=80 Ind. Cas. 905; see also A. I. R. 1928 Mad. 840=(1928) M. W. N. 336=28 L. W. 82=52 M. L. J. 52=110 Ind. Cas. 554; A. I. R. 1928 Mad. 1201=52 M. 465=30 L. W. 36=116 Ind. Cas. 827. Cause of action arising subsequent to the dismissal of the claim need not be joined in a suit under rule 63, to set aside the order under rule 58. A. I. R. 1928 Mad. 810=(1928) M. W. N. 336=28 L. W. 82=56 M. L. J. 52=110 Ind. Cas. 554. Where objection was dismissed but the attachment was also ceased within one year, the claimant is not bound to bring suit for declaration of title. A. I. R. 1934 All. 267 (F. B.). Where one of two unsuccessful claimants brings a suit under this rule, making the other defendant and admitting his claim, the non-suing claimant also gets the advantage of the decree. A. I. R. 1934 Bom. 189. Where objection is dismissed on ground of unnecessary delay, still suit must be brought within one year. 144 Ind. Cas. 933=35 Bom. L. R. 147=57 B. 213=A. I. R. 1933 Bom. 190. Where no adverse order is made against a person, it is not necessary for him to bring a suit within one year. 133 Ind. Cas. 248=33 Bom. L. R. 395=A. I. R. 1931 Bom. 288; see also A. I. R. 1931 Rang. 279=135 Ind. Cas. 326=9 Rang. 561; 142 Ind. Cas. 345=37 M. L. W. 437=1933 M. W. N. 669=A. I. R. 1933 Mad. 328. Plaintiff must affirmatively prove title. 144 Ind. Cas. 851=A. I. R. 1933 Rang. 129; see also 144 Ind. Cas. 1002=55 A. 266=A. I. R. 1933 All. 198. Order dismissing a claim to attached property is binding in favour of the attaching creditor which can be assailed only by the institution of a suit within one year as provided for in rule 63. A. I. R. 1928 Mad. 1259; see also 26 A. L. J. 974=A. I. R. 1928 All. 32; 35 Ind.

Cas. 321=66 P. R. 1916 ; 44 C. 698=21 C. W. N. 222 ; 41 Ind. Cas. 684=6 L. W. 281 ; 38 M. L. J. 397=27 M. L. T. 312=56 Ind. Cas. 481 ; 45 Ind. Cas. 270=41 M. 985 (F. B.) ; 51 Ind. Cas. 100=45 P. L. R. 1919 ; 94 Ind. Cas. 573=A. I. R. 1925 Nag. 390=8 N. L. J. 170 ; 26 C. W. N. 126=64 Ind. Cas. 713 ; 64 Ind. Cas. 209=A. I. R. 1921 Oudh 54=24 O. C. 213 ; 54 Ind. Cas. 530=37 M. L. J. 547=26 M. L. T. 513 ; 75 Ind. Cas. 322=2 Bur. L. J. 60 ; 80 Ind. Cas. 994=A. I. R. 1924 Sind 97=17 S. L. R. 63 ; A. I. R. 1924 Cal. 744=51 C. 548=39 C. L. J. 418=83 Ind. Cas. 233. Rule 63 lays down that where a claim or an objection is preferred under the preceding rules of Order 21, the party against whom an order is made may institute a suit to establish "the right which he claims to the property in dispute," obviously these words do not mean that the plaintiff has to establish his ownership of the property in dispute. All that he is required to do is to establish "the right which he claims to the property in dispute." A. I. R. 1936 Lah. 524=17 Lah. 668. In a suit under this rule by the alienees from a judgment-debtor, whose properties have been attached by the decree-holder as properties belonging to the judgment-debtor it is not sufficient for the alienees to prove the deed of transfer. The burden of proving that the transfer was for consideration and was in good faith also lies on them. A. I. R. 1936 Lah. 72=162 Ind. Cas. 495. Where the attachment ceases to exist within the period of one year from the dismissal of the objection it is no longer incumbent upon the claimant to file a suit for a declaration of title to the property in order to avoid the conclusiveness of the order in the claim case. A. I. R. 1934 All. 267 (F. B.)=1934 A. L. J. 19=56 A. 537=148 Ind. Cas. 676. The terms of Order 21, rule 63, are wide enough to include a suit based on title ; and in order to prove that the claimant has a right to the property in dispute, a consideration of his title as well as of possession will be relevant. 156 Ind. Cas. 878=1935 M. W. N. 581=A. I. R. 1935 Mad. 596=41 L. W. 726=68 M. L. J. 590. Order 21, rule 63, has no application to cases where a claim has not been disposed of on the merits or rejected as being too late. A. I. R. 1935 Mad. 328=41 L. W. 500=1935 M. W. N. 331=156 Ind. Cas. 906. Where a claim petition is withdrawn and it is dismissed in consequence of such withdrawal, the order of dismissal is not an order "against" the claimant within the meaning of Order 21, rule 63, C. P. Code. A suit filed by the claimant more than a year from the date of the order is not barred. 156 Ind. Cas. 880=41 L. W. 578=1935 M. W. N. 417=A. I. R. 1935 Mad. 544. Where the attachment is not valid no claim or objection can be raised and therefore no suit under rule 63 would lie. 156 Ind. Cas. 697=A. I. R. 1935 Rang. 186 ; see also 14 Pat. 857=156 Ind. Cas. 930=A. I. R. 1935 Pat. 409. Where objection wrongly filed under rule 58 instead of under s. 47, no separate suit is maintainable. 1935 A. L. J. 74=A. I. R. 1935 All. 183=153 Ind. Cas. 577.

If a claim under r. 58, is allowed and the judgment-debtor is not a party to such claim suit, the order does not bind the judgment-debtor so as to compel him to bring a suit for a declaration under rule 63. A. I. R. 1929 Pat. 604=10 P. L. T. 581=120 Ind. Cas. 762. Order under r. 63 is conclusive as between claimant and decree-holder and does not affect judgment-debtor's right and title to the property. A. I. R. 1931 Lah. 74=131 Ind. Cas. 225. The word "conclusive" means final *i. e.*, unappealable. A. I. R. 1923 Rang. 195=76 Ind. Cas. 677. Dismissal of claim petition by Court without jurisdiction need not be set aside by suit. A. I. R. 1928 Mad. 878=112 Ind. Cas. 619. Where a claim petition is dismissed for default, Court can restore it to file and that right is not taken away by rule 63. A. I. R. 1924 Mad. 715=47 M. 451=47 M. L. J. 13=79 Ind. Cas. 818. Rule 63 does not apply to cases where a claim has not been disposed of on the merits or rejected as being too late. 110 Ind. Cas. 511. Where a claim petition is dismissed but the attachment falls through owing to the insolvency, the claimant need not file suit to set aside the order as there is no attachment. 110 Ind. Cas. 115 ; A. I. R. 1930 All. 177=1930 A. L. J. 594=122 Ind. Cas. 865 ; but see A. I. R. 1929 Rang. 228=124 Ind. Cas. 261.

In defence to a suit under rule 63 an attaching decree-holder can plead that the alienation is a fraudulent one intended to defeat or delay the creditors. 43 M. 760=38 M. L. J. 350=12 L. W. 47=59 Ind. Cas. 947 ; see also 57 Ind. Cas. 430=22 Bom. L. R. 743 ; 54 Ind. Cas. 798. Where the objection of the claimant was granted on the basis of a deed of gift, suit to declare gift as fictitious and fraudulent is not suit under Order 21, rule 63. 144 Ind. Cas. 378=34 P. L. R. 443=A. I. R. 1933 Lah. 449. Where substantial portion of the consideration is found to be fraudulent, the whole transfer should be treated as fraudulent. 131 Ind. Cas. 383=12 Lah. 763=32. P. L. R. 350=A. I. R. 1932 Lah. 174. Where declaratory suit is dismissed on

ground of ceasing of attachment due to dismissal of execution proceedings does not decide title to attached property. A. I. R. 1933 Rang. 190. Order by executing Court on objection under Order 21, rule 58, is covered by Order 21, rule, 63 whether passed after or without investigation. 131 Ind. Cas. 77=7 O. W. N. 1173=6 Luck. 461=A. I. R. 1931 Oudh 1 (F. B.). Creditor cannot without pre-previous leave bring declaratory suit as to insolvent's property. 145 Ind. Cas. 697=A. I. R. 1933 Nag. 217; see also A. I. R. 1933 Mad. 340=1933 M. W. N. 152=37 M. L. W. 346. Suit under Order 21, r. 63, is of a comprehensive nature and not confined to whether execution order is correct. 132 Ind. Cas. 215=13 Lah. L. J. 143=33 P. L. R. 345=A. I. R. 1931 Lah. 483. Dismissal of first objection to attachment bars second objection. 130 Ind. Cas. 406=32 P. L. R. 413=A. I. R. 1931 Lah. 6.

**Onus.**—Onus is on the plaintiff to prove his case. A. I. R. 1929 Lah. 455=30 P.L.R. 389=118 Ind. Cas. 897; A.I.R. 1933 Lah. 855; 34 P.L.R. 205=A.I.R. 1933 Lah. 550; 55 M. 748=A. I. R. 1932 Mad 302; 67 M.L.J. 585=A.I.R. 1934 Mad. 579; A.I.R. 1934 Nag. 585; 16 Pat. L. T. 367=A.I.R. 1935 Pat. 231; 18 N.L. J. 329. In a suit under rule 63, the plaintiff has to prove not merely the execution of the document on which he relies and the passing of consideration, but also that the document is a *bona fide* transaction. (1919) Pat. 409=53 Ind. Cas. 892; see also A. I. R. 1929 Pat. 579=10 P. L. T. 339=8 Pat. 890=119 Ind. Cas. 74; 117 Ind. Cas. 220=A. I. R. 1929 Nag. 121; A. I. R. 1928 Mad. 1259=113 Ind. Cas. 358; 142 Ind. Cas. 112=34 P. L. R. 363=A. I. R. 1933 Lah. 537; A. I. R. 1929 Nag. 293=92 Ind. Cas. 810; 105 Ind. Cas. 208=A. I. R. 1927 Oudh 440=4 O. W. N. 794; A. I. R. 1928 Pat. 434=7 Pat. 777=9 P. L. T. 451=112 Ind. Cas. 371; 107 Ind. Cas. 782=10 L. L. J. 42; 78 Ind. Cas. 887=A. I. R. 1924 Nag. 240; 77 Ind. Cas. 50=A. I. R. 1923 Nag. 334; A. I. R. 1924 Mad. 770=34 M. L. J. 201=47 M. L. J. 14=19 L. W. 627; 50 Ind. Cas. 884=47 P. L. R. 1919; 36 Ind. Cas. 427=19 O. C. 64; 67 Ind. Cas. 876=3 Lah. L. J. 198; 131 Ind. Cas. 383=12 Lah. 763=32 P. L. R. 350=A. I. R. 1932 Lah. 174; 58 Ind. Cas. 205; 55 Ind. Cas. 72; 55 Ind. Cas. 752; 60 Ind. Cas. 751. In a suit under rule 63, the plaintiff has to prove that he and not the judgment-debtor was the owner of the property on the date on which it was attached in execution of the decree. 31 P. L. R. 394. Where defendant pleads that the plaintiff's title was based on nominal transaction intended to defraud creditors the onus of proving fraud is on the defendants. A. I. R. 1931 Mad. 40=32 L. W. 57=128 Ind. Cas. 453; see also A. I. R. 1926 Lah. 25=89 Ind. Cas. 953; A. I. R. 1933 Nag. 185=143 Ind. Cas. 419. Proof of possession by plaintiff shifts the burden to the person who is out of possession under s. 110 of the Evidence Act. 37 Ind. Cas. 767=10 Bur. L. T. 238.

**Declaratory suit.**—A suit under rule 63, may be a suit for declaration to set aside an order passed in the execution department within one year. A. I. R. 1930 All. 395=124 Ind. Cas. 713; see also 120 Ind. Cas. 679=A. I. R. 1929 Lah. 865=11 Lah. 369=31 P. L. R. 752=11 Lah. L. J. 452=120 Ind. Cas. 679; A. I. R. 1926 Rang. 124=4 Rang. 22=95 Ind. Cas. 98; 93 Ind. Cas. 997=A. I. R. 1926 Lah. 348=7 Lah. 235=27 P. L. R. 408=8 Lah. L. J. 359; 52 Ind. Cas. 157; A. I. R. 1935 Rang. 489; 9 Bur. L. T. 199=34 Ind. Cas. 125; 9 Bur. L. T. 89=33 Ind. Cas. 124. If an objector or a claimant wants to get rid of an order that has been passed against him in the removal of attachment case, he must do so by instituting a suit within the time allowed by law asking for a declaration of his title to the property in suit. He must impeach the validity of the order directly as a plaintiff and not indirectly as a defendant. 156 Ind. Cas. 586=A. I. R. 1935 Rang. 161.

**Party.**—A judgment-debtor not party to the claim proceedings does not become so by reason solely of his being the judgment-debtor. A. I. R. 1924 All. 302=46 A. 45=21 A. L. J. 770=77 Ind. Cas. 82; see also 144 Ind. Cas. 524=A. I. R. 1933 Lah. 573. On the death of a decree-holder, his representatives should be made parties. A. I. R. 1922 Lah. 78=16 P. L. R. 1922=64 Ind. Cas. 359. So also claimant's representatives should be made parties where the suit is by decree-holder. A. I. R. 1921 Cal. 101=33 C. L. J. 201=25 C. W. N. 544=62 Ind. Cas. 348. Where property is sold by auction after rejecting the objection, decree-holder is not a necessary party to the suit against auction purchaser. A. I. R. 1927 Lah. 631=103 Ind. Cas. 763; see also A. I. R. 1923 Mad. 58=16 L. W. 330=1922 M. W. N. 674=32 M. L. T. 124=70 Ind. Cas. 168; A. I. R. 1928 Nag. 65=105 Ind. Cas. 799. Auction purchaser is a necessary party. A. I. R. 1935 Pesh. 29.



A judgment-debtor or his Official Receiver when not a party to the claim proceedings is not bound by any order passed on the claim petition, nor can he take advantage of such order to defeat the sale executed by the judgment-debtor on the ground that the suit was not brought within one year from the order. 110 Ind. Cas. 511 (Mad). Attaching creditor whose attachment is raised on objection from transferee can institute suit without impleading other creditors of judgment-debtors. 133 Ind. Cas. 118=32 P. L. R. 201=A. I. R. 1931 Lah. 430. For a suit under this rule the judgment-debtor's legal representatives are necessary parties. A. I. R. 1937 Rang. 249. A was declared insolvent and the creditor firm attached and brought to sale his one-third share which he had inherited from his mother. The daughter objected under Order 21, rule 58, on the ground that she was a mortgagee of the whole property from the mother. Her objection was upheld and the insolvent's share was sold subject to her mortgage. She filed a suit under her mortgage whereupon the creditor firm objected to the mortgage and also brought a suit under Order 21, rule, 63, for a declaration that the mortgage was collusive and without consideration. It was contended that the creditor firm had no *locus standi* and could not be allowed to challenge the mortgage as being without consideration. *Held* that the firm by purchasing land at the Court auction succeeded to the rights of insolvent in his mother's property and the insolvent being the representative of his mother, the firm was also a representative of the mother and there had a right to challenge the mortgage and to assert that it was a sham and collusive transaction and without consideration. A. I. R. 1936 Rang. 2=161 Ind. Cas. 342. In a suit by a defeated claimant, the decree-holder is a necessary party. A. I. R. 1936 Pesh. 189=165 Ind. Cas. 252. Plaintiff obtained a decree against respondents 3 and 4 and in execution of the decree attached certain property. Respondents 1 and 2 objected to the attachment and their objection was upheld and the attachment removed. Plaintiff filed a declaratory suit under Order 21, rule 63, against the objectors and in the same suit joined respondents 3 and 4 as defendants: *Held* that the respondents 3 and 4 were possible and proper parties to the suit though not necessary parties. A. I. R. 1936 Rang. 56=161 Ind. Cas. 950. Where a suit is brought under Order 21, rule 63, by an attaching creditor to establish his right to attach and to bring to sale certain property by avoiding a transfer of the property, on the ground that it has been made with intent to defeat or delay the creditors of the transferor, it is the duty of the trial Court to see that the suit is brought in a representative capacity and it can if such a suit is brought by one creditor in his individual capacity, direct the plaintiff to take proper steps to put matters right. A. I. R. 1936 Rang. 117=14 Rang. 81=161 Ind. Cas. 887; see also A. I. R. 1934 Rang. 332=12 Rang. 670. Where a claimant's interest accrues after attachment and his claim is dismissed on that ground, his right is not affected in any way. A. I. R. 1934 Pat. 511=152 Ind. Cas. 902.

**Limitation.**—Limitation for suit to set aside an order under r. 58 is one year, even if that order is passed without investigation and not on merits. A. I. R. 1923 Nag. 69=69 Ind. Cas. 522; see also A. I. R. 1923 Nag. 187=6 N. L. J. 66=19 N. L. R. 34=71 Ind. Cas. 404; A. I. R. 1927 Bom. 234=29 Bom. L. R. 285=101 Ind. Cas. 335; 40 C. W. N. 146=165 Ind. Cas. 84. The limitation runs from the date of order passed under rule 58. A. I. R. 1927 Lah. 680=104 Ind. Cas. 289; A. I. R. 1929 Pat. 166=11 P. L. T. 28=115 Ind. Cas. 703; A. I. R. 1923 Nag. 187=19 N. L. R. 34=71 Ind. Cas. 404. The ordinary rule of law is that a party who is aggrieved by the attachment and sale of his property has a longer period of limitation within which to sue than that prescribed under Art. 11, Limitation Act, which is an exception to the general law and curtail the plaintiff's rights very considerably; consequently, if an order 21, rule 63, is intended to operate to the prejudice of any person, it should be concluded in clear and unambiguous terms, so that there can be no misapprehension as to exactly what is meant. A. I. R. 1937 Nag. 170. Where the order is an ambiguous order, such order is not against the claimant under this rule and as such Art. 11 of the Limitation Act has no application. 19 N. L. J. 308. Where a person has been actually in possession of certain properties adversely to the owner thereof the dismissal of a claim petition preferred by him under Order 21, r. 63, does not operate as an interruption of that adverse possession by operation of law, especially when the attachment is raised subsequently. 1936 M. W. N. 1113=44 L. W. 617. A suit is not barred under article 11 where person acts in two capacities

in two proceedings. 158 Ind. Cas. 175=42 L. W. 215=1913 M. W. N. 524= A.I.R. 1935 Mad. 670=68 M. L. J. 120.

**Costs.**—Under s. 63, Court cannot allow the successful party in a regular suit to have his costs of the claim petition. A. I. R. 1925 Mad. 233=20 L. W. 557=35 M. L. T. 106=83 Ind. Cas. 89; see also 37 Ind. Cas. 78=3 O. L. J. 529. In a regular suit the question of costs of the miscellaneous proceedings should also be dealt with. A. I. R. 1928 Rang. 245=6 Rang. 408=112 Ind. Cas. 285; see also A. I. R. 1929 Rang. 128=119 Ind. Cas. 213; 144 Ind. Cas. 315=A. I. R. 1933 Rang. 91.

**Appeal.**—A claimant under rule 58 cannot file an appeal or second appeal under s. 47. 3 L. W. 377=34 Ind. Cas. 759; see also 35 Ind. Cas. 6=38 A. 537=14 A. L. J. 722; 38 Ind. Cas. 152. If on an objection of a third party the application for execution is dismissed, the decree-holder can either bring a suit against objector or prefer an appeal. No revision can lie. 38 Ind. Cas. 299. Appeal from original side from order in claim case does not lie. 37 C. W. N. 641=60 C. 914=A. I. R. 1933 Cal. 715.

**Revision.**—Conclusive in rule 63, means “unappealable” and does not preclude revision in case of an order under r. 60, or r. 61 in proper cases. A. I. R. 1927 Nag. 286=10 N. L. J. 155=103 Ind. Cas. 12; see also 120 Ind. Cas. 735. High Court can interfere in revision even though remedy of suit is open. A. I. R. 1933 Rang. 259.

**Revival of Attachment.**—When the claim being allowed under Order XXI, rule 60, a property is released from attachment and a suit is brought by decree-holder as provided by r. 63, and decided in his favour the result is that the attachment is revived although the property was released from attachment. A. I. R. 1929 Cal. 524=57 C. 122=123 Ind. Cas. 737.

**Valuation.**—The plaint in a suit under rule 63 has to be charged with a fixed Court-fee of Rs. 10 and not with *ad valorem* Court-fee. 64 Ind. Cas. 49. The proper valuation for purposes of jurisdiction is the decree-amount and not the value of the property when it is higher than the decree-amount. 38 A. 72=13 A. L. J. 1104=31 Ind. Cas. 879; but see A. I. R. 1929 Mad. 323=56 M. L. J. 589=119 Ind. Cas. 46; 137 Ind. Cas. 55=A. I. R. 1932 Rang. 20.

### *Sale generally.*

**64. [S. 284.]** Any Court executing a decree may order that any property

Power to order property attached to be sold and proceeds to be paid toperson entitled.

attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

**Soope.**—Attachment is a condition precedent for sale. A. I. R. 1930 Mad. 414=120 Ind. Cas. 863; 42 Ind. Cas. 259; but see A. I. R. 1931 Cal. 35=57 C. 1206=129 Ind. Cas. 779; A. I. R. 1923 Pat. 45=3 P. L. T. 765=2 Pat. 207=68 Ind. Cas. 363; 64 Ind. Cas. 420=A. I. R. 1922 Nag. 267=18 N. L. R. 152=4 N.L.J. 118=63 Ind. Cas. 420. Sale is valid where proclamation contains correct number, no matter writ of attachment states wrong one. A. I. R. 1931 Cal. 35=57 C. 1206=129 Ind. Cas. 779. Proceedings if not objected to on notice of sale proclamation cannot be questioned at sale. A. I. R. 1930 Lah. 685=121 Ind. Cas. 369. Where property attached by one Court but sold by different Court the sale is not invalid. A. I. R. 1929 Mad. 852=30 L. W. 649=125 Ind. Cas. 90. Attachment may be had before judgment. A. I. R. 1929 Cal. 818=33 C. W. N. 848=57 C. 67=A.I.R. 1929 Cal. 67=126 Ind. Cas. 43. Where there are two applications for sale in execution of two decrees of different decree-holders sale should be ordered first in case of application which is prior. 138 Ind. Cas. 686=A. I. R. 1933 Lah. 10. Money decree cannot be sold. 141 Ind. Cas. 37=11 Pat. 36=A. I. R. 1932 Pat. 349. Court in execution can sell any right and interest of judgment-debtor which he is competent to sell. A. I. R. 1931 Oudh 352=7 Luck. 111. The material date for determining the status of a defendant in execution as to whether he is an agriculturist or not, under the Dekhkhana Agriculturists' Relief Act, is the date of the order for sale under Order 21, rule 64, C. P. Code, and not the date of the order

subsequently made after notice under Order 21, rule 66. 152 Ind. Cas. 589=A. I. R. 1934 Bom. 383=36 Bom. L. R. 804. The absence of an attachment is an irregularity but does not render the sale absolutely void. 151 Ind. Cas. 382=A. I. R. 1934 Rang. 188.

**65. [S. 286.]** Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf, and shall be made by public auction in manner prescribed.

*N. B.*—For local amendments in C. P., and Rangoon.—*Vide infra*.

**Scope.**—Sale is complete when property is knocked down to highest bidder. 131 Ind. Cas. 227=A. I. R. 1931 Lah. 78; A. I. R. 1936 Lah. 555. Bidders can be from a particular class of persons. A. I. R. 1927 Bom. 143=29 Bom. L. R. 102=100 Ind. Cas. 1008. Where sale is made under direction of officer not entrusted with sale, but subsequently the fact that the sale is made is recorded by proper officer, sale is invalid. A. I. R. 1928 Pat. 615=8 Pat. 122=9 P. L. T. 627=113 Ind. Cas. 681. According to the Rangoon High Court, highest bid need not be accepted by the Judge for the completion of the sale. A. I. R. 1929 Rang. 311=7 Rang. 425=120 Ind. Cas. 142.

**66. [S. 287.]** (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as farly and accurately as possible—

- (a) the property to be sold;
- (b) the revenue assessed upon the estate, or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;
- (c) any incumbrance to which the property is liable;
- (d) the amount for the recovery of which the sale is ordered; and
- (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

*N. B.*—For local amendments in C. P., Lahore, Peshwar and Rangoon.—*Vide infra*.

**Scope.**—Court must inquire all details required to be mentioned in sale proclamation from the judgment-debtor. A. I. R. 1928 Nag. 281=109 Ind. Cas. 443. Court can act on report of certain person. A. I. R. 1927 Mad. 943=105 Ind. Cas. 335. Failure to issue notice is material irregularity. A. I. R. 1927 Lah. 84=99 Ind. Cas. 515; but see A. I. R. 1926 Cal. 879. Failure to mention place of sale in sale proclamation is material irregularity. A. I. R. 1927 Rang. 84=5 Bur. L. J. 183=100 Ind. Cas. 74. Proceedings under rule 66 are administrative only. A. I. R. 1927 All. 208=99 Ind. Cas. 208. The time of sale which is required to be set out under sub-section (2) means the time at which the sale would begin. 1936 A. M. L. J. 13. Arrears of rates are statutory charges on the property according to the Calcutta Municipal Act. Such charges are to be mentioned in the sale proclamation under sub-section (2) (c). 63 C. 621. The failure to issue any proclamation at all does not *ipso facto* vitiate the sale. A. I. R. 1934 Rang. 188=151 Ind. Cas. 382. Where the

failure to pass a formal order under Order 5, rule 19, in respect of service of notice under Order 21, rule 66, is not material irregularity, it does not vitiate the sale. A. I. R. 1934 Lah. 985. Under rule 66 it is obligatory on the Court to issue a sale proclamation and in order to state the value of the property an enquiry is necessary. 37 Bom. L. R. 489=A. I. R. 1935 Bom. 331=159 Ind. Cas. 358; see also A. I. R. 1935 Cal. 614=158 Ind. Cas. 556. Where a property which is subject to a mortgage is not sold subject to the mortgage in execution of a decree, the auction purchaser can dispute its validity. A. I. R. 1935 Rang. 19. Arrears of rates due to the Corporation of Calcutta should be stated in the sale proclamation. 40 C. W. N. 41. Determination of question under rule 66 is unappealable. A. I. R. 1926 Cal. 1184=96 Ind. Cas. 567; A. I. R. 1927 All. 208=99 Ind. Cas. 208; A. I. R. 1926 All. 268=48 A. 260. Order under rule 66 coming under s. 47 is only appealable. A. I. R. 1926 Mad. 834=51 M. L. J. 135; A. I. R. 1926 Cal. 610=91 Ind. Cas. 819. Failure to publish sale proclamation is irregularity only. A. I. R. 1926 Cal. 577. Notice of sale proclamation is only necessary. A. I. R. 1926 Oudh 45=89 Ind. Cas. 107; see also A. I. R. 1924 All. 747=19 L. W. 585=76 Ind. Cas. 173. Omission to state time of sale in proclamation vitiates sale if loss is proved. 15 N. L. R. 125=51 Ind. Cas. 864. Notice issued under rule 66 is enough even for purpose of r. 22. A. I. R. 1921 Lah. 384=5 Lah. L. J. 67=118 P. L. R. 1920=55 Ind. Cas. 816. Failure to mention amount of revenue assessed vitiates sale proclamation. 28 C. W. N. 593=75 Ind. Cas. 546 (P. C.). Proclamation of sale is not rendered void for failure to mention plea of house. A. I. R. 1925 Oudh 150=80 Ind. Cas. 667. It is not incompetent to add minor's interest in joint-family in sale proclamation. A. I. R. 1929 B. 465=53 Bom. 777=31 Bom. L. R. 1115, onus of proof that notice was not properly served on judgment-debtor is on him. 145 Ind. Cas. 915=A. I. R. 1933 Pat. 640. Inquiry contemplated by rule is a summary one and need not be elaborate. 35 C. W. N. 907=136 Ind. Cas. 468=A. I. R. 1932 Cal. 141. Under this rule Court can grant interest up to the date of sale. A. I. R. 1932 Cal. 555=36 C. W. N. 404. Failure to apply under r. 66 (2) does not render sale void. A. I. R. 1930 Lah. 685=121 Ind. Cas. 369. Failure to raise objections regarding want of attachment if not raised at time of notice of settlement of proclamation would operate as *res judicata*. A. I. R. 1930 Mad. 414=120 Ind. Cas. 863. Both decree-holder and judgment-debtor must enquire into correctness of proclamation. 1929 A. L. J. 619=A. I. R. 1929 All. 704. Before order for sale can be passed application under rule 60 (3) for order for sale must be made. A. I. R. 1929 Nag. 305=106 Ind. Cas. 95. Failure to object even after notice debars judgment-debtor from raising objections subsequently. A. I. R. 1928 Cal. 328=32 C. W. N. 309. Failure to issue notice is irregularity in publishing sale proclamation within the meaning of Order XXI, r. 90. A. I. R. 1929 Nag. 130=25 N. L. R. 58=118 Ind. Cas. 49. The valuation in the sale proclamation is intended primarily for the protection of the judgment-debtor and for giving information to the bidders at the auction sale. 150 Ind. Cas. 757=15 Pat. L. T. 552=A. I. R. 1934 Pat. 345.

**Valuation.**—Where a sale proclamation and notice have been settled in a manner so as to include properties not included in the mortgage and the judgment-debtor with full knowledge allows such properties to be sold, an objection by the judgment-debtor subsequently that the whole proceeding has been vitiated and therefore the sale ought to be set aside and ought not to be allowed. 40 C. W. N. 428. Sale proclamation must state value of property. A. I. R. 1930 Nag. 191=124 Ind. Cas. 250; see also 35 C. W. N. 142=58 C. 577; A. I. R. 1930 Oudh 81=5 Luck. 481=6 O. W. N. 1085=124 Ind. Cas. 422; A. I. R. 1930 Cal. 781=52 C. L. J. 145=127 Ind. Cas. 257; A. I. R. 1929 Cal. 818=33 C. W. N. 848=57 C. 67=126 Ind. Cas. 43; A. I. R. 1924 Cal. 589=28 C. W. N. 552=83 Ind. Cas. 430; 1 P. L. W. 111=37 Ind. Cas. 372; A. I. R. 1934 Cal. 200; A. I. R. 1934 Cal. 204. Valuation at 20 times of revenue is no valuation at law. 3 Pat. L. J. 580=48 Ind. Cas. 141. Proclamation containing other than Court's valuation is wrong. 4 Pat. L. J. 37=47 Ind. Cas. 193; A. I. R. 1923 Pat. 445=73 Ind. Cas. 317. Court's valuation of property in preparing proclamation need not be accurate. A. I. R. 1922 Pat. 551=1 Pat. 214=75 Ind. Cas. 185. Incorrect valuation gives right to have sale set aside. A. I. R. 1924 Mad. 767=19 L. W. 585=76 Ind. Cas. 173; 55 A. 519=1933 A. L. J. 1273=A. I. R. 1933 A. 545. Valuation in proclamation is approximate only. A. I. R. 1926 Pat. 140=6 P. L. T. 859=92 Ind. Cas. 350. But failure to enter value of property in proclamation is not material irregularity. A. I. R. 1927 Mad. 1009=106 Ind. Cas. 201; 106 Ind. Cas. 138=A. I. R. 1928 Mad. 398; 109 Ind. Cas. 443; 70 Ind. Cas. 308; A. I. R. 1932 All. 664. Order fixing upset price is unappealable. A. I. R.

1928 Mad. 1169=114 Ind. Cas. 652. Refusal to change value or to adjourn sale being an administrative order is unappealable. A. I. R. 1928 Bom. 245=52 B. 444=30 Bom. L. R. 679=111 Ind. Cas. 892. Court need not state its value in sale proclamation. A. I. R. 1928 Mad. 503=51 M. 655=27 L. W. 577=55 M. L. J. 363=109 Ind. Cas. 698. Fixing upset price before fixed date is without jurisdiction. A. I. R. 1923 Pat. 102=3 P. L. T. 342=65 Ind. Cas. 360 ; see also A. I. R. 1923 Mad. 619=44 M. L. J. 599=72 Ind. Cas. 836. Failure to attend and settle terms does not preclude judgment-debtor from impeaching liability of property for attachment. A. I. R. 1924 Mad. 1=46 M. 1=45 M. L. J. 346=74 Ind. Cas. 155. But failure to assist Court in estimating valuation after notice for settling sale proclamation operates as estoppel. A. I. R. 1924 Pat. 111=1923 Pat. 283=4 P. L. T. 721=74 Ind. Cas. 838. Where valuation of property cannot be ascertained by Court, the valuation given by the decree-holder as well as the judgment-debtor may be mentioned. 35 C. W.N. 142=132 Ind. Cas. 687=58C. 577=A. I. R. 1931 Cal. 520 ; see also 35 C. W. N. 907=A. I. R. 1932 Cal. 141 ; 37 C. W. N. 231=60 C. 581=A. I. R. 1933 Cal. 511. Order as regards valuation is not appealable. A. I. R. 1932 All. 136=1931 A. L. J. 1084. As regards valuation of leasehold, *vide* A. I. R. 1934 Lah. 146=149 Ind. Cas. 104.

**Income of the property.**—Sale proclamation need not mention the income of the property. A. I. R. 1930 Lah. 692=122 Ind. Cas. 234 ; A. I. R. 1928 Lah. 918=110 Ind. Cas. 339 ; 39 Ind. Cas. 59=11 P. L. R. 1917.

**Description of property.**—Misdescription of property is no ground for invalidating sale, if property could be identified otherwise. A. I. R. 1929 Cal. 409=33 C. W. N. 305=56 C. 902=120 Ind. Cas. 151. Property should be so described as to identify it. A. I. R. 1928 Pat. 615=8 Pat. 122=9 P. L. T. 627=113 Ind. Cas. 681. Purchaser takes the risk if property does not answer description unless sale is vitiated by fraud. 9 Bur. L. T. 169=8 L. B. R. 527=33 Ind. Cas. 1003.

**Encumbrance.**—Proclamation should not specify mere alleged encumbrance. 134 Ind. Cas. 746=9 Rang. 367=A. I. R. 1931 Rang. 301. Court can only notify but cannot order sale subject to prior encumbrance. 132 Ind. Cas. 767=8 O. W. N. 179=A. I. R. 1931 Oudh 157. Omission to mention encumbrances in sale proclamation cannot be by itself injurious to judgment-debtor. 143 Ind. Cas. 673=55 A. 519=1933 A. L. J. 1273=A. I. R. 1933 All. 546 ; see also 140 Ind. Cas. 494=A. I. R. 1932 All. 369. Where reasonable particulars of encumbrances are given, exact amount need not be given. A. I. R. 1934 Mad. 260. In a suit by subsequent mortgagee prior mortgage may be shown in sale proclamation. A. I. R. 1921 Oudh 88=5 O. W. N. 210=110 Ind. Cas. 79. It is sufficient if the sale proclamation mentions the encumbrances and the other details relating thereto. It is not necessary that the amount of interest should be calculated actually and the figure given. 66 M. L. J. 464=A. I. R. 1934 Mad. 260=39 L. W. 396=1934 M. W. N. 123=150 Ind. Cas. 1134.

**Other information.**—Court is justified in giving information material for judging the nature and value of property. 136 Ind. Cas. 47=1931 M. W. N. 1162=61 M. L. J. 683=56 M. 205=A. I. R. 1932 Mad. 119. High Court will not interfere where Judge has used his discretion fairly under Order 21, rule 66 (2) (e). 139 Ind. Cas. 225=36 C. W. N. 347=A. I. R. 1932 Cal. 576. Omission to specify time and place of sale by proclamation constitutes material irregularity in conduct of sale. A. I. R. 1937 All. 407.

67. [S. 289.] (1) Every proclamation shall be made and published, as nearly as may be, in the manner prescribed by

Mode of making proclamation. rule 54, sub-rule (2).

(2) Where the Court so directs, such proclamation shall also be published in the "official Gazette,"\* or in a local newspaper or in both, and the costs of such publication shall be deemed to be costs of the sale.

(3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot unless proper notice of the sale cannot, in the opinion of the Court, otherwise be given.

\* Substituted by G. I. Order of 1937.

**Local amendment in Burma.**—For “official Gazette” read “Gazette.”

**Scope.**—A proclamation affixed to one of the properties is quite sufficient. A. I. R. 1930 Lah. 685=121 Ind. Cas. 369. Failure to publish sale proclamation by beat of drum where it is possible is material irregularity. 1933 A. L. J. 73=55 A. 182=A. I. R. 1933 A. 147. For publication of proclamation, no particular period is required to be elapsed. 140 Ind. Cas. 732=36 C. W. N. 242=A. I. R. 1922 Cal. 627.

68. [S. 290.] Save in the case of property of the kind described in the proviso to rule 43, no sale hereunder shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immovable property, and of at least fifteen days in the case of movable property, calculated from the date on which the copy of the proclamation has been affixed on the Court-house of the Judge ordering the sale.

*N.B.*—For local amendments in Allahabad, Lahore, Oudh and Peshwar.—*Vide infra.*

**Scope.**—Where a sale takes place 29 days after sale proclamation in Court, it was not illegality but a material irregularity and the sale cannot be set aside unless substantial injustice resulted. A. I. R. 1924 Nag. 293=78 Ind. Cas. 746; see also 20 I. R. 176=21 C. 66; 31 C. 385; 68 Ind. Cas. 363=3 P. L. T. 765=A. I. R. 1923 Pat. 45=2 Pat. 207; 145 Ind. Cas. 125=A. I. R. 1933 Lah. 186; but see 16 C. 794; 17 C. 769 (F. B.).

69. [S. 291.] (1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such adjournment :

Provided that, where the sale is made in, or within the precincts of the Court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1), for longer period than seven days, a fresh proclamation under rule 61 shall be made, unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

*N.B.*—For local amendments in Allahabad, Bombay, C. P., Lahore, Oudh, Peshwar and Rangoon.—*Vide infra.*

**Scope.**—Omission to state date and hour of adjourned sale vitiates sale. A. I. R. 1930 All. 540=1930 A. L. J. 1062=124 Ind. Cas. 721; see also 19 N. L. J. 103. Hour of adjourned sale may be presumed to be same but date of hour should be fixed. A. I. R. 1928 Mad. 823=110 Ind. Cas. 779. Holding of sale on day to which it was not adjourned is material irregularity. A. I. R. 1921 Cal. 597=35 C. L. J. 140=65 Ind. Cas. 746. Omission of fresh proclamation after adjournment is irregularity. A. I. R. 1928 Pat. 615=8 Pat. 122=113 Ind. Cas. 681; see also A. I. R. 1928 Oudh 98=2 Luck. 490=4 O. W. N. 273=100 Ind. Cas. 787; 43 A. 433=60 Ind. Cas. 763=19 A. L. J. 262; A. I. R. 1923 Rang. 154=2 Bur. L. J. 54=75 Ind. Cas. 343; 3 P. L. W. 357=41 Ind. Cas. 63. Omission to announce hour fixed for sale is material irregularity. A. I. R. 1927 All. 241=49A. 405=25 A. L. J. 302=99 Ind. Cas. 926. Successive adjournments beyond seven days is mere irregularity. A. I. R. 1929 Mad. 24=117 Ind. Cas. 727. Where with the hope of higher bid the property is kept under hammer for 12 days, it is a continuous sale and rule 69 (2) does not apply. A. I. R. 1927 Pat. 313=6 Pat. 432=8 P. L. T. 796=104 Ind. Cas. 315. Where a sale has taken place without communication of the order of stay the sale is good and not a nullity. A. I. R. 1930 Lah. 17=11 Lah. L. J. 457=125 Ind. Cas. 53. This rule does not apply where sale is postponed on the ground

that the decree has been satisfied. A. I. R. 1923 Pat. 572=4 P. L. T. 495=75 Ind. Cas. 676. Sale by *amin* in ignorance of postponement order by Court is nullity. A. I. R. 1921 All. 102=19 A. L. J. 225=62 Ind. Cas. 687. Order under rule 69 is only interlocutory. A. I. R. 1924 Mad. 234=46 M. L. J. 71=18 L. W. 615=(1923) M. W. N. 894=75 Ind. Cas. 901. Where sale is adjourned, without reasons being recorded, it amounts to material irregularity. 140 Ind. Cas. 499=1932 A. L. J. 357=A. I. R. 1932 All. 369. So also when it is adjourned and no time is specified, it is material irregularity. *Ibid*; see 143 Ind. Cas. 673=55 A. 519=1933 A. L. J. 1273=A. I. R. 1933 All. 546; 37 C. W. N. 622=A. I. R. 1933 Cal. 662. This rule does not refer to a case where sales on the same sale list held in accordance with the rules of the Court continue beyond the first day. A. I. R. 1937 Pat. 386. Rule 69 of Order 21 is very general and there is nothing to prevent the Court adjourning the sale at the request of the third party. A. I. R. 1935 Mad. 295=41 L. W. 192=156 Ind. Cas. 492=1935 M. W. N. 200. Rule 69 (1) only provides that where the Court adjourns a sale the Court should specify the day and hour, but it does not provide that the officer making the adjournment should also specify the hour. A. I. R. 1935 All. 182=153 Ind. Cas. 410. Where the executing Court makes an order postponing the sale but the sale has been effected before such order reached the officer conducting it, the Court is justified in setting aside the sale on the ground that the sale could not be legally held after the Court has passed an order postponing it. A. I. R. 1935 Lah. 694.

**Clause (3).**--Notice to the clerk in the Collector's office is not sufficient notice to the Collector that the amount has been paid into Court. It is the officer conducting the sale who has to be satisfied as to that or to when the full amount must be tendered. A. I. R. 1935 Lah. 694.

**70. [S. 287, last para.]** Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree has been transferred to the Collector.

**Scope.**--*Vide*. A. I. R. 1929 Oudh 235=6 O. W. N. 226=4 Luck. 635=117 Ind. Cas. 431.

**71. [S. 293.]** Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

**Scope.**--Defaulting purchaser is answerable for loss on re-sale if his bid is finally accepted by Court. A. I. R. 1929 Lah. 673=118 Ind. Cas. 901; A. I. R. 1925 Mad. 631=21 L. W. 232=87 Ind. Cas. 1; A. I. R. 1924 Mad. 476=46 M. L. J. 134=34 M. L. T. 358=78 Ind. Cas. 296; 42 M. 776=37 M. L. J. 274=(1919) M. W. N. 784=54 Ind. Cas. 805; 43 Ind. Cas. 685=41 M. 474=34 M. L. J. 156=23 M. L. T. 9=(1918) M. W. N. 1121. Defaulting purchaser is not liable for deficiency if re-sale is not held forthwith. A. I. R. 1929 Lah. 714=121 Ind. Cas. 189; 88 Ind. Cas. 131=12 O. L. J. 261=2 O. W. N. 212=A. I. R. 1925 Oudh 397; see also A. I. R. 1922 All. 200=20 A. L. J. 105=40 A. 266=65 Ind. Cas. 815 (F. B.); 45 P. W. R. 1916=32 Ind. Cas. 407. Remedy under this rule is not exhaustive. (1919) Pat. 210=50 Ind. Cas. 59. Defaulting purchaser is liable for interest only from date of order to pay. A. I. R. 1924 Mad. 476=49 M. L. J. 134=19 L. W. 197=78 Ind. Cas. 296. Certificate under rule 71 as to deficiency can be executed and attached as decree. A. I. R. 1926 All. 379=24 A. L. J. 385=95 Ind. Cas. 1033. Order concerning liability to pay deficit is appealable. A. I. R. 1927 Nag. 112=23 N. L. R. 14=100 Ind. Cas. 691. In execution of a decree for deficiency defaulting purchaser becomes judgment-debtor. A. I. R. 1926 Mad. 872=49 M. 570=97 Ind. Cas. 86. Decree-holder means decree-holder who brings property to sale. A. I. R. 1926 Mad. 672=49 M. 570=97 Ind. Cas. 86. Where deficit is less than Rs. 500, no second appeal lies. A. I. R. 1921 Bom. 229=45 B. 223=22 Bom. L. R. 1193=59 Ind. Cas. 192. This rule applies to insolvency proceedings. A. I. R. 1921 Nag. 25=17 N. L. R. 49=62 Ind. Cas. 307. Separate suit cannot lie to set aside order under rule 71. A. I. R. 1925

Oudh 360=12 O. L. J. 80=2 O. W. N. 141=29 O. C. 18=87 Ind. Cas. 284. Misdescription of property by decree-holder is fraud and defaulting purchaser is not liable for deficit. A. I. R. 1929 Oudh. 294=6 O. W. N. 407=4 Luck. 814=118 Ind. Cas. 833 ; see also 134 Ind. Cas. 692=33 Bom. L. R. 750=A. I. R. 1931 B. 367. Deficiency is not recoverable by officer holding sale. 134 Ind. Cas. 692=33 Bom. L. R. 750=A. I. R. 1931 Bom. 367. Where deficiency is certified but not in prescribed form, deficiency can be recovered. 141 Ind. Cas. 367=29 N. L. R. 52=A. I. R. 1933 Nag. 123. The decree-holder who can recover the deficiency in price resulting on re-sale by reason of the purchaser's default under rule 71 is not any decree-holder of the judgment-debtor or any decree-holder who is entitled to share ratably under s. 73, but no decree-holder who brings the property to sale. A. I. R. 1936 Oudh 277=1936 O. W. N. 559=163 Ind. Cas. 175.

72. [S. 294.] (1) No holder of a decree in execution of which Decree-holder not to bid for property is sold shall, without the express or buy property without permission of the Court, bid for or purchase the property.

(2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree Where decree-holder purchases, amount of decree may be taken as payment. may, subject to the provisions of section 73, be set off against one another, and the Court executing the decrees shall enter up satisfaction of the decree in whole or in part accordingly.

(3) Where a decree-holder purchases by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale ; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder.

*N. B.*—For local amendments in Allahabad, Bombay, Oudh, Peshwar and Rangoon.—*Vide infra.*

**Scope.**—Rule 72 (1) does not apply to U. P. A. I. R. 1927 All. 681=25 A. L. J. 891=103 Ind. Cas. 293. Decree-holder is deemed to be permitted to bid under the rule if actually allowed to bid at sale. A. I. R. 1927 Pat. 312=6 Pat. 432=8 P. L. T. 706=104 Ind. Cas. 315. Purchase without permission under the rule is mere voidable. A. I. R. 1927 Mad. 1135=101 Ind. Cas. 89 ; see also 41 B. 857=39 Ind. Cas. 3=19 Bom. L. R. 75 ; A. I. R. 1923 Cal. 302=27 C. W. N. 208=37 C. L. J. 403=75 Ind. Cas. 196 ; A. I. R. 1922 P. C. 336=24 A. L. J. 23=49 I. A. 312=27 C. W. N. 294=44 M. L. J. 718=25 Bom. L. R. 680=67 Ind. Cas. 914 (P. C.) ; 62 Ind. Cas. 854=A. I. R. 1921 Mad. 402=13 L. W. 616=(1921) M. W. N. 535. Decree-holder bidding with permission at Court at auction sale is in the position of ordinary purchaser. 142 Ind. Cas. 595=10 O. W. N. 1=8 Luck. 233=A. I. R. 1933 Oudh 124. Order 21, rule 72, provides that the decree-holder can himself bid for and purchase the property unless debarred by an order of the Court. Where therefore the officer in charge of the sale proceedings dishonestly sent away the decree-holder in order that he should not be in a position to raise the bids there is a serious irregularity in the conduct of the sale resulting in loss to the decree-holder. A. I. R. 1934 Oudh. 94=11 O. W. N. 116. The executing Court has power under this rule to impose a condition to the permission given to the decree-holder to bid at an execution sale, that he must bid up to that amount. 39 C. W. N. 1293. The decretal amount is set off against the purchase price automatically by operation of law and no order of the Court is necessary in order that the respective amounts may be set off against each other. A. I. R. 1935 Lah. 690 ; see also 59 B. 310=37 Bom. L. R. 78=A. I. R. 1935 Bom. 176 ; A. I. R. 1935 Mad. 907. Exemption to decree-holder from making deposit of 25 p. c. of purchase money, under rule 84 (2), need not be expressed and is necessarily implied if permission is granted to him under rule 72 to bid. A. I. R. 1931 Lah. 78=131 Lah. 387=121 Ind. Cas. 227. Order for set-off under the rule is possible only after sale has taken place. A. I. R. 1931 Bom. 252=33 Bom. L. R. 503. Decree-holder purchaser must pay poundage as part of execution costs. A. I. R. 1929 All. 266=(1929) A. L. J. 243=118 Ind. Cas. 378. Even permission granted to decree-holder to set off purchase money against decretal



amount does not affect right of rival decree-holder to distribute under s. 73. 12 L. W. 328=59 Ind. Cas. 86; see also A. I. R. 1930 Cal. 761=52 C. L. J. 19=129 Ind. Cas. 776; A. I. R. 1931 Bom. 252=33 Bom. L. R. 503; 1933 A. L. J. 1102=A. I. R. 1933 All. 666; A. I. R. 1931 Bom. 350=55 B. 473=33 Bom. L. R. 537=133 Ind. Cas. 817; 130 Ind. Cas. 458=A. I. R. 1931 Mad. 103=1930 M. W. N. 568=130 Ind. Cas. 458. Sale cannot be upheld where Receiver purchases property at auction sale as decree-holder. 139 Ind. Cas. 186=36 C. W. N. 125=55 C. L. J. 85=59 C. 956=A. I. R. 1932 Cal. 672. Set-off should be deemed to be made as soon as sale is made and other decree-holders cannot claim ratable distribution in the amount of bid. 145 Ind. Cas. 975=1933 M. W. N. 1145=38 M. L. W. 529=65 M. L. J. 569=A. I. R. 1933 Mad. 804. Order refusing to execute order granting ratable distribution is appealable. 133 Ind. Cas. 166=12 P. L. T. 477=10 Pat. 830=A. I. R. 1931 Pat. 359. Where decree-holder has been allowed to bid upto decretal amount need not offer decretal amount plus costs of sale. 145 Ind. Cas. 158=A. I. R. 1933 Rang. 151=6 R. R. 26. Where decree-holder does not bid upto price mentioned in sale proclamation, Court cannot dismiss execution. A. I. R. 1934 Pat. 345. Where proceedings are transferred to Collector, decree-holder can apply to him for leave to bid but should apply to Court for set-off under rule 72. 44 Bom. L. R. 346=22 Bom. L. R. 106=55 Ind. Cas. 527. *Benami* purchase by decree-holder without leave is also voidable at the instance of judgment-debtor. 44 B. 352=22 Bom. L. R. 296=36 Ind. Cas. 349.

**73. [S. 292.]** No officer or other person having any duty to perform in connexion with any sale shall, either directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

Notes.—*Vide* A. I. R. 1924 Lah. 70=40 P. L. R. 1922=69 Ind. Cas. 718.

#### *Sale of Movable Property.*

**74. [New.]** (1) Where the property to be sold is agricultural produce, the sale shall be held,—

(a) if such produce is a growing crop, on or near the land on which such crop has grown, or

(b) if such produce has been cut or gathered, at or near the threshing-floor or place for treading out grain or the like or fodder stack on or in which it is deposited :

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage.

(2) Where, on the produce being put up for sale,—

(a) a fair price, in the estimation of the person holding the sale, is not offered for it, and

(b) the owner of the produce or a person authorized to act in his behalf applies to have the sale postponed till the next day or, if a market is held at the place of sale, the next market-day, the sale shall be postponed accordingly and shall be then completed, whatever price may be offered for the produce.

**75. [New.]** (1) Where the property to be sold is a growing crop and the Special provisions relating to growing crops. crop from its nature admits of being stored but has not yet been stored, the day of the sale shall be so fixed as to admit of its being made ready for storing before the arrival of such day, and the sale shall not be held until the crop has been cut or gathered and is ready for storing.

(2) Where the crop from its nature does not admit of being stored, it may be sold before it is cut and gathered, and the purchaser shall be entitled to enter on the land, and to do all that is necessary for the purpose of tending and cutting or gathering it.

*N. B.*—For local amendments in C. P., Oudh, Peshwar and Punjab.—*Vide infra.*

76. [S. 296.] Where the property to be sold is a negotiable instrument or a share in a corporation, the Court may, instead of directing the sale to be made by public auction, authorize the sale of such instrument or share through a broker.

77. [S. 297.] (1) Where movable property is sold by public auction the price of each lot shall be paid at the time of sale or as soon after as the officer or other person holding the sale directs, and in default of payment the property shall forthwith be re-sold.

(2) On payment of the purchase-money, the officer or other person holding the sale shall grant a receipt for the same, and the sale shall become absolute.

(3) Where the movable property to be sold is a share in goods belonging to the judgment-debtor and a co-owner, and two or more persons, of whom one is such co-owner, respectively bid the same sum for such property or for any lot, the bidding shall be deemed to be the bidding of the co-owner.

78. [S. 298.] No irregularity in publishing or conducting the sale of movable property shall vitiate the sale; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation or (if such other person is the purchaser), for the recovery of the specific property and for compensation in default of such recovery.

Scope.—On sale of movable property it automatically becomes absolute. A.I.R. 1930 Lah. 236=3 P. L. R. 241=115 Ind. Cas. 70; see also A. I. R. 1930 All. 513=124 Ind. Cas. 48. Under the rule irregularity in publishing or conducting sale of movable property does not vitiate sale. 119 Ind. Cas. 285 (All).

79. [Ss. 299, 300, 301.] (1) Where the property sold is movable property of which actual seizure has been made, it shall be delivered to the purchaser.

(2) Where the property sold is movable property in the possession of some person other than the judgment-debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court, prohibiting the creditor from receiving the debt or any interest thereon, and the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from permitting any such transfer or making any such payment to any person except the purchaser.

Scope.—Simple mortgage-deed can be sold under the rule. A. I. R. 1924 All. 976=46 A. 917=22 A. L. J. 840=80 Ind. Cas. 890. This rule does not compel a company to accept purchaser of shares at Court sale as the transferee. 41 B. 76=18 Bom. L. R. 982=37 Ind. Cas. 669.

80. [S. 302.] (1) Where the execution of a document or the endorsement of the party in whose name a negotiable instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf

may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party.

(2) Such execution or endorsement may be in the following form, namely :—

A. B. by C. D., Judge of the Court of (*or as the case may be*), in a suit by E. F. against A. B.

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same ; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself.

**Scope.**—To entitle purchaser at auction of share to the share, execution of transfer by Court under this rule which is permissive is not necessary in every case but only where execution is required for transfer. A. I. R. 1928 Mad. 571=(1928) M. W. N. 442=28 L. W. 932=111 Ind. Cas. 225.

81. [S. 303.] In the case of any movable property not hereinbefore provided for, the Court may make an order vesting such property in the purchaser or as he may direct ; and such property shall vest accordingly.

*N. B.*—For local amendment in Burma.—*Vide infra*.

**Scope.**—Mortgagee of movables cannot follow the same into hands of auction purchaser. A. I. R. 1925 Rang. 303=4 Bur. L. J. 135=92 Ind. Cas. 370. Rule 81 is subject to accepted principle that Court's or its officer's acts should prejudice none. A. I. R. 1924 Mad. 324=45 M. L. J. 849=47 M. 543=1923 M. W. N. 811=33 M. L. T. 106=79 Ind. Cas. 651.

### *Sale of Immoveable Property.*

82. [S. 304.] Sales of immovable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

83. [S. 305.] (1) Where an order for the sale of immovable property has been made, if the judgment-debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or lease or private sale of such property, or some part thereof, or of any other immovable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.

(2) In such case the Court shall grant a certificate to the judgment-debtor authorizing him within a period to be mentioned therein, and notwithstanding anything contained in section 64, to make the proposed mortgage, lease or sale :

Provided that all monies payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but, save in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court :

• Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the Court.

(3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property.

**Scope**—Alienations under Order 21, rule 83, are the "acts of the judgment-debtor alone" and clearly therefore fall under the terms "private transfer" under s. 64. A. I. R. 1934 Mad. 727=67 M. L. J. 741=40 L. W. 720. Where the permission granted to the judgment-debtor under Order 21, rule 83, was qualified and was known to the prospective purchaser the mere fact that there was an arrangement made between her and the judgment-debtor fixing a certain sum as the sale consideration in case the sale was sanctioned by the Court, did not give her any legal rights which were adversely affected by the order cancelling the permission given under Order 21, rule 83. A. I. R. 1934 Pesh. 76. Where immovable property under attachment was sold by the judgment-debtor after obtaining permission of the executing Court under rule 83 and the executing Court had given permission to judgment-debtor to satisfy the decree-holder out of the sale proceeds and out of sale proceeds of the property re-attached, the judgment-debtor kept the balance with him after satisfying some decree-holders and the purchaser filed a suit to set aside the attachment and the sale was upheld by the trial Court on certain conditions and the lower appellate Court held the sale void on second appeal: *Held* that the trial Court's order to uphold the sale on the payment by the purchaser of the balance left with himself is legal and equitable. That which granting permission under rule 83 the executing Court ought to have ordered the judgment-debtor to deposit entire sale proceeds. A. I. R. 1935 Lah. 481. Discretion is properly exercised in refusing certificate for private sale, after allowing sufficient time. A. I. R. 1921 Lah. 384=2 U. P. L. R. (Lah) 9=118 P. L. R. 1920=5 Lah. L. J. 67=45 Ind. Cas. 816. Rule 83 and para 11, Sch. III, are entirely independent and uncontrolled by each other. A. I. R. 1921 Oudh 176=8 O. L. J. 358=66 Ind. Cas. 642. For private alienation under the rule reference to prior incumbrancer is not at all necessary. A. I. R. 1924 Lah. 134=5 Lah. L. J. 279=76 Ind. Cas. 529. Time allowed under mortgage-decree for payment cannot be extended under this rule. A. I. R. 1924 Mad. 234=46 M. L. J. 71=1923 M. W. N. 894=75 Ind. Cas. 901. No special form under r. 83 is necessary for Collector's written permission under the rule. A. I. R. 1921 Oudh 176=8 O. L. J. 358=66 Ind. Cas. 642. Where case falls both under Order XXI, r. 83 and s. 29, Guardian and Wards Act, procedure under both must be followed. A. I. R. 1922 Cal. 150=49 C. 911=28 C. W. N. 57=36 C. L. J. 326=70 Ind. Cas. 990. Order under r. 83 is appealable. 109 Ind. Cas. 524. Mortgage decrees are exempt from operation of the rule because right of sale is specifically provided in decree independently of attachment. A. I. R. 1921 Lah. 384=118 P. L. R. 1921=2 U. P. L. R. 91=5 Lah. L. J. 67=55 Ind. Cas. 816.

**Appeal**.—No appeal lies from a decision under Order 21, rule 83, C. P. Code, refusing to postpone the sale of the property. A. I. R. 1937 Pesh. 64. An order refusing the judgment-debtor's application to postpone the sale of his property under this rule does not amount to the decision of the case but the order is essentially of an interlocutory nature. Hence an appeal from such an order cannot be treated as revision application. *Ibid.*

84. [S. 306] (1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty-five per cent. on the amount of his purchase money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be re-sold.

(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase money under rule 72, the Court may dispense with the requirements of this rule.

*N. B.*—For local amendment in Oudh.—*Vide infra.*

**Scope**.—Failure to deposit 25 p. c. of purchase money immediately is only irregularity which does not affect validity of sale unless substantial injury is caused to judgment-debtor. 144 Ind. Cas. 314=10 O. W. N. 440=A. I. R. 1933 Oudh 345. It is essential for the auction purchaser to deposit 25 per cent. whether he was the decree-holder or not. If he was the decree-holder, he ought to ask the Court to dispense with that obligation but if he failed to do so the natural

consequence would be that the sale would not be complete. A. I. R. 1934 Pesh. 25. But the provisions of rule 84 are to be read along with rule 72. If the decree-holder's application for set-off, is pending and the decree-holder is not called upon to deposit, the sale is not a nullity because 25 per cent. of the purchase money has not been deposited by the decree-holder at the time of the sale. A. I. R. 1934 Pat. 329=150 Ind. Cas. 733. In case of bid under misrepresentation, Court has power to restore deposit. A. I. R. 1935 All. 204=1935 A. L. J. 249=153 Ind. Cas. 477. Clause 2 of rule 84 must be construed in such a way as to be consistent with rule 72 clause (2) and with the proviso to rule 85 of the same order. A. I. R. 1935 Mad. 893=42 L. W. 564=1935 M. W. N. 792. Where the second part of rule 84 is put into operation, the first part ceases to apply, and hence the use of the word "immediately" in the first part cannot be relied upon in order to ascertain the precise meaning of the second part. The second part must be interpreted according to the plain meaning of the words contained in it alone. There is nothing in those words precluding the Court from passing an order with retrospective effect. A. I. R. 1935 Pesh. 123. Sale of property in auction held by Court does not become complete before its acceptance by Court. 134 Ind. Cas. 447=58 C. 788=A. I. R. 1931 Cal. 583. Knocking down property to final bidder is acceptance thereof. 141 Ind. Cas. 367=29 N. L. R. 52=A. I. R. 1933 Nag. 123. Acceptance by presiding officer is not necessary. *Ibid.* It is only officer conducting sale who can declare highest bidder to the purchaser. A. I. R. 1929 Rang. 311=7 Rang. 425=120 Ind. Cas. 142. Final acceptance of bid rests with Court and until that is not done by declaration of purchaser, deposit of one-fourth cannot be called upon. A. I. R. 1929 Lah. 672=118 Ind. Cas. 901. Deposit of 25 p. c. must be made unless expressly or impliedly dispensed with by Court. A. I. R. 1929 Lah. 492=116 Ind. Cas. 212. Omission to deposit 25 p. c. immediately is mere irregularity under r. 90 and does not avoid sale unless it results in substantial injury. 110 Ind. Cas. 773; see also 67 Ind. Cas. 427; A. I. R. 1934 Pat. 329; A. I. R. 1934 Pesh. 25. It is sufficient under the rule that property is put up for re-sale, although not re-sold for want of bidders to make purchaser liable for deficit. A. I. R. 1926 Mad. 739=23 L. W. 724=51 M. L. J. 658=95 Ind. Cas. 865; see also A. I. R. 1922 All. 200=44 A. 266=20 A. L. J. 105=65 Ind. Cas. 813; 42 M. 776=37 M. L. J. 274=(1919) M. W. N. 784=51 Ind. Cas. 805. Re-sale must be held forthwith. A. I. R. 1930 Mad. 761=53 M. 900=59 M. L. J. 267=32 L. W. 154=127 Ind. Cas. 303. If final bid remains unaccepted by officer conducting sale for a time, a period of 30 days under r. 92 will not commence to run until acceptance. A. I. R. 1930 Lah. 41=118 Ind. Cas. 900. Sale is complete by acceptance of bid. A. I. R. 1923 Pat. 525=2 Pat. 548=4 P. L. T. 498=76 Ind. Cas. 113. Delay in making deposit due to grant of time by Court on ground that the revision was filed against order of sale, though material irregularity did not cause substantial injury. A. I. R. 1924 Rang. 81=2 Bur. L. J. 166=79 Ind. Cas. 747. Order setting aside execution sale on default of auction purchaser to deposit purchase money is not appealable. 58 Ind. Cas. 597.

85. [S. 307.] The full amount of the purchase money payable shall be paid by the purchaser into Court before the Time for payment in full Court closes on the fifteenth day from the sale of purchase money. of the property :

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under rule 12.

*N. B.*—For local amendment in C. P.—*Vide infra.*

**Soope.**—This rule is applicable when bid of decree-holder purchaser allowed set-off before sale exceeds the decretal amount, in which case 25 p. c. if excused from being deposited at sale date, can be paid within 15 days after sale. A. I. R. 1931 Mad. 103=(1930) M. W. N. 568=130 Ind. Cas. 458. With consent of parties time for payment of balance of purchase money can be extended. A. I. R. 1927 Lah. 337=100 Ind. Cas. 800; see also A. I. R. 1931 Lah. 15=112 Ind. Cas. 561; A. I. R. 1923 Mad. 48=16 L. W. 319=43 M. L. J. 477=(1922) M. W. N. 707=31 M. L. T. 363=69 Ind. Cas. 101. Property will be re-sold on decree-holder purchaser's failing to deposit balance of purchase money after deducting decree-amount, as the rules are mandatory. 51 Ind. Cas. 316. Payment of whole balance of purchase money by one of joint purchasers must be deemed to be on behalf of all who are entitled to purchase their shares. A. I. R. 1926 Cal. 719=51 C. 992=81 Ind. Cas. 1029.

Time limit of 15 days under the rule does not apply for carrying out order of Appellate Court confirming sale to repay deposit withdrawn or lower Court's setting aside sale. (1917) M. W. N. 861=42 Ind. Cas. 552. Court cannot extend period under Order 21, r. 85. 35 C. W. N. 877=59 C. 117=A. I. R. 1932 Cal. 126. Effect of extension of period on consent of judgment-debtor is that irregularity is to be deemed to have waived. 138 Ind. Cas. 177=35 C. W. N. 877=59 C. 117=A. I. R. 1932 Cal. 126. Under certain circumstances the provisions of this rule may be directory only and not mandatory and as such the Court may in its discretion refuse to set aside the sale. 122 Ind. Cas. 561=A. I. R. 1931 Lah. 15; see also 147 Ind. Cas. 98=12 P. L. T. 559=A. I. R. 1932 Pat. 342. A *bona fide* tender amounts to payment unless there is a suggestion that the applicant was not in a position to make the payment at the time when he filed the tender in Court. A. I. R. 1934 All. 817=148 Ind. Cas. 348=1934 A. L. J. 71. The Court has no jurisdiction to extend the time when default is made in depositing the balance of the purchase money within 15 days as required by rule 85 of Order 21. A. I. R. 1935 All. 243=1935 A. L. J. 167=57 A. 658.

86. [S. 308.] In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be sold.

**Scope.**—This rule shows that the effect of delay in paying balance of purchase money is not necessarily to invalidate sale. A. I. R. 1924 Rang. 81=2 Bur. L. J. 166=79 Ind. Cas. 747. Return of purchase money is normal course and forfeiture should be used not for filling Government coffers but as penalty to prevent laxity and delay. A. I. R. 1921 Nag. 120=17 N. L. R. 15=59 Ind. Cas. 705; see also A. I. R. 1926 All. 509=95 Ind. Cas. 46; A. I. R. 1925 P. C. 61=27 Bom. L. R. 806=22 L. W. 1=30 C. W. N. 268=48 M. L. J. 335=20 O. W. N. 308 (P. C.)=86 Ind. Cas. 373. Extension of one month's time on express agreement between auction-purchaser and decree-holder where sale proceeds were insufficient to pay the decree-amount would cause no loss to judgment-debtor. A. I. R. 1924 Rang. 81=2 Bur. L. J. 166=89 Ind. Cas. 747. Any person interested can move Court to re-sell property. 138 Ind. Cas. 103=1932 A. L. J. 501=A. I. R. 1932 All. 392. The auction purchaser deposited one-fourth of the purchase money on the date of sale but failed to deposit the rest within 15 days under Order 21, rule 85; within 30 days of the sale the judgment-debtor applied to set aside the sale under Order 21, rule 89, depositing the necessary amount. The decree-holder accepted the deposit and agreed to cancel the sale as he did not want the property to be sold again. The Court, however, purporting to act under Order 21, rule 86, ordered that the one-fourth deposit made by the purchaser should be forfeited to the Government after defraying the expenses of sale as he had failed to deposit the remaining three-fourths: *Held* that the Court acted with material irregularity in ordering the forfeiture where there was no question of re-sale within Order 21, rule 86. The purchaser was not however, entitled to 5 per cent. of purchase money under rule 89 owing to his failure to pay the full price within time. A. I. R. 1934 Oudh 429=11 O. W. N. 1132=151 Ind. Cas. 310.

87. [S. 309.] Every re-sale of immovable property, in default of payment of the purchase-money within the period allowed for such payment shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

**Scope.**—This rule does not apply to a case in which the property is put up and sold forthwith under the provisions of rule 84. 2 C. W. N. 411.

88. [S. 310.] Where the property sold is a share of undivided immovable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.

**Scoope.**—Co-sharer bidding same amount as preceding stranger bestowed and asserting pre-emption right is within the rule. 3 O. L. J. 405=36 Ind. Cas. 654 ; but see 3 A. 817 ; (1888) A. W. N. 208. Officer appointed to conduct sale has no jurisdiction to determine claims under this rule. 145 Ind. Cas. 281=10 O. W. N. 816=A. I. R. 1933 Oudh 491.

**89. [S. 310A.]** (1) Where immovable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court,—

(a) for payment to the purchaser, a sum equal to five per cent. of the purchase money, and

(b) for payment to the decree-holder ; the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

*N. B.*—For local amendments in Allahabad, C.P., Lahore, Madras and Peshwar.—*Vide infra.*

**Scoope**—The word “immovable property” in this rule should be interpreted to mean tangible immovable property. It does not mean merely the right, title and interest of the judgment-debtor alone. A. I. R. 1936 Oudh 128=1936 O. W. N. 48=159 Ind. Cas. 1044. The provisions of r. 89, must be strictly complied with, being of the nature of an exceptional concession allowed to the judgment-debtor. A. I. R. 1929 Nag. 10. Person making payment under rule 89 must accept the validity of sale and cannot challenge its validity. A.I.R. 1928 Pat. 193=7 Pat. 30=115 Ind. Cas. 193. Court is bound to reject the application under this rule where the deposit is made after expiry of 30 days from the date of sale. A. I. R. 1928 Nag. 136=109 Ind. Cas. 449 ; see also 29 C. 626 ; A. I. R. 1930 B. 335 ; A. I. R. 1926 Lah. 638 ; A. I. R. 1928 All. 196 ; A. I. R. 1929 Rang. 286=6 Rang. 490=113 Ind. Cas. 810. Persons in rule 90 are not identical with those referred to in rule 89. The wording of rule 90 is verely much wider than that of in rule 89. A. I. R. 1928 Mad. 454=1928 M. W. N. 216 ; A. I. R. 1926 B. 377=50 B. 457. Where necessary amount is deposited but no application is made to set aside the sale the application is one under this rule. A. I. R. 1928 Nag. 111=106 Ind. Cas. 333. Provisions of C. P Code under rule. 89 are not applicable to sales under Bengal Land and Tenant Procedure Act. A. I. R. 1927 Cal. 752=31 C. W. N. 1016=104 Ind. Cas. 180. Compensation under rule 89 is payable to a purchaser for disappoinment caused by having the sale set aside. A. I. R. 1927 Pat. 288=6 Pat. 386=103 Ind. Cas. 724. A man is not debarred from defending his action under rule 89 if he omits to do so under rule 58. A. I. R. 1927 Mad. 327=25 L. W. 106=1927 M. W. N. 53=99 Ind. Cas. 893. Application under rule 89 need not show the name of the auction-purchaser in the array of parties. A. I. R. 1930 All. 167=124 Ind. Cas. 23. After application under rule 89 is heard and disposed of, an application under rule 90 is maintainable. A. I. R. 1925 All. 778=47 A. 850=23 A. L. J. 760=88 Ind. Cas. 500. An application either written or oral is necessary for the setting aside of a sale under rule 89. A. I. R. 1925 Oudh 411=12 O. L. J. 289=87 Ind. Cas. 829 ; 87 Ind. Cas. 437=28 M. L. J. 405 ; A. I. R. 1925 Mad. 909=86 Ind. Cas. 898 ; A. I. R. 1923 Cal. 394=82 Ind. Cas. 776 ; 78 Ind. Cas. 705=A. I. R. 1925 Nag. 30 ; A. I. R. 1924 Pat. 37=4 Pat. L. T. 491=75 Ind. Cas. 430. In an application under rule 89, notice must be given to the judgment-creditor and rights of parties to deposit must be decided. A. I. R. 1923 Pat. 353=4 P. L. T. 247=73 Ind. Cas 12. After admitting sufficiency of deposit, the decree-holder cannot take out execution. 141 Ind. Cas. 297=11 Pat. 796=A. I. R. 1933 Pat. 89. Money paid under this rule is assets in the hands of Court. A. I. R. 1933 Pat. 303=12 Pat. 772 ;

see also 28 N. L. R. 179=A. I. R. 1932 Nag. 156 ; A. I. R. 1933 Nag. 347. Where an application under this rule for setting aside a sale is made and the circumstances of the case show that the applicant is ready to deposit the sum required the Court can entertain the application always provided that the applicant has an interest by virtue of title. But the application and the deposit both to be made within 30 days. A. I. R. 1936 Pat. 119=161 Ind. Cas. 26. Directly a bid is made the sale cannot be said to be concluded. A. I. R. 1934 Oudh. 25=11 O. W. N. 18=9 Luck. 393=147 Ind. Cas. 1077. Where a deposit made for the purpose of setting aside a sale is short by a small amount due to the applicant being misled by the officer whose duty it is to check the deposit, such an act is not a casual act of an officer of the Court and if a party is misled by the act, the Court should set the matter right. 146 Ind. Cas. 1012=A. I. R. 1934 Pat. 246. Where the decretal amount is wrongly stated in the proclamation of sale through mistake as being less than the original decretal amount, the judgment-debtor cannot be allowed to take advantage of such a mistake. A. I. R. 1934 Lah. 790.

The words "any amount which may, since the date of such proclamation of sale, have been received by the decree-holder" in Order 21, rule 89 (1), (b) C. P. Code do not mean that there must be a cash receipt by the decree-holder. A. I. R. 1935 Mad. 1050=42 L. W. 692=1935 M. W. N. 937. A judgment-debtor or a person interested cannot attach any condition to his deposit under Order 21, rule 89, C. P. Code, nor can a Court accept the deposit subject to any condition or protest. 69 M. L. J. 349 (F. B.)=58 M. 972=A. I. R. 1935 Mad. 842=1935 M. W. N. 710. Starting point of limitation is date when bid is accepted and declaration and deposit of one-fourth is made by purchaser and not date when bid was made. 132 Ind. Cas. 263=A. I. R. 1931 Oudh. 291. Amount deposited in Court is not amount "received" within the meaning of rule 89. 141 Ind. Cas. 167=A. I. R. 1933 Mad. 263=1933 M. W. N. 48. This rule applies to sale of original side of High Court under mortgage. 133 Ind. Cas. 587=58 C. 510=A. I. R. 1931 Cal. 688. Sale can be confirmed only 30 days after the declaration of bid. A. I. R. 1934 Oudh 25.

**Immovable property.**—The interest of a usufructuary mortgagee is immovable property. A. I. R. 1930 All. 110=1930 A. L. J. 330=122 Ind. Cas. 409. Simple mortgage bond is movable property. A. I. R. 1924 All. 976=22 A. L. J. 840=46 A. 917=80 Ind. Cas. 890. This rule is mainly to prevent sale of immovable property for inadequate price. 40 B. 557=18 Bom. L. R. 571=37 Ind. Cas. 211.

**Any person.**—Judgment-debtor is entitled to apply under rule 89 to set aside sale even after the transfer of his interest in the property to another after Court-sale. 37 Ind. Cas. 211=40 B. 557=18 Bom. L. R. 571 ; A. I. R. 1921 Pat. 364=4 Pat. L. J. 340=51 Ind. Cas. 873 ; A. I. R. 1926 All. 204=48 A. 188=24 A. L. J. 69=93 Ind. Cas. 24. But in the above case the purchaser after sale has no right to apply under this rule. A. I. R. 1921 Mad. 157=44 M. 554=40 M. L. J. 497=63 Ind. Cas. 937 ; see also 26 C. W. N. 149=49 C. 454 ; A. I. R. 1930 Mad. 921=53 M. 943 ; A. I. R. 1927 Mad. 151. An applicant under rule 89 must be a person who can even at the date of his application, be proved to be a person either owning the property or holding an interest therein by virtue of a title, and further that title must have been a pre-existing title that is to say, a title acquired before the auction sale. A. I. R. 1926 Nag. 10=21 N. L. R. 102=90 Ind. Cas. 963 ; see also 102 Ind. Cas. 471=A. I. R. 1927 All. 561=49 A. 839=25 A. L. J. 576. The reversioner of a person can deposit. 19 C. L. J. 72. A member of an undivided family may deposit. A. I. R. 1928 Mad. 399=51 M. 246=54 M. L. J. 455=109 Ind. Cas. 297 ; see also 30 C. 425. Lessee of judgment-debtor can also deposit. A. I. R. 1928 Mad. 119=51 M. 770=54 M. L. J. 445=109 Ind. Cas. 168. A purchaser of a portion of a transferable occupancy holding can apply under this section. A. I. R. 1927 Cal. 817=55 C. 108=31 C. W. N. 1050=106 Ind. Cas. 143. A mortgagee of the property of the judgment-debtor mortgaged after attachment and before sale is entitled to apply under this rule for setting aside the sale. A. I. R. 1927 Mad. 445=52 M. L. J. 157=100 Ind. Cas. 82 ; see also A. I. R. 1926 Oudh 17=2 O. W. N. 860=91 Ind. Cas. 93 ; 29 C. 1=5 C. W. N. 824 (F. B.). The mortgagee of the property is entitled to apply under rule 89 to set aside sale, even though the property is sold subject to the mortgage. 10 L. W. 556=1920 M. W. N. 151=27 M. L. T. 130=53 Ind. Cas. 958 ; see also 87 Ind. Cas. 829=12 O. L. J. 289 ; 66 Ind. Cas. 929. Mortgagee purchasing equity of redemption of a portion of the mortgaged property can apply. A. I. R. 1923 Pat. 490=2 Pat. 715=74 Ind. Cas. 102. Ownership recently acquired is not restricted by the word "owning such property by virtue of title acquired before such



sale". A. I. R. 1927 Mad. 327=25 L. W. 106=38 M. L. T. (H. C.) 30=1927 M. W. N. 53=99 Ind. Cas. 893. A co-heir can apply under this section. A. I. R. 1928 Rang. 278=6 Rang. 500=113 Ind. Cas. 801. One of two joint judgment-debtors may pay. A. I. R. 1926 Mad. 765=50 M. L. J. 580=23 L. W. 720=96 Ind. Cas. 77. Where the Court erroneously held that the person has no *locus standi* the order is subject to revision. A. I. R. 1926 Nag. 10=21 N. L. R. 102=90 Ind. Cas. 963. Where the mortgagee is a part owner, he can apply under this rule. A. I. R. 1923 Pat. 490=2 Pat. 715=74 Ind. Cas. 102. A legatee can deposit. 14 M. L. J. 326=72 Ind. Cas. 335. Where co-judgment debtor deposits alone, the other judgment-debtors are entitled to the benefit of deposit. A. I. R. 1922 Mad. 54=42 M. L. J. 71=30 M. L. T. 83=65 Ind. Cas. 983. A person expecting to get title and possession in a pending litigation is not entitled to apply under rule 89 to set aside sale. 39 A. 70=15 A. L. J. 671=41 C. 839. Person paying money in Court to set aside sale in execution under protest is entitled to get his money back under section 72. A. I. R. 1931 Mad. 753=135 Ind. Cas. 24. Holder of money decree attaching immovable property before its sale by mortgagee decree-holder cannot apply to set aside sale. 55 B. 239=A. I. R. 1931 Bom. 277=33 Bom. L. R. 455. Interest in property at the time of application is sufficient. It need not be at the date of sale. A. I. R. 1934 Pesh. 25. A person who acquires an interest in the immovable property after its auction sale would not, *prima facie*, be entitled to have the sale set aside on his depositing 5 per cent. of the purchase money and the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered. 1936 O. W. N. 344=161 Ind. Cas. 424. It is not necessary that the interest in the property should date from before the time of the sale; so long as a person is interested at the time of the application, he is entitled to make an application. A. I. R. 1934 Pesh. 25=148 Ind. Cas. 1082.

**Court.**—Court mentioned in this rule is not the Court of the Collector or the sale officer where the proceedings take place, but the Civil Court. A. I. R. 1927 All. 754=100 Ind. Cas. 726.

**Clause (a).**—Purchaser in addition to the 5 p. c. is entitled to be paid by the judgment-debtor any loss of interest and costs which he may have incurred. A. I. R. 1930 Cal. 685=57 C. 676=129 Ind. Cas. 181; A. I. R. 1934 Pesh. 25=148 Ind. Cas. 1082; A. I. R. 1934 Nag. 21=150 Ind. Cas. 611; A. I. R. 1934 Lah. 875=36 P. L. R. 101. Deposit by judgment-debtor of price of property sold to auction-purchaser, together with 5 p. c. of the decretal amount is good deposit within rule 89. A. I. R. 1930 All. 843=120 Ind. Cas. 818. Amount of sale price with 5 p. c. deposited by judgment-debtor must be deposited. A. I. R. 1929 Bom. 215=31 Bom. L. R. 433=117 Ind. Cas. 527. A small shortage of deposit does not vitiate the deposit. A. I. R. 1928 Rang. 286=6 Rang. 490=113 Ind. Cas. 810. The provision of law regarding the deposit of 5 per cent. commission in addition to the amount specified in the proclamation must be strictly complied with. A. I. R. 1924 Nag. 216=78 Ind. Cas. 270; 1 Pat. L. J. 459=3 Pat. L. W. 48=36 Ind. Cas. 779. In case of deficient deposit, time should be given to the applicant to make good the deficient amount. A. I. R. 1933 Pat. 515=14 P. L. T. 478. Deposit of mere 5 p. c. is not sufficient to set aside sale. 143 Ind. Cas. 854=38 M. L. W. 138=56 M. L. J. 253=1933 M. W. N. 1081=56 M. 808=A. I. R. 1933 Mad. 598. Section 151 cannot be invoked for setting aside sale on application under this rule but without 5 p. c. deposit. 137 Ind. Cas. 735=A. I. R. 1932 Lah. 235=33 P. L. R. 146. Decree-holder auction-purchaser is entitled to 5 p. c. 55 A. 200=A. I. R. 1933 All. 29; see also A. I. R. 1933 All. 155=55 A. 123. Where mortgagor is trying to set aside sale in mortgage-decree he is not liable to deposit anything more than 5 p. c. 133 Ind. Cas. 587=58 C. 510; A. I. R. 1931 Cal. 688. Deposit of 5 per cent. of price is essential. A. I. R. 1934 Pesh. 25; see also A. I. R. 1934 Nag. 21. Where party is misled by officer of Court and thus the deposit is short by a small amount, Court should set the matter right. A. I. R. 1934 Pat. 246; but see A. I. R. 1934 Pat. 336. The person who can apply to have the sale set aside under Order 21, r. 89, is either the judgment-debtor or his recognized agent within the meaning of Order 3, rule 1, C.P. Code, or any person acquiring interest in the property before the date of sale. A would be purchaser therefore who acquires interest after the auction sale cannot apply to set aside sale under Order 21, r. 89. A. I. R. 1937 Oudh 108.

**Clause (b).**—The deposit is not affected where insufficient amount is deposited owing to the mistake of the Court clerk. A. I. R. 1930 Cal. 249=33 C. W. N. 1170=126 Ind. Cas. 207. Where properties are sold in lots, the sale of one lot is not set

aside by depositing value of that lot only. A. I. R. 1930 Pat. 318=9 Pat. 310=11 P. L. T. 880=125 Ind. Cas. 570. Judgment-debtor need not deposit any costs and interests not covered by the proclamation of sale within 30 days from the date of sale. A. I. R. 1930 Oudh 9=118 Ind. Cas. 805. Deposit of amount stated in sale proclamation gives *ipso facto* a right to relief under rule 89. A. I. R. 1923 All. 315=21 A. L. J. 162=71 Ind. Cas. 1018. Conditional deposit is not good; but if condition is withdrawn the deposit is good. A. I. R. 1923 Pat. 418=2 Pat. 534=72 Ind. Cas. 907; see also A. I. R. 1923 Pat. 59=4 P. L. T. 295=68 Ind. Cas. 629; 35 C. W. N. 1056=A. I. R. 1932 Cal. 216. Part payment of the amount due to the decree-holder with an undertaking to pay the balance does not amount to a deposit within the meaning of the rule. The provision of r. 89 is a concession allowed to judgment-debtor and they must be strictly complied with. A. I. R. 1922 Bom. 193=46 B. 171=23 Bom. L. R. 847=63 Ind. Cas. 39. Suit for refund of sum paid to decree-holder does not lie. A. I. R. 1921 Bom. 169=45 B. 1094=23 Bom. L. R. 455=62 Ind. Cas. 104; 57 B. 601=A. I. R. 1933 Bom. 239=35 Bom. L. R. 462. A mere deposit without application either written or oral is not sufficient. 43 B. 735=21 Bom. L. R. 835=53 Ind. Cas. 135; 63 Ind. Cas. 140; 3 L. W. 174=32 Ind. Cas. 783; 32 Ind. Cas. 45; A. I. R. 1933 Lah. 210; A. I. R. 1933 All. 510. Period of thirty days cannot be extended except with consent of parties. 2 Pat. L. J. 164=39 Ind. Cas. 664; A. I. R. 1923 Rang. 8. Judgment-debtor is to deposit only the amount of that decree under which property is sold. 143 Ind. Cas. 768=14 Lah. 55=A. I. R. 1933 Lah. 226. In an application to set aside a sale under Order 21, rule 89 of the C. P. Code, the judgment-debtor made a double mistake in the *challan*-deposit. When the deposit was first made there was a deficit of 4 annas in favour of the auction-purchaser and when the deficit was deposited the judgment-debtor made the mistake of depositing it in favour of the decree-holder. The Court disallowed the application on the ground of mistake in *challan*: *Held* that it would not be said that the judgment-debtor had not complied with the strict letter of the law on the principle of *de mini mis non curas lex*. It was therefore proper under the circumstances to allow the application to set aside the sale. A. I. R. 1937 Pat. 409. There is no authority for the proposition that in every case of an application under rule 89 for setting aside a sale, there must be a cash deposit in Court of the amount specified in the sale proclamation. The amount received by the decree-holder since the sale proclamation being deductible under rule 89 (1) (b) in a case where at the date of the application there is nothing due to the decree-holder by reason of payments made to him out of Court since the sale proclamation whether before or after the sale, the application, accompanied only by a deposit of the compensation money payable to the auction-purchaser is in order; and the Court on satisfying itself as to the payment for which it may accept the admission of the decree-holder, may rightly allow the application and set aside the sale. 39 C. W. N. 829. The "amount specified in the proclamation of sale as that for the recovery of which the sale was ordered" in sub-rule (1) (b) means only the amount actually specified in the proclamation. 156 Ind. Cas. 965=37 P. L. R. 298=A. I. R. 1935 Lah. 423.

### 90. [S. 311.] (1) Where any immovable property has been sold in

Application to set aside sale on ground of irregularity or fraud.

execution of a decree, the decree-holder, or any person entitled to share in a ratable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

N. B.—For local amendments in Allahabad, C. P., Lahore, Oudh and Rangoon.—*Vide infra*.

Scope.—Wording of rule 90 is wider than that of r. 89. A. I. R. 1928 Mad. 454=(1928) M. W. N. 216=109 Ind. Cas. 148; 24 L. W. 406=1926 M. W. N. 631=97 Ind. Cas. 574=A. I. R. 1926 Mad. 956. Rule 90 covers case of material irregularity and also a case of fraud in publishing or conducting the sale. 66 Ind. Cas. 220; see also A. I. R. 1929 Lah. 592=4 Lah. 243=75 Ind. Cas. 103; A. I. R. 1923 Cal. 538=37 C. L. J. 145=27 C. W. N. 587; 34 Ind. Cas. 829=30 M. L. J. 611=3 L. W. 504=19 M. L. T. 357. Failure of notice under rule 66, Order 21, though

material irregularity must result in serious injury to set aside sale under r. 90. A. I. R. 1927 Lah. 84=99 Ind. Cas. 515. Previous irregularity or fraud does not come within the purview of rule 90. Suppression of processes and low price are enough. A. I. R. 1926 Cal. 829=93 Ind. Cas. 870. Illegal sale is not covered by rule 90 but is covered by s. 47. A. I. R. 1924 All. 698=22 A. L. J. 413=83 Ind. Cas. 1028. Right of auction-purchaser to apply under rule 90 does not mean that general enquiry into the judgment-debtor's title would be opened. A. I. R. 1925 All. 459=47 A. 479=23 A. L. J. 233=87 Ind. Cas. 278. Where there is no irregularity or fraud in the actual conduct of sale this rule is not applicable. 1933 M. W. N. 77=A. I. R. 1933 Mad. 838 ; see also A. I. R. 1933 Pesh. 41=144 Ind. Cas. 14 ; 144 Ind. Cas. 414=A. I. R. 1933 Mad. 225. Right of judgment-debtor to assail is not restricted to grounds in rule 90. 143 Ind. Cas. 522=1932 A. L. J. 1118=A. I. R. 1933 All. 192. Order 21, rule 90, does not refer only to an irregularity or fraud in publishing or conducting the auction-sale. The decree-holder is also responsible for any irregularity or fraud consequently occurring in the sale proclamation which is itself prepared from the sale statement for which the decree-holder himself is responsible. A. I. R. 1937 Nag. 140. Objections relating to failure to deposit 25 p. c. of the purchase money in the first instance and the balance of the purchase later and the acceptance of an improper bid come within the purview of this rule. A. I. R. 1936 Lah. 969=38 P. L. R. 839.

Sale of properties need not be in the order in which they are entered. A. I. R. 1931 All. 159=1921 A. L. J. 62 ; A. I. R. 1933 All. 546=55 A. 519=1933 A. L. J. 1273. System of conducting sale from day to day and fixing date for bringing sale to an end is deprecated. 144 Ind. Cas. 414=56 M. 356=A. I. R. 1933 Mad. 225. Wholesale is to be dealt with unless properties are sold in lots. A. I. R. 1926 Cal. 829=93 Ind. Cas. 870 ; see also A. I. R. 1928 Cal. 349=32 C. W. N. 519=47 C. L. J. 351 ; (1930) A. L. J. 1177=A. I. R. 1930 All. 556. Under this rule substantial injury must be proved. A. I. R. 1934 Pat. 274. Section 5, Limitation Act has no application to petitioner under Order 21, r. 90. A. I. R. 1934 All. 314. Attaching creditor can apply under this section. A. I. R. 1934 Cal. 477. After waiver of irregularities in service of notice and of proclamations, such question cannot be raised subsequently. A. I. R. 1934 Cal. 251 ; see also A. I. R. 1934 Cal. 205. Where for omission of mention of time of sale, bidders were prevented from offering bid, irregularity is material. A. I. R. 1934 Lah. 413. Where sale officer dishonestly sends away decree-holder to prevent raising of bid, there is serious irregularity resulting in loss to the decree-holder. A. I. R. 1934 Oudh 94. Parties must be given opportunity to adduce evidence to prove their case. A. I. R. 1932 Pat. 326=11 Pat. 542. Under this rule, it is the duty of Court to decide three points, namely, whether there has been material irregularity, whether property is sold for unreasonable low price and whether injury to judgment-debtor is caused. A. I. R. 1932 All. 369=1932 A. L. J. 357. Refusal by judgment-debtor to take property at sale price is test of adequacy of price. 37 C. W. N. 622=A. I. R. 1933 Cal. 662 ; see also A. I. R. 1933 Cal. 486=37 C. W. N. 146. A suit does not lie to have an execution sale set aside on the ground of any fraud in the conduct and proclamation of sale. The remedy is under Order 21, C. P. Code, only. 159 Ind. Cas. 299=60 C. L. J. 584=39 C. W. N. 510=A. I. R. 1935 Cal. 356.

Order 9 does not apply to application under Order 21, r. 90. 136 Ind. Cas. 283=1931 A. L. J. 622=A. I. R. 1931 All. 594. Application under rule 90 must be decided on merits even in default of purchaser. 135 Ind. Cas. 412=27 N. L. R. 339=A. I. R. 1932 Nag. 14.

Who can apply.—Auction purchaser is not a person whose interests are affected by sale and he cannot apply under r. 90. A. I. R. 1928 Cal. 828=49 C. L. J. 207=116 Ind. Cas. 156 ; 114 Ind. Cas. 538=A. I. R. 1929 Rang. 33=6 Rang. 821 ; A. I. R. 1936 Bom. 311=38 Bom. L. R. 589=60 B. 750 ; *contra* A. I. R. 1927 Rang. 301=5 Rang. 516 ; 87 Ind. Cas. 278=47 A. 479=23 A. L. J. 233=A. I. R. 1925 All. 459. "Interest" includes proprietary, pecuniary or other interest. A. I. R. 1928 Mad. 454=109 Ind. Cas. 148. Next reversioner (A. I. R. 1928 Mad. 1139 ; 51 Ind. Cas. 359), interim Receiver (A. I. R. 1928 Mad. 454), purchaser of one item of mortgaged property (A. I. R. 1927 Mad. 783=53 M. L. J. 229), a simple reversioner (A. I. R. 1926 Mad. 959), co-judgment-debtor (A. I. R. 1926 Cal. 829), or a mortgagee of entire non-transferable holding can apply under

this rule. Purchaser of part only of non-transferable occupancy holding can also apply. A. I. R. 1925 Pat. 461=6 P. L. T. 295=87 Ind. Cas. 381 ; see also 46 Ind. Cas. 612=A. I. R. 1925 Cal. 925. Attaching decree-holder through another Court can apply. A. I. R. 1927 Mad. 67=51 M. L. J. 661=98 Ind. Cas. 628. A person obtaining an order for attachment before judgment and subsequently obtaining a decree in the suit has *locus standi* to maintain an application under Order 21, rule 90, to set aside a sale, held in execution of a decree obtained against the same judgment-debtor, provided he obtained the decree in his suit before the sale was held. The fact that there was in fact no attachment before judgment, by reason of failure to affix a copy of prohibitory order in the Court-house according to Order 21, rule 54, does not affect the position of the applicant. It is sufficient if the applicant got the order of attachment and some part of the provision of Order 21, rule 54, had been complied with before the challenged sale and if subsequently obtained his decree before sale. A. I. R. 1937 Cal. 7. The auction purchaser can apply under this rule to set aside the sale. A. I. R. 1937 Nag. 140. The Civil Procedure Code does not lay down that the parties who would be affected by an order setting aside a sale under Order 21, rule 90, should be formally impleaded as parties to the application made for the purpose. It is sufficient if notice is issued to them before the sale is set aside. 62 C. 286=157 Ind. Cas. 637=39 C. W. N. 186=A. I. R. 1935 Cal. 502. Where the Official Receiver of the estate of an insolvent father of a joint-family was entitled to sell sons' share for the debts of their insolvent father, he should be given notice of the sale of the sons' share in execution of a decree against the sons inasmuch as he is "a person whose interests are affected by the sale" under Order 21, rule 90. 157 Ind. Cas. 251=1935 M. W. N. 258=41 L. W. 309=A. I. R. 1935 Mad. 459. As the entire ancestral property including the interest of the sons can be sold in execution of a decree obtained against a Hindu father ; the interest of the sons is affected by the sale and they are competent to apply to set aside the sale. 14 Pat. 436=156 Ind. Cas. 350=16 Pat. L. T. 680=A. I. R. 1935 Pat. 205. Strangers are barred from questioning sale on ground of irregularity. A. I. R. 1927 Cal. 82=97 Ind. Cas. 757 ; see also A. I. R. 1926 Cal. 1219=44 C. L. J. 167=98 Ind. Cas. 206. A co-sharer of the judgment-debtor cannot apply when the property is being sold as belonging to one member of the joint-family. A. I. R. 1926 Nag. 68=8 N. L. J. 184=91 Ind. Cas. 218. Judgment-debtor selling after auction sale his interest in property sold can apply under rule 90. A. I. R. 1926 Cal. 56=87 Ind. Cas. 94. Heir presumptive of transferee of a portion of property cannot apply under rule 90. A. I. R. 1925 Pat. 556=86 Ind. Cas. 575. Holder of protected interest is not bound to apply under this rule. A. I. R. 1925 Pat. 556=86 Ind. Cas. 575. Holder of money-decree cannot apply under this rule. A. I. R. 1925 Sind 101=86 Ind. Cas. 1095. Attaching creditor though his claim to ratable distribution is lost can still apply under this rule. A. I. R. 1924 Cal. 786=51 C. 495=28 C. W. N. 899=84 Ind. Cas. 119 ; A. I. R. 1932 All. 2=53 A. 759. An interest created by sale itself does not come under rule 90. "Interest affected by the sale" in this rule means interests in the property existing before the sale and adversely affected thereby. This rule is intended for the relief of the decree-holder and judgment-debtor so far as material irregularity or fraud is concerned. The auction-purchaser cannot take the benefit of that rule by pleading fraud. He must apply under rule 91. A. I. R. 1924. Pat. 319=5 P. L. T. 41=74 Ind. Cas. 760 ; A. I. R. 1932 Lah. 468 ; A. I. R. 1931 Sind 107 ; 35 Ind. Cas. 530=10 S. L. R. 53 ; see also A. I. R. 1923 Nag. 161=68 Ind. Cas. 429 ; but see A. I. R. 1922 Nag. 113=5 N. L. J. 147=18 N. L. R. 98=65 Ind. Cas. 875 ; 37 C. W. N. 766=A. I. R. 1933 Cal. 815 ; A. I. R. 1933 Pat. 435 (S B) ; 38 M. L. J. 228=11 L. W. 184=55 Ind. Cas. 333. A creditor cannot apply. A. I. R. 1925 Cal. 1103=42 C. L. J. 37=89 Ind. Cas. 668 ; see also 39 Ind. Cas. 932=10 S. L. R. 189. A person filing a declaratory suit regarding property ordered to be sold in execution of a decree, cannot, during the pendency of his suit, take advantage of this rule. 38 A. 358=14 A. L. J. 409=34 Ind. Cas. 272. Co-sharer landlords can apply. 23 C. W. N. 619=50 Ind. Cas. 329. Application of judgment-debtor cannot be rejected on ground that prior to sale he sold properties to stranger and his interest has ceased. A. I. R. 1926 Mad. 217=22 L. W. 872=92 Ind. Cas. 597. As regards the meaning of the person whose interest has been affected, *vide* 37 C. W. N. 912=A. I. R. 1933 Cal. 788 ; A. I. R. 1933 All. 54=55 A. 121 ; A. I. R. 1933 Mad. 694=65 M. L. J. 359 ; A. I. R. 1933 Pat. 445 ; A. I. R. 1931 Pat. 217=132 Ind. Cas. 111. Where judgment-debtor dies after application under this rule, his legal representatives can continue proceedings without obtaining letters of administrations. 139 Ind. Cas. 74

=13 P. L. T. 457=11 Pat. 424=A. I. R. 1932 Pat. 234. Persons having attachment before judgment and getting decree subsequently has pecuniary interest and can apply under this rule. 64 M. L. J. 605=A. I. R. 1933 Mad. 455. Transferee from judgment-debtor after attachment can apply under rule 90. 140 Ind. Cas. 600=63 M. L. J. 945=A. I. R. 1933 Mad. 96. Receiver in insolvency objecting to sale on ground that property had vested in him for benefit of creditors is not representative of judgment-debtor. 35 C. W. N. 971=A. I. R. 1932 Cal. 203=136 Ind. Cas. 593. As regards applications by minor, *vide* A. I. R. 1930 Nag. 185 ; 70 Ind. Cas. 365=43 M. L. J. 92 ; A. I. R. 1932 Lah. 576.

**Parties.**—Auction-purchaser is not necessary party. It is sufficient if notice is given to him subsequently. A.I.R. 1932 Pat. 255=11 Pat. 504 ; but see 26 N. L. R. 127=A. I. R. 1930 Nag. 5 ; A. I. R. 1928 Cal. 189 ; 62 Ind. Cas. 61=2 P. L. T. 336 ; 50 Ind. Cas. 5 ; A. I. R. 1928 Lah. 418=111 Ind. Cas. 506 (in these cases it has been held that he is a necessary party in application under rule 90 and also in appeal therefrom). No adverse order should be passed in absence of persons affected by order on application. All persons affected by application need not be parties but they should have notice. A. I. R. 1926 Pat. 286=7 P. L. T. 532=94 Ind. Cas. 31. Auction purchaser is a necessary party in appeal. A. I. R. 1933 Lah. 324=34 P. L. R. 8.

**Material irregularity.**—Omission to determine value is gross irregularity but sale will not be set aside unless substantial injury is caused. 37 C. W. N. 622=A. I. R. 1933 Cal. 662 ; see also A. I. R. 1933 All. 546=55 A. 519=1933 A. L. J. 1273 ; 1929 A. L. J. 1228=A. I. R. 1929 All. 948 ; A. I. R. 1922 Cal. 93=70 Ind. Cas. 303 ; A. I. R. 1922 Lah. 35=4 Lah. L. J. 441=67 Ind. Cas. 885 ; 35 C. W. N. 75. Where mis-statement of valuation is knowingly made it is material irregularity. 52 Ind. Cas. 23. Different valuation in different sale proclamation is material irregularity. A. I. R. 1928 Pat. 108=9 P. L. T. 189=105 Ind. Cas. 153. Mis-statement of value in sale proclamation is material irregularity. A. I. R. 1930 Cal. 511=51 C. L. J. 336=127 Ind. Cas. 264 ; see also 106 Ind. Cas. 201=A. I. R. 1927 Mad. 1009. Sale without notice is material irregularity. 1933 A. L. J. 92=A. I. R. 1933 All. 161. Where a sale is fixed for a particular day on which it was postponed it being a holiday and it was held on the next day but there was no paucity of bidders, it cannot be set aside on the ground of material irregularity. 37 C. W. N. 146=144 Ind. Cas. 779=A. I. R. 1933 Cal. 486. A sale should be set aside for material irregularity where auctioneer arbitrarily closes auction at 4 o'clock although another bidder is willing to purchase property for larger sum. A. I. R. 1936 Lah. 555. Objections based on the ground of non-compliance with Order 21, rule 66, such as defects in mentioning the value of the property, the incumbrances on the property and the description of the property proclaimed for sale, must be raised before the sale is held. 19 N. L. J. 282. Absence of attachment before sale is only an irregularity. A. I. R. 1934 Bom. 348. Inadequacy of price by itself is no ground unless it is due to material irregularity. A. I. R. 1934 Nag. 250. Where judgment-debtor is absent, he cannot subsequently urge about material irregularity in publishing the same. A. I. R. 1934 Nag. 250. The fact that no notice was issued under Order 21, rule 66, C. P. Code, though a material irregularity does not of itself vitiate a sale. A. I. R. 1935 Lah. 962. Omission to fix time for sale, although is an irregularity does not vitiate a sale unless substantial loss to the judgment-debtor is caused. A. I. R. 1935 Lah. 992. Before a sale can be set aside on the ground of irregularity, a connection must be established between the irregularity and the loss to the judgment-debtor on account of the sale of the property at a low price. 158 Ind. Cas. 167=A. I. R. 1935 Lah. 390 ; A. I. R. 1935 Oudh 154 ; A. I. R. 1935 Lah. 962 ; A. I. R. 1935 Bom. 331=37 Bom. L. R. 489. Gross under-valuation of the properties in the sale proclamation is material irregularity. 157 Ind. Cas. 251=1935 M.W.N. 258=41 L.W. 309=A. I. R. 1935 Mad. 459. Execution sale cannot be set aside on ground of material irregularity unless substantial injury is proved. 129 Ind. Cas. 661=11 P. L. T. 701=A. I. R. 1931 Pat. 43. Where sale is held earlier than the hour mentioned in the sale proclamation it is only irregularity. A. I. R. 1933 Pesh. 57. Failure to deposit 25 p.c. immediately is only irregularity and does not affect validity of sale unless substantial injury is caused to judgment-debtor. A. I. R. 1933 Oudh 345=10 O. W. N. 440. Confirmation of sale before adjudication upon application under Order 21, rule 90 by judgment-debtor amounts to material irregularity. 145 Ind. Cas. 732=A. I. R. 1933 All. 137. Not selling properties in order in which they are entered is not material irregularity. A. I. R. 1931 All. 159=1931 A. L. J. 62=130 Ind. Cas. 485. Failure in affixing sale proclamation to property is material irregu-

larity. A. I. R. 1929 All. 948=1929 A. L. J. 1228=120 Ind. Cas. 545. Changing date of sale without notice to parties, is material irregularity. A. I. R. 1929 All. 948=1929 A. L. J. 1228=120 Ind. Cas. 545. After proclamation the sale of the whole house, selling only half is material irregularity. A. I. R. 1930 Lah. 15=120 Ind. Cas. 536. Error in measurement is material irregularity but by itself is not sufficient to set aside sale. A. I. R. 1926 Lah. 588=96 Ind. Cas. 196. Omission to mention encumbrance is material irregularity. A. I. R. 1925 Oudh 424=12 O. L. J. 331=2 O. W. N. 315=88 Ind. Cas. 532. The omission to mention land revenue is not necessarily immaterial for the purpose of rule 90 which entitles the person injured to apply on the ground of a material irregularity. 28 C. W. N. 593=45 M. L. J. 403=75 Ind. Cas. 546 (P.C.). Sale must be set aside if there is material irregularity. A. I. R. 1925 Sind 101=86 Ind. Cas. 1095. To hold sale on a day other than the adjourned day is a material irregularity. A. I. R. 1921 Cal. 597=35 C. L. J. 40=65 Ind. Cas. 745.

**Fraud.**—Fraud and irregularity are different things. A. I. R. 1925 Pat. 521=6 P. L. T. 567=85 Ind. Cas. 622. Proof of particular fraud is essential. A. I. R. 1924 Pat. 67=83 Ind. Cas. 747. It is not necessary that fraud should be alleged against the auction-purchaser. A. I. R. 1923 Pat. 435=4 P. L. T. 306=72 Ind. Cas. 625 ; 26 A. L. J. 412=108 Ind. Cas. 899. Fraud may be of any person not necessarily of decree-holder. 56 M. 734=A. I. R. 1933 Mad. 626. Great discrepancy of value stated in sale proclamation and real value is evidence of fraud. 143 Ind. Cas. 284=53 C. L. J. 570=A. I. R. 1933 Cal. 339. Under-valuation is not always by itself sufficient to set aside sale. A. I. R. 1934 Pat. 186 ; see also 64 Ind. Cas. 636=3 P. L. T. 501. No substantial injury is caused where bidders are not misled as to real price. A. I. R. 1934 Mad. 260. This rule governs a case of fraud committed after publication of the sale proclamation. 3 P. L. J. 645=48 Ind. Cas. 560. Objections to an execution sale on the ground of fraud can only be made prior to the confirmation of the sale. 51 Ind. Cas. 447. Party relying upon fraud must state serially and in detail the facts constituting fraud and how he was kept from the knowledge of the execution proceedings. A. I. R. 1921 Pat. 145=2 P. L. T. 401=61 Ind. Cas. 823. Objections to an execution sale on the ground of fraud can only be made prior to the confirmation of sale. 51 Ind. Cas. 447. To bring property to sale subject to a bogus mortgage is fraud. A. I. R. 1928 Mad. 1138=113 Ind. Cas. 873. Wilful mistake of value in sale proclamation may justify interference of fraud. A. I. R. 1922 Pat. 507=3 P. L. T. 50=77 Ind. Cas. 957 ; see also 75 Ind. Cas. 185=A. I. R. 1922 Pat. 550 ; 89 Ind. Cas. 107. Proof of fraud causing ignorance of execution of judgment-debtor is necessary. A. I. R. 1930 Pat. 153=119 Ind. Cas. 891. There is no presumption of fraud in sale of wrong item. A. I. R. 1928 All. 704=110 Ind. Cas. 876. Purchase by clerk of decree-holder's pleader without knowledge of decree-holder amounts to fraud. A. I. R. 1925 Oudh 381=87 Ind. Cas. 997. Limitation begins to run from the date of the knowledge of fraud committed by the decree-holder. A. I. R. 1924 Pat. 496=5 P. L. T. 200=80 Ind. Cas. 761 ; see also 87 Ind. Cas. 555 ; 60 Ind. Cas. 801=A. I. R. 1921 Cal. 251=48 C. 119. A sale bad on the ground of irregularity or fraud and liable to be set aside is voidable only and an application to set aside must be made within 30 days of the sale. 60 Ind. Cas. 529 ; see also 48 Ind. Cas. 970 ; A. I. R. 1926 All. 305=48 A. 786=24 A. L. J. 286=92 Ind. Cas. 567 ; 76 Ind. Cas. 507 ; A. I. R. 1933 Cal. 339=56 C. L. J. 570 ; A. I. R. 1932 Cal. 733=55 C. L. J. 345 ; A. I. R. 1933 Lah. 570. Where a person is not aware of the sale proclamation and false representations are made to him by the bailiff as to the nature and interest put to sale and he purchases the property relying on those representations, the sale must be set aside. A. I. R. 1936 Rang. 327=164 Ind. Cas. 202.

**Illegality.**—Proof of some breach of definite rule of law is necessary in order that there may be illegality proved. A. I. R. 1929 Mad. 275=30 L. W. 995=117 Ind. Cas. 705. The distinction between irregularity and illegality is one of decree. A. I. R. 1921 Mad. 583=54 M. 35=59 Ind. Cas. 167. Sale is void if held in spite of injunction. 88 Ind. Cas. 532=12 O. L. J. 331. There is no illegality where notice under rule 22 has been served on father as guardian of his son even after the A. I. R. of the son. 117 Ind. Cas. 705=A. I. R. 1929 Mad. 275=30 L. W. 995. of the pignorance of stay order is without jurisdiction. A. I. R. 1926 All. 457=24 1933 Cal. 7.

**Judgment-debtor's injury.**—Serious injury must be shown to get sale set aside on ground of material irregularity. A. I. R. 1931 Pat. 43=11 P. L. T. 701 ; A. I. R.

1929 All. 671 ; A. I. R. 1933 Lah. 186 ; A. I. R. 1930 Pat. 58 ; A. I. R. 1931 Pat. 63 ; 104 Ind. Cas. 196=A. I. R. 1927 Cal. 873 ; A. I. R. 1924 Pat. 785=5 P. L. T. 250=76 Ind. Cas. 168 ; 57 Ind. Cas. 892 ; 45 Ind. Cas. 212 ; 37 Ind. Cas. 964. Serious injury need not be pecuniary. 47 A. 479=233 A. L. J. 23=87 Ind. Cas. 278. Some connection must be shown between irregularity and inadequacy. 33 Ind. Cas. 692 ; 32 Ind. Cas. 990. Denial of opportunity to purchase property sold is substantial injury. 1933 A. L. J. 92=A. I. R. 1933 All. 161. Where application is by decree-holder to set aside sale on ground of substantial injury suffered by him, such suffering need not be in capacity of decree-holder. 1933 A. L. J. 92=A. I. R. 1933 All. 161. Where two properties are sold in auction under same decree and one property fetched inadequate price due to irregularity in sale, the sale should be set aside in respect of the property which fetched inadequate price. A. I. R. 1936 Mad. 121=1935 M. W. N. 1306=59 M. 438=160 Ind. Cas. 645. Sale held after two hours of the appointed time was set aside on the ground that intending purchasers went away. 38 P. L. R. 515. Substantial injury by reason of gross under-valuation may be proved not only by direct evidence connecting the material irregularity with the substantial injury, but also by circumstantial evidence. 157 Ind. Cas. 251=1935 M. W. N. 258=41 L. W. 309=A. I. R. 1935 Mad. 459.

**Under-valuation.**—Low valuation of property is not fraud. A. I. R. 1926 Cal. 577=91 Ind. Cas. 407 ; see also 4 P. L. W. 88=42 Ind. Cas. 394. Injury as a consequence of under-valuation must be proved. A. I. R. 1928 Cal. 328=32 C. W. N. 309=113 Ind. Cas. 562 ; see also A. I. R. 1930 All. 542=1930 A. L. J. 1062 ; 57 Ind. Cas. 640 ; 57 Ind. Cas. 892 ; 44 Ind. Cas. 412 ; 33 Ind. Cas. 946. Where judgment-debtor failed to object to under-valuation of property even where served with notice under rule 66, he is estopped from urging under-valuation as ground for material irregularity. 143 Ind. Cas. 673=55 A. 519=1933 A. L. J. 1273=A. I. R. 1933 All. 546.

**Want of attachment.**—Want of attachment by itself does not vitiate sale. A. I. R. 1927 Cal. 847=103 Ind. Cas. 698 ; 1 Rang. 533=77 Ind. Cas. 368 ; see also A. I. R. 1926 Mad. 211=92 Ind. Cas. 833. Objection to attachment must be taken before order for sale is passed. A. I. R. 1931 Pat. 63.

**Publication of sale proclamation.**—Failure to publish sale proclamation by beat of drum where it is possible is material irregularity. 55 A. 182=1933 A. L. J. 173=A. I. R. 1933 All. 747 ; see also 48 Ind. Cas. 611 ; For setting aside sale on the ground of an omission in the sale proclamation, the omission must be a material one. 53 Ind. Cas. 143 ; see also 32 Ind. Cas. 990 ; 41 M. L. J. 465=68 Ind. Cas. 916 ; 110 Ind. Cas. 339 ; A. I. R. 1933 Mad. 225=56 M. 356 ; A. I. R. 1931 Lah. 63=32 P. L. R. 933=132 Ind. Cas. 525 ; 58 C. 813=35 C. W. N. 75=53 C. L. J. 575=A. I. R. 1931 Cal. 490 ; A. I. R. 1931 Bom. 367=33 Bom. L. R. 500 ; 37 C. W. N. 622=A. I. R. 1933 Cal. 662 ; A. I. R. 1933 Lah. 103.

**Notice.**—Omission of notice under rule 66 is material irregularity. A. I. R. 1929 Nag. 130=25 N. L. R. 58 ; 75 Ind. Cas. 103=4 Lah. 243. Sale is void when there is no notice under rule 22. A. I. R. 1930 Pat. 153=119 Ind. Cas. 891. Want of notice to Receiver who is not in possession nor is a party is not material irregularity. A. I. R. 1929 Rang. 311=120 Ind. Cas. 142. Sale is inoperative for omission to serve notice on legal representative. A. I. R. 1928 All. 74=25 A. L. J. 507. Notice under rule 92 must be served. 62 Ind. Cas. 113=2 P. L. T. 270. Auction sale by Court without notice to judgment-debtor is bad and must be set aside. 20 M. L. T. 479=37 Ind. Cas. 387 ; but see 74 Ind. Cas. 458=A. I. R. 1922 Mad. 95=16 L. W. 934.

**Burden of proof.**—Burden of proving defect in execution sale is on party assailing it. A. I. R. 1925 Pat. 48=78 Ind. Cas. 609 ; see also A. I. R. 1930 Lah. 692=122 Ind. Cas. 234.

**Bar of suit.**—In case of fraudulent sale only application under this rule lies. A. I. R. 1928 Mad. 1139=113 Ind. Cas. 873 ; see also A. I. R. 1930 All. 556=1930 A. L. J. 1177 ; 123 Ind. Cas. 755=L. R. 11 A. 137 ; A. I. R. 1921 Mad. 121=44 M. 351=40 M. L. J. 55=62 Ind. Cas. 203 ; A. I. R. 1928 Rang. 18=105 Ind. Cas. 706 ; A. I. R. 1925 Cal. 779=85 Ind. Cas. 529 ; but see A. I. R. 1927 Mad. 1035=51 M. 76=53 M. L. J. 688 ; 85 Ind. Cas. 1014=2 Pat. 386 ; 63 Ind. Cas. 425=19 A. L. J. 530 ; 78 Ind. Cas. 108=A. I. R. 1925 Mad. 325.

**Appeal.**—An appeal against an order dismissing an application for setting aside a sale under Order 21, r. 90, lies to the Divisional Court. 39 Ind. Cas. 372=11 Bur. L. T. 8; see also 56 C. W. N. 125=55 C. L. J. 85=89 C. 956=A. I. R. 1932 Cal. 672; A. I. R. 1933 Mad. 851 (F. B.)=65 M. L. J. 719=38 M. L. W. 745. In cases falling under Order 21, rule 90, no second appeal lies. 1933 M. W. N. 77=A. I. R. 1933 Mad. 838; see also A. I. R. 1929 Mad. 624; A. I. R. 1927 Cal. 657=45 C. L. J. 172; A. I. R. 1925 Lah. 624; 87 Ind. Cas. 555; 5 P. L. T. 444=78 Ind. Cas. 315; A. I. R. 1935 Rang. 521; A. I. R. 1935 Lah. 962; 74 Ind. Cas. 838=4 P. L. T. 721; 62 Ind. Cas. 685; 2 P. L. T. 401=6 P. L. J. 319=61 Ind. Cas. 623; 56 Ind. Cas. 646=1 P. L. T. 265; 39 Ind. Cas. 374=11 Bur. L. T. 26; 40 A. 122=43 Ind. Cas. 522. Auction-purchaser is not a necessary party in an appeal against order refusing an application to set aside the sale under Order 21, rule 90. A. I. R. 1936 Lah. 478=163 Ind. Cas. 698. Second appeal does not lie where application is merely to set aside sale on account of irregularities. A. I. R. 1934 Pat. 627. Second appeal lies where decree-holder himself is purchaser. A. I. R. 1930 Nag. 191=124 Ind. Cas. 250; see also A. I. R. 1923 Mad. 1142=87 Ind. Cas. 413; but see A. I. R. 1936 All. 763=1936 A. L. J. 959=165 Ind. Cas. 654. A second appeal against an order passed on appeal dismissing an appeal from an order under Order 21, rule 90, is incompetent as no second appeal lies in such a case. 17 Pat. L. T. 712; see also 38 P. L. R. 839=A. I. R. 1936 Lah. 969. Where an application by a person is rejected on the ground that he has no *locus standi* to apply under this rule as an attaching creditor, that amounts to failure to exercise a jurisdiction vested in the Court by law, and the High Court will interfere in revision. 40 C. W. N. 1338.

Application by a purchaser to set aside sale on ground of judgment-debtor having no saleable interest. 91. [S. 313.] The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold.

*N. B.*—For local amendment in Bombay.—*Vide infra*.

**Scope.**—Where the judgment-debtor has no saleable interest in the property the auction-purchaser must apply within 30 days to set aside the sale under Order XXI, rule 91. 13 Bur. L. T. 152=61 Ind. Cas. 805; 7 P. L. T. 25=88 Ind. Cas. 537; 88 Ind. Cas. 693. An auction-purchaser has no right to maintain suit for refund of purchase-money on the ground of absence of saleable interest in the judgment-debtor. A. I. R. 1924 Cal. 172=28 C. W. N. 20=80 Ind. Cas. 257; A. I. R. 1925 Lah. 199; 6 P. L. T. 769=3 Pat. 917=88 Ind. Cas. 219. The auction-purchaser's right is limited to an application for an order for repayment of the purchase money after the sale has been set aside. A. I. R. 1921 All. 377=43 A. 60=58 Ind. Cas. 105; 65 Ind. Cas. 230; but see 76 Ind. Cas. 605. No sale can be set aside except by a resort to the procedure of Order XXXI. A. I. R. 1924 Pat. 273=2 Pat. 829=76 Ind. Cas. 927. If the property has been sold in execution, the judgment-debtor has no interest thereafter in the property. 40 A. 411=16 A. L. J. 236=44 Ind. Cas. 697. The Court-sale carries no guarantee that the property belongs to the judgment-debtor and the auction-purchaser takes the risk, and bears the loss if property does not belong to the judgment-debtor. A. I. R. 1927 Mad. 394=50 M. 639=52 M. L. J. 148. The Court-sale of a property not belonging to the judgment-debtor is not void *ab initio* but only voidable. A. I. R. 1927 Mad. 835=53 M. L. J. 255=104 Ind. Cas. 614. Before a decree-holder can apply again to execute the decree, recorded as satisfied by the previous Court-sale he must have the sale set aside. To such an application, Order 21, r. 91, in terms applies and it must be put in within 30 days of the sale. A. I. R. 1925 Mad. 394=50 M. 639=100 Ind. Cas. 522; see also 33 Bom. L. R. 503=A. I. R. 1931 Bom. 252. Although a purchaser at an auction sale can get the sale set aside, if he cannot get possession, it does not prevent him from asserting the title of his vendor acquired by the purchase. A. I. R. 1929 Cal. 218=33 C. W. N. 117. Where subsequent to the purchase half of the property is lost, decree-holder is not entitled to get back the money. 53 A. 496=1931 A. L. J. 228=A. I. R. 1931 All. 377. An auction purchaser purchasing immovable property at a Court-sale is not entitled to a refund of his purchase-money if subsequently a third party claims the property and obtains a decree for possession. Where an auction purchaser purchases immovable property at an auction sale by a Court, there is no guarantee by the Court corresponding to the guarantee under s. 55 T. P. Act. The auction-purchaser must be aware of the fact that he is purchasing property



subject to the risk that it may be claimed subsequently by a third party. It is only the right and title of the judgment-debtor which passes to the auction purchaser and the auction purchaser takes that right and title subject to any claims which may subsequently be made by third parties. A. I. R. 1937 All. 18; see also A. I. R. 1935 All. 910=1935 A. L. J. 474. Once the sale is confirmed it must be presumed conclusively that there is no defect in the sale either under rule 90 or under rule 91; and so there exists no basis for a suit on the ground of want of saleable interest in the judgment-debtor. If there is no warranty of title there is no cause of action in favour of the auction purchaser and no question of equity and justice arises. A. I. R. 1937 Nag. 140. A sale of immovable property in which the judgment-debtor has no interest at the date of the sale is not a nullity in the sense of being beyond the jurisdiction of the executing Court or void as between the judgment-debtor and the decree-holder or auction-purchaser. The decree-holder, if he purchases the property, cannot successfully maintain an application for the revival of the execution proceedings on the ground that the sale has not in fact satisfied his decree to the extent of the sale price, unless he has the sale set aside by applying under this rule. A. I. R. 1936 Pat. 97 (F. B.)=15 Pat. 308=16 Pat. L. T. 908=160 Ind. Cas. 1049. Rule 91 contemplates want of saleable interest in the judgment-debtor. 145 Ind. Cas. 421=12 Pat. 665=14 P. L. T. 388=A. I. R. 1933 Pat. 435. (S. B.). Where application under this rule is not proper, sale could well be confirmed. 134 Ind. Cas. 496=32 P. L. R. 63=A. I. R. 1931 Lah. 244. Where Court refused to set aside sale under this rule no second appeal lies. 140 Ind. Cas. 833=33 P. L. R. 625. Decree-holder purchaser cannot set aside sale merely because he is not allowed to set off on account of ratable distribution to other decree-holders. 133 Ind. Cas. 737=33 Bom. L. R. 503=A. I. R. 1931 Bom. 252. Only remedy to claim refund is under Order 21, rule 91. A. I. R. 1934 Oudh 233.

**92.** [Ss. 312, 314] (1) Where no application is made under rule 89,

Sale when to become absolute or be set aside.

rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon

the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

*N. B.*—For local amendments in Allahabad, C. P., Madras and Oudh.—*Vide infra.*

**Scope.**—Where there is no irregularity in publishing and conducting the sale, execution Court cannot refuse to confirm the sale. A. I. R. 1934 Lah. 146. Objection not taken before sale is presumed to have been waived. A. I. R. 1937 Lah. 416. This rule applies only to valid sales. 143 Ind. Cas. 854=56 M. L. J. 253=56 M. 808=A. I. R. 1933 Mad. 598. Where objection under rule 90 is dismissed, sale must be automatically confirmed. A. I. R. 1933 Lah. 99=34 P. L. R. 70=13 Lah. 761; A. I. R. 1926 Nag. 193=21 N. L. R. 157. Confirmation of sale may be presumed from conduct of executing Court. 31 Ind. Cas. 254=81 P. R. 1915. Where sale is confirmed by order of Court and becomes absolute under rule 92, the only remedy is by suit, and an application under s. 47 is incompetent. A. I. R. 1922 Mad. 63=70 Ind. Cas. 569=15 L. W. 272. This rule is mandatory in its provisions. A. I. R. 1930 All. 843. Order 21, rule 92, contemplates the passing of an order of confirmation and it is the passing of this order which makes the sale absolute; so it is not the lapse of 30 days that confirms the sale but the passing of the order which cannot be passed within 30 days. A. I. R. 1937 Mad. 560. But the Court may stay confirmation of sale by virtue of its power under s. 151. A. I. R. 1930 Lah. 793; see also A. I. R. 1929 All. 671=121 Ind. Cas. 270. On the date fixed for confirmation of sale held in execution of a decree, decree-holder's presence is not necessary. A. I. R. 1930 Nag. 134=120 Ind. Cas. 405. Order XXI, rule 92, is applicable only to immovable

property. A. I. R. 1930 Lah. 236=30 P. L. R. 421=115 Ind. Cas. 70. Under this rule a suit for setting aside a sale does not lie if an order confirming the sale is made. A. I. R. 1926 Oudh. 45=89 Ind. Cas. 107. Order 21, rule 92, C. P. Code under which a sale is to become absolute or be set aside is independent of a proceeding under s. 58. The latter moreover refers to attachments of all kinds of properties, whether movable or immovable, whereas the question of a sale becoming absolute arises only in the case of immovable property. A. I. R. 1937 Cal. 390. Once a sale has taken place the Court has no jurisdiction to refuse to confirm it unless the specified objections are taken and sustained. A. I. R. 1936 Lah. 191=161 Ind. Cas. 752. A judgment-debtor who was declared insolvent during the sale proceedings has no *locus standi* to appeal from the order confirming the sale. 162 Ind. Cas. 299=38 P. L. R. 108=A. I. R. 1936 Lah. 368. No second appeal lies against an appellate order upholding an order rejecting an application to set aside sale under Order 21, rule 92, C. P. Code. 160 Ind. Cas. 468=1936 O. W. N. 137=A. I. R. 1936 Oudh 172; see also A. I. R. 1936 Pat. 119. Order setting aside or refusing to set aside sale is not one in execution proceedings. A. I. R. 1934 Lah. 508. Where appeal has been filed from order of Sub-judge disallowing application to set aside sale, sale is not absolute till disposal of appeal. A. I. R. 1934 P. C. 134.

**Sub-section 2—Proviso.**—The proviso to clause (2) of rule 92 of Order 21, C. P. Code, only lays down that a sale should not be ordered to be set aside unless notice is given to the persons affected thereby. It is not necessary that they should be made parties to the application and arrayed in the categories of plaintiffs and defendants. A. I. R. 1935 Cal. 502=62 C. 286.

**Sub-rule (8).**—The effect of sub-rule (3) is that a Civil suit to set aside an order made under Order 21, r. 92, is prohibited. A. I. R. 1935 All. 470=1935 A. L. J. 261=157 Ind. Cas. 33. But where a decree in execution of which the sale took place is itself found to be invalid or where it is found that the sale officer had no authority to sell the property the remedy of a separate suit would be barred. 1935 A. L. J. 261=A. I. R. 1935 All. 470.

**Appeal.**—In an appeal against the order confirming the sale, auction-purchaser is a necessary party. A. I. R. 1935 Lah. 802.

**Setting aside of sale**—The executing Court has to consider in deciding if the sale should be confirmed whether there is any reason with reference to rr. 89-91 for refusing to do so. If there are not, the Court must confirm the sale. If there are circumstances which vitiate the sale at its inception, the executing Court can refuse to confirm the sale, even apart from the contingencies contemplated in rr. 89, 91. A. I. R. 1926 Nag. 17=88 Ind. Cas. 693. Making sale absolute after satisfaction of decree is without jurisdiction. A. I. R. 1922 Nag. 248=18 N. L. R. 134=65 Ind. Cas. 331. A sale cannot be set aside after its confirmation. A. I. R. 1935 All. 889=1935 A. L. J. 940=156 Ind. Cas. 389.

**Notice.**—Order setting aside sale without notice to auction-purchaser is bad for want of jurisdiction. 32 Ind. Cas. 891; see also A. I. R. 1921 Pat. 498=2 P. L. T. 336=62 Ind. Cas. 61. Order under r. 90 without notice is nullity. A. I. R. 1921 Pat. 293=62 Ind. Cas. 113; 3 Lah. L. J. 463=62 Ind. Cas. 986; see also 68 Ind. Cas. 238; 75 Ind. Cas. 863=5 P. L. T. 233; A. I. R. 1924 Bom. 130=80 Ind. Cas. 648; 80 Ind. Cas. 931; A. I. R. 1927 Lah. 681; A. I. R. 1929 Mad. 763=52 M. 861.

**93. [S. 315.]** Where a sale of immovable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase-money, with or without interest as the Court may direct, against any person to whom it has been paid.

**Scope.**—Principles of *caveat-emptor* applies at Court sale 39. Ind. Cas. 763=1 Pat. L. W. 551. Mistake in sale proclamation is good ground for suit to cancel sale and for refund of proportionate part of purchase-money. 8 L. B. R. 427=33 Ind. Cas. 1030. But under the new Code action to recover money must be taken in execution proceedings. Under old Code, separate suit lay for the same. 37 Ind. Cas. 663; see also 44 Ind. Cas. 200; 22 C. W. N. 760=46 Ind. Cas. 783. Order for refund of purchase-money can be executed like

decree. 23 M. L. T. 355=47 Ind. Cas. 630. Unlike private sale no genuineness of title is implied in Court-sale. 52 Ind. Cas. 174=12 Bur. L. T. 211; 52 Ind. Cas. 818=15 N. L. R. 40; 49 Ind. Cas. 359. Court may award interest while refunding purchase-money when sale is set aside. 48 I. A. 24=19 A. L. J. 101=25 C.W.N. 376=59 Ind. Cas. 782 P. C.; see also 40 M. 1009=45 Ind. Cas. 109; 57 C. 676=A. I. R. 1930 Cal. 685; A. I. R. 1929 Lah. 617=30 P. L. R. 439. Separate suit does not lie to recover purchase-money on account of absence of saleable interest in judgment-debtor. 3 Pat. 947=88 Ind. Cas. 218; see also 28 C. W. N. 20=80 Ind. Cas. 257; 27 C. W. N. 183=50 C. 115=79 Ind. Cas. 609; 46 B. 833=24 Bom. L. R. 308=67 Ind. Cas. 360; 64 Ind. Cas. 628; 43 A. 80=18 A. L. J. 905=58 Ind. Cas. 105; but see A. I. R. 1932 Lah. (F. B.) 401. There are other remedies also to claim refund of purchase-money than those provided by r. 92. A. I. R. 1926 Cal. 971=53 C. 758=43 C. L. J. 418=95 Ind. Cas. 64. Right to refund of purchase-money arises only after sale is set aside. 54 A. 948=A. I. R. 1933 All. 63. In absence of remedy *Caveat emptor* applies. 65 N. L. J. 230=4 N. L. J. 274; 55 A. 221=A. I. R. 1933 All. 218; see also A. I. R. 1937 Oudh 145. Third party being purchaser at auction sale is entitled to compensation for improvements if sale is set aside. A. I. R. 1926 Nag. 160=89 Ind. Cas. 18. A right to claim refund in restitution is recognized against the decree-holder in Order 21, rule 93. In principle there is no difference between the liability of the decree-holder whether the sale is set aside under Order 21, rule 92 or under s. 47. A. I. R. 1936 Lah. 497. Where an execution sale turns out to be fertile by a finding in a suit in which the decree and the sale in execution declared void, the auction-purchaser has a right of other action to get back his money under the general law, though not under the C. P. Code. 159 Ind. Cas. 625=1935 M. W. N. 1023=69 M. L. J. 250 (F. B.).

94. [S. 316.] Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the Certificate to purchaser. property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute.

*N. B.*—For local amendments in C. P. and Rangoon.—*Vide infra*.

**Scope.**—Certificate of sale can be granted to person only who bids the highest bid. 24 C.W.N. 27=54 Ind. Cas. 726. Court must issue sale certificate, claim of third party not being satisfied is no bar. 1 Pat. L. J. 446=38 Ind. Cas. 576. Onus of proof lies on judgment-debtor to prove invalidity of decree if sale certificate is not granted. 34 Ind. Cas. 911. Sale certificate is only evidence of title, but does not create any. 24 C. W. N. 1011=47 C. 1108=31 C. L. J. 463; see also 45 B. 1186=23 Bom. L. R. 514=63 Ind. Cas. 248. Plain meaning of sale certificate should not be reversed by different interpretation of documents forming grounds for decree. A. I. R. 1922 P. C. 252=24 Bom. L. R. 692=44 M. 483=48 I. A. 155=63 Ind. Cas. 708. In subsequent proceedings Court cannot go behind sale certificate. A. I. R. 1927 Mad. 311=52 M. L. J. 68. Sale certificates cure irregularities. A. I. R. 1927 Cal. 82=97 Ind. Cas. 757. Sale certificate being issued, sale cannot be set aside for petty reason. A. I. R. 1923 Mad. 48=43 M. L. J. 477=31 M. L. T. 363=63 Ind. Cas. 1001. Sale certificate should not be amended without notice to judgment-debtor. A. I. R. 1922 Mad. 63=65 Ind. Cas. 722. Costs for proper stamps for sale certificate must be borne by purchaser. A. I. R. 1930 Bom. 392=32 Bom. L. R. 1084 (F. B.). If insufficiently stamped sale certificate is issued Court may issue another without imposing penalty or purchaser may apply for correction. A. I. R. 1930 Bom. 392=32 Bom. L. R. 1084=128 Ind. Cas. 31 (F. B.). Certificate for sale should not furnish material for fresh litigation. 137 Ind. Cas. 603=34 Bom. L. R. 206=A. I. R. 1932 Bom. 210. Title passes from date of sale and it can be established independent of sale certificate. 136 Ind. Cas. 49=10 Pat. 670=A. I. R. 1932 Pat. 80. Under the Code a sale certificate should bear the date of expiration of sale. A. I. R. 1936 Mad. 733. An assignee from the auction purchaser can apply for sale certificate and the Court is competent to grant it to him. 161 Ind. Cas. 740=38 Bom. L. R. 104=A. I. R. 1936 Bom. 137.

96. [S. 318.] Where the immovable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been

granted under rule 94, the Court shall, on application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same.

**Scope.**—Possession in rule 95 means legal possession. A. I. R. 1928 Oudh 251=3 Luck. 506=5 O.W.N. 372. In execution delivery of possession must be according to either rule 95 or 96. 55 Ind. Cas. 946; see also A. I. R. 1926 All. 120=89 Ind. Cas. 134. Where a mortgage decree has been obtained against executors in their representative capacity and there has been a decree for sale and a sale is held, the purchaser cannot by proceeding under Order 21, rr 95 and 96, Civil Procedure Code, obtain possession as against the beneficiaries under the will, that is to say the beneficiaries entitled to the estate which is represented by the executors. The reason for this is that the beneficiaries are not affected by rr. 97, 95 or 35. They are not "judgment-debtors" or some persons on their behalf under rule 95 or any person bound by a decree under rule 35. Beneficiaries do not claim under executors and they are excluded under the definition in s. 2, C. P. Code. A. I. R. 1937 Cal. 301. This section does not apply where the property sold in execution is claimed by a person in his own right and independently of the judgment-debtor. 1936 M. W. N. 1369=44 L. W. 698=71 M. L. J. 725. Where delivery that is originally attempted is under Order 21, rule 95, *i. e.*, actual vacant possession, and the result of the objection raised is the outstanding dispute that remains is only the rights of the tenants, the common sense and reasonable view is that delivery, so far as landlords' right is concerned under Order 21, rule 95, is effected, and what is completed is the right to actual possession asserted by tenants. A. I. R. 1936 Mad. 733. An application by decree-holder auction purchaser under rules 95 and 97 is an application in execution of a decree and the removal of obstruction to the decree-holder auction purchaser is in execution of the decree even though the decree be only for sale. A. I. R. 1936 Sind 11=30 S. L. R. 290=161 Ind. Cas. 524. Possession by demolition of structures cannot be granted under rule 95. A. I. R. 1934 Cal. 751. It is not necessary in every case where an application for delivery under Order 21, rule 95, is made that a complete inquiry is necessary. Where the questions raised are questions for decision in a regular suit and not in summary proceedings, the proper course is to leave the aggrieved party to his remedy by way of a regular suit. 156 Ind. Cas. 551=A. I. R. 1935 Rang. 159. Where there was no opposition by the judgment-debtors and the obstruction was only by a third person to a limited extent, the portion as to which there was no obstruction by the third person and no opposition by the judgment-debtor should be delivered. 58 M. 893=159 Ind. Cas. 279=1935 M. W. N. 926=69 M. L. J. 821 (F. B.)=42 L. W. 375. Court is not bound to see that delivery is actually effected. A. I. R. 1926 Mad. 385=50 M. L. J. 72=91 Ind. Cas. 485. The delivery of possession by beat of drum to an auction-purchaser of share in a property can be considered as a valid one. A. I. R. 1928 Oudh 251=3 Luck. 507. Application under rule 95 is not proceeding under s. 47. A. I. R. 1930 Pat. 311=11 P. L. T. 331; but see 53 C. 781=30 C. W. N. 649 (F. B.)=A. I. R. 1926 Cal. 798; 90 Ind. Cas. 952=51 M. L. J. 106. Possession under r. 95 has the effect of making the judgment-debtor's possession that of trespasser. A. I. R. 1922 Pat. 197=66 Ind. Cas. 817. Formal possession gives new start to limitation for actual possession. 124 Ind. Cas. 767; A. I. R. 1930 Lah. 823; 27 C. W. N. 24=77 Ind. Cas. 1035=A. I. R. 1923 Cal. 138; A. I. R. 1933 Cal. 424; 60 Ind. Cas. 320=46 B. 710=24 Bom. L. R. 232; but see 43 A. 520=63 Ind. Cas. 212; 130 Ind. Cas. 706. No proclamation by beat of drum is necessary. A. I. R. 1934 Nag. 172. Court has power even to direct breaking open lock to put purchaser in possession. A. I. R. 1934 Pat. 119. Such summary procedure under rules 95 and 96 does not bar suit for possession by auction-purchaser. A. I. R. 1931 Pat. 241 (F. B.)=10 Pat. 670=12 P. L. T. 423. When actual possession is withheld after symbolical possession is granted fresh suit for possession lies. A. I. R. 1929 Nag. 298=116 Ind. Cas. 70. Symbolical possession is equivalent to actual possession with respect to judgment-debtor and mortgagee during the pendency of suit. A. I. R. 1930 Cal. 15=33 C. W. N. 963=56 C. 1130=121 Ind. Cas. 407.

96. [S. 319.] Where the property sold is in the occupancy of a tenant or

**Delivery of property in occupancy of tenant.**

other person entitled to occupy the same and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application

of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment-debtor has been transferred to the purchaser.

**Scope.**—After ordering possession under rule 96, Court has no power to grant stay of warrant. A. I. R. 1927 Oudh 301=1 Luck. Cas. 226=103 Ind. Cas. 695. Omission to state period of lease does not entitle the purchaser to actual possession before expiry of lease. A. I. R. 1927 Rang. 927=6 Bur. L. J. 7=100 Ind. Cas. 1014. This rule does not apply to property in the hands of a Receiver. 14 S. L. R. 81=63 Ind. Cas. 685. An order of possession to a purchaser under rule 96, is a judicial order. 45 Ind. Cas. 608. Symbolical possession has no effect against stranger. 21 O. C. 70=45 Ind. Cas. 606; 3 Pat. L. W. 133=42 Ind. Cas. 449; 39 C. W. N. 1306. Purchaser of undivided share if obstructed must sue for partition. 9 L. W. 81=25 M. L. T. 153=49 Ind. Cas. 629. No limitation is fixed for order under rule 96 for symbolical possession. 40 Ind. Cas. 605.

*Resistance to Delivery of Possession to Decree-holder or Purchaser.*

97. [Ss. 328—334.] (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

**Scope.**—The locking of the house by the judgment-debtor amounts to resistance or obstruction. A. I. R. 1930 B. 375=30 Bom. L. R. 619=54 B. 479=125 Ind. Cas. 703. Application under rule 97 by decree-holder auction-purchaser does not come under section 47. *Ibid.* Order under r. 97 on application by stranger auction-purchaser is not under s. 47. A. I. R. 1930 Pat. 311=11 Pat. L. T. 331=9 Pat. 775=126 Ind. Cas. 849. The "resistance or obstruction" contemplated by rule 97 in some overt act by some person who is present at the time. A. I. R. 1924 Rang. 261=3 Bur. L. J. 71=82 Ind. Cas. 865. To such case alone Art. 11 A of the Limitation Act applies. *Ibid.*; see A. I. R. 1924 All. 495 (F. B.)=22 A. L. J. 626=83 Ind. Cas. 923. There is nothing wrong in anticipating the obstruction and ordering any investigation under Order 21, r. 97. A. I. R. 1925 Rang. 374=4 Bur. L. J. 178=92 Ind. Cas. 667. Order under r. 97 on bailiff's report of obstruction without an application by decree-holder and notice to other side is bad. A. I. R. 1928 Lah. 215=10 Lah. L. J. 68=106 Ind. Cas. 491. Court cannot stay proceedings under rr. 97 and 98 at instance of obstructor pending his suit. A. I. R. 1929 Lah. 694=119 Ind. Cas. 488. Order IX does not apply to proceedings under rule 97 or rule 100. A. I. R. 1929 Mad. 757 (F. B.)=52 M. 899=57 M. L. J. 381=30 L. W. 424=120 Ind. Cas. 567. The Court has no inherent power to set aside the order of dismissal for default or an order passed *ex parte* in an application under Order XXI, rr. 97 and 100 on sufficient cause being shown. A. I. R. 1929 Mad. 757=57 M. L. J. 381 (F. B.)=30 L. W. 424=52 M. 899. Auction-purchaser has a right to sue for possession. 57 Ind. Cas. 177. Fresh warrant can be ordered where execution of first was obstructed. A. I. R. 1921 Mad. 559=66 Ind. Cas. 722=1921 M. W. N. 698; 4 P. L. J. 94=49 Ind. Cas. 150 (F. B.). Order passed in dispute between auction-purchaser, decree-holder and party to suit, is appealable by virtue of its coming under s. 47. A. I. R. 1934 Cal. 541. The executing Court has no jurisdiction to start an enquiry under this rule either *suo motu* or upon the application of a prospective objector in the absence of a complaint by the decree-holder under this rule about resistance or obstruction of delivery of possession to him. 31 N. L. R. 408=A. I. R. 1935 Nag. 212=159 Ind. Cas. 584. Where a decree-holder purchaser seeks delivery of possession of an item of property and the judgment-debtor obstructs, the decree-holder should make a complaint under Order 21, rule 97, C. P. Code and the matter must be disposed of in execution. 58 M. 893=159 Ind. Cas. 279=1935 M. W. N. 926=42 L. W. 375=A. I. R. 1935 Mad. 803=69 M. L. J. 821 (F. B.). An application under this rule for delivery of

possession by an auction-purchaser may be treated as an application in execution proceeding, but it cannot be treated as an application for execution. 62 C. 66=158 Ind. Cas. 191=A. I. R. 1935 Cal. 333. An Order against the judgment-debtor under rule 97 is appealable. A. I. R. 1921 Mad. 627=41 M. L. J. 490=14 L. W. 449=70 Ind. Cas. 367. Rule 97 applies to decree under s. 9 of the Specific Relief Act. A. I. R. 1926 Mad. 353=23 L. W. 157=92 Ind. Cas. 61=1926 M. W. N. 162. Sub-tenant cannot resist execution of warrant of possession against tenant. A. I. R. 1922 Bom. 449=46 B. 887=23 Bom. L. R. 1316=65 Ind. Cas. 312; see also 64 Ind. Cas. 697=A. I. R. 1922 Bom. 273=46 B. 526=23 Bom. L. R. 125; but see 47 C. 907=60 Ind. Cas. 969. No appeal lies where application under r. 97 is rejected as under rule 99. 53 Ind. Cas. 923. In this rule the duty of Court on resistance to delivery of possession is laid down. A. I. R. 1933 All. 57=1932 A. L. J. 1036=54 A. 1031. Decree-holder or auction-purchaser can apply under this rule. A. I. R. 1931 Lah. 686=132 Ind. Cas. 844. Oral application is sufficient. A. I. R. 1931 Lah. 13.

**98. [Ss. 329, 330.]** Where the Court is satisfied that the resistance or

Resistance or obstruction by judgment-debtor,

obstruction was occasioned without any just cause by the judgment-debtor, or by some other person at his instigation, it shall direct that the applicant

be put into possession of the property and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days.

*N. B.*—For local amendments in Allahabad, C. P., Lahore, Peshwar and Rangoon.—*Vide infra*.

**Scope.**—This rule applies when judgment-debtor obstructs possession. 31 Ind. Cas. 799. But where the objection by a tenant is a *bona fide* one this rule has no application. A. I. R. 1936 Mad. 733. A purchaser *pendente lite* comes within the definition of a judgment-debtor as mentioned in rule 98. A. I. R. 1925 Cal. 1243=85 Ind. Cas. 1504; see also 12 L. W. 350=59 Ind. Cas. 894. This rule has no application where the person obstructing is not acting at the instigation of the judgment-debtor. 60 Ind. Cas. 969=47 C. 907; 25 B. 478 (486). Resistance by judgment-debtor who has purchased the stranger auction-purchaser's interest is for just cause under this rule. A. I. R. 1928 Mad. 806=111 Ind. Cas. 551; see also A. I. R. 1930 Bom. 375=32 Bom. L. R. 619=54 B. 479. Where auction-purchaser applies for possession and application is disallowed, the remedy is in suit under rule 103 and no revision or appeal lies. A. I. R. 1933 All. 959; see also A. I. R. 1933 Pat. 604. Decree-holder is not a party to proceedings under rule 98. A. I. R. 1926 Cal. 985=92 Ind. Cas. 544. Order under r. 98 is appealable when purchaser is decree-holder. A. I. R. 1925 Pat. 478=6 P. L. T. 351=88 Ind. Cas. 104. Rule 103 does not bar appeal if allowed by s. 47. A. I. R. 1921 Mad. 559=66 Ind. Cas. 722. The terms of rule 103 of Order 21 clearly cover an order under rule 98; and so far as the conclusiveness enacted in the final part of rule 103 is concerned, it can make no difference whether the question is sought to be reagitated by a person as a plaintiff or as defendant. A. I. R. 1937 Mad. 366.

**99. [Ss. 331, 335.]** Where the Court is satisfied that the resistance or

Resistance or obstruction by *bona fide* claimant.

obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own

account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.

*N. B.*—For local amendments in Allahabad, C. P., Oudh, Peshwar and Rangoon.—*Vide infra*.

**Scope.**—The legislature has specifically provided that in cases where delivery of possession is obstructed on behalf of a third party, any order passed by the executing Court shall be final subject to the result of the suit provided for. A. I. R. 1937 Pat. 135. Resistance by person not *bona fide* cannot be allowed. A. I. R. 1928 Mad. 909=108 Ind. Cas. 894; see also 46 B. 887=23 Bom. L. R. 1316=65 Ind. Cas. 212; A. I. R. 1926 Oudh 610=2 Luck. 269. Unmarried sisters under Hindu

Law can successfully resist possession of partition of house to which they are entitled. 43 M. 635=38 M. L. J. 433=56 Ind. Cas. 524. Question of possession is conclusive in favour of party other than judgment-debtor if no suit is brought within one year by unsuccessful party. 51 P. W. R. 1919=51 Ind. Cas. 787. Order to decree-holder to file suit against obstructors is not one under rule 99 and is not conclusive under rule 103 in absence of suit. A. I. R. 1928 Lah. 672=108 Ind. Cas. 614 ; see also 72 Ind. Cas. 582=44 M. L. J. 443. Objection by transferee *pendente lite* that wrong property has been delivered though not falling under rule 99 or 101 falls under s. 47 and is tenable. A. I. R. 1926 Mad. 968=51 M. L. J. 255. Order under rule 99 dismissing decree-holder's application is not appealable. 133 Ind. Cas. 335=58 C. 808=35 C. W. N. 286=A. I. R. 1931 Cal. 574.

100. [S. 332.] (1) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or where such property has been sold in execution of a decree by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

**Scope.**—This rule applies to cases of joint possession. 144 Ind. Cas. 147=A. I. R. 1933 Pat. 132 ; A. I. R. 1931 Cal. 385=58 C. 55. Party bound by mortgage decree cannot set up paramount title in execution. 38 M. L. J. 199=A. I. R. 1933 Mad. 569. Events subsequent to delivery of possession must be considered. 37 C. W. N. 339=60 C. 685=A. I. R. 1933 Cal. 534. This rule includes auction-purchaser's legal representatives. 36 C. W. N. 790=A. I. R. 1933 Cal. 293. This rule does not apply where there has been only symbolical delivery of possession. A. I. R. 1933 Cal. 144=142 Ind. Cas. 152. Applicant in possession even though as a trespasser is entitled to succeed under rule 101. A. I. R. 1927 Cal. 339. Auction-purchaser in joint-possession can apply. A. I. R. 1924 Pat. 506=5 P. L. T. 106=83 Ind. Cas. 599. Court cannot go into question of *benami*. A. I. R. 1924 Pat. 506=83 Ind. Cas. 599. Usufructuary mortgagee dispossessed by auction-purchaser can apply. A. I. R. 1922 Pat. 408=70 Ind. Cas. 306. Court cannot go behind original decree in proceeding under rule 100. A. I. R. 1930 Pat. 416=127 Ind. Cas. 564. Appeal lies against an order under r. 100 where question is between parties to suit or their representatives. 41 M. L. J. 54=63 Ind. Cas. 730. Where possession is effectively delivered by Civil Court to one party the only course for other party is to apply under r. 100. A. I. R. 1922 Pat. 210=25 C. L. J. 541=77 Ind. Cas. 1005. An objection under Order 21, rule 58 of the mortgagee in possession was dismissed for default, and he did not take recourse to Order 21, rule 63 ; but put his claim under Order 21, r. 100 : *Held* that the Order 21, rule 58 being inapplicable to the claim by mortgagee, order 63 was not applicable ; and the mortgagee therefore was not barred from pressing his claim under rule 100. A. I. R. 1937 Pat. 63. Where a decree is made against father, his sons would be *prima facie* bound by the decree and would not therefore be said to be the persons other than the judgment-debtor. A. I. R. 1935 Pat. 253=155 Ind. Cas. 93. It is only when a person has been dispossessed that he can apply under Order 21, rule 100, C. P. Code. When no possession has been given to the decree-holder or purchaser, there is no dispossession as contemplated by this rule. *Ibid.* Where a certain property has been purchased in sale held in execution of a money-decree pending a partition suit and an application is filed under Order 21, rule 100, in granting the summary relief which has been provided by rules 100 and 101 the Court will have to confine itself to the language of the specific provisions by which a remedy is provided and the general doctrine of *lis pendens* will not apply. A. I. R. 1935 Pat. 230=16 Pat. L. T. 220=157 Ind. Cas. 86. Where a lease in favour of a lessee was executed during the pendency of the proceedings in the Revenue Court consequent on the application made by a tenant under Order 21, rule 100 for restoration of possession ; the doctrine of *lis pendens* is applicable. A. I. R. 1935 Oudh 462=1935 O. W. N. 698. An order on an application under Order 21, rule 100, without allowing any oral evidence to be led by the parties on the ground that there was sufficient documentary evidence on record, is illegal and is liable to be set aside in revision. 1935 A. L. J. 419=A. I. R. 1935 All. 457.

**101. [Ss. 332, 335.]** Where the Court is satisfied that the applicant *Bona fide* claimant to be restored to possession. was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

**Scope.**—Rule 101 does not apply to transferee *pendente lite*. 42 Ind. Cas. 523=6 L. W. 568. Order under rule 101 does not affect party's right to possession upon redemption. 17 N. L. R. 33=54 Ind. Cas. 276. Court cannot determine title of exonerated party. 40 M. 964=38 Ind. Cas. 297. Under rule 103 no appeal lies from an order under rule 101. 101 P. L. R. 1917=41 Ind. Cas. 891. There is no warranty in Court-sale and hence no compensation can be demanded. 25 C. W. N. 756=63 Ind. Cas. 126. Court has no power to enquire as to equities of the case in favour of purchaser. A. I. R. 1926 Mad. 1127=24 L. W. 389=97 Ind. Cas. 605. Court cannot pass declaratory order. A. I. R. 1927 Nag. 300=103 Ind. Cas. 231. Where claim petition is dismissed it must be challenged within one year. A. I. R. 1924 Mad. 111=45 M. L. J. 690=77 Ind. Cas. 264. High Court can interfere in revision against an order under rule 101 to correct error or illegality. A. I. R. 1931 Cal. 385=58 C. 55. Rule 101 is applicable to proceedings under the Madras Estates Land Act by reason of s. 192 of the Estates Land Act. 157 Ind. Cas. 1066=1935 M. W. N. 633=A. I. R. 1935 Mad. 309=68 M. L. J. 324.

**102. [S. 333.]** Nothing in rules 99 and 101 shall apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.

**Notes.**—*Vide* 99 Ind. Cas. 219=2 Luck. 269=A. I. R. 1926 Oudh 610 ; 97 Ind. Cas. 1031=A. I. R. 1926 Mad. 958=51 M. L. J. 255. Rule 102 does not in terms apply to involuntary sale. A. I. R. 1935 Pat. 230=16 Pat. L. T. 220=157 Ind. Cas. 86.

**103. [S. 332, fourth para ; S. 335 second para.]** Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property ; but subject to the result of such suit (if any), the order shall be conclusive.

*N. B.*—For additional rules in Allahabad, Lahore, Oudh and Patna.—*Vide infra*.

**Scope.**—Suit under rule 103 though brought on title must be brought within one year. 53 B. 668=31 Bom. L. R. 765=A. I. R. 1929 B. 379 ; A. I. R. 1928 Cal. 179=47 C. L. J. 87. Suit under rule 103 is to decide right to possession and not only actual possession. A. I. R. 1921 Mad. 317=44 M. 227=60 Ind. Cas. 109. Where auction-purchaser applies for possession and his application is disallowed his remedy is in suit under rule 103 and no revision or appeal lies. A. I. R. 1933 All. 959 ; see also 35 C. W. N. 286=58 C. 808=A. I. R. 1931 Cal. 574. Where order falls under s. 47, rule 103 does not prohibit second appeal. 54 A. 1031=A. I. R. 1933. All. 57. Where suit is within s. 47 neither r. 103 nor Art. 11 of the Limitation Act applies. A. I. R. 1927 Mad. 952=105 Ind. Cas. 414. Procedure under rule 103 and section 47 is not cumulative. 90 Ind. Cas. 952=51 M. L. J. 106. In a suit of possession under rule 103 cause of action must be adverse decision passed under rule 101. 90 Ind. Cas. 575=30 C. W. N. 163. Party out of possession must prove his title. A. I. R. 1925 Sind 201=82 Ind. Cas. 861. Order under rule 101 becomes final after one year. 75 Ind. Cas. 814=19 L. W. 394. This rule applies only when order under one of the rules 98, 99 or 101 has been passed. A. I. R. 1923 Lah. 145=69 Ind. Cas. 557. Section 47 governs the cases where persons concerned are parties to suit or their representative while rule 103 only applies when strangers to decree are involved. 41 M. L. J. 54=63 Ind. Cas. 730. Suit under rule 103 is to decide right to possession and only actual possession. 44 M. 227=60 Ind. Cas. 109. Order under rule 101 must be on merits or else it will not bar a suit more than a year after order. 45 Ind. Cas. 102=14 N. L. R. 66. Words "any party" in rule



103 refer to any party to petition and not to decree under execution. 43 M. 695=39 M. L. J. 456=58 Ind. Cas. 501. Special right to bring suit for declaration of present right to possession is not taken away by the Specific Relief Act, s. 42 proviso. A. I. R. 1934 Nag. 169. Person dispossessed can bring a suit under this section. 1935 A. M. L. J. 107. This rule does not purport to lay down what may or may not be included in a suit filed for the purpose indicated therein or what persons may be impleaded as party to such a suit. The object of this rule is not far to seek. On the one hand the rule is intended to deprive the claimant of his remedy by way of an appeal or application for revision to a higher Court and on the other hand to declare that the adverse order shall be conclusive against the claimant, subject however to the result of any suit which he may file to establish his claim to the present possession of the property which is the subject-matter of the order passed against him. A. I. R. 1935 Sind 129. There is no provision of law which requires a judgment-debtor to be made a party to a suit filed against the obstructor in consequence of an adverse order passed in execution proceedings against the claimant. *Ibid.*

## ORDER XXII.

### *Death, Marriage and Insolvency of Parties.*

1. [S. 361.] The death of a plaintiff  
No abatement by party's death if right to sue survives. or defendant shall not cause the suit to abate if the right to sue survives.

**Scope of Order XXII.**—Order 22 is confined to questions of continuance of suit by devolution of deceased's right to sue on other persons during pendency of suit. But there are cases where suit can be continued by others having independent right to sue on same cause of action. A. I. R. 1931 Lah. 79=31 P. L. R. 973=131 Ind. Cas. 98. This order contemplates devolution of interest not by act of parties but by operation of law. A. I. R. 1927 Mad. 693=53 M. L. J. 142=102 Ind. Cas. 444. Order 22 does not apply to revision. A. I. R. 1933 Sind 200=144 Ind. Cas. 883. This order has no application to application for leave to appeal to the Privy Council. A. I. R. 1934 Sind 36=28 S. L. R. 150. Under this order an application is necessary and the Court cannot proceed out of its own accord. A. I. R. 1934 All. 465=1934 A. L. J. 86. In order to make this order applicable, suit or appeal must be pending. 141 Ind. Cas. 711=26 S. L. R. 362=A. I. R. 1932 Sind 220. Order setting aside abatement cannot be questioned in appeal from suit. A. I. R. 1933 Lah. 152=141 Ind. Cas. 337=34 P. L. R. 221=14 Lah. 361. It is doubtful whether the sons of the manager of a joint Hindu family can be brought on record after his death. 145 Ind. Cas. 164=35 Bom. L. R. 388=A. I. R. 1933 Bom. 245. This order has no application for leave to appeal to Privy Council. A. I. R. 1934 Sind 36. Court's order is not necessary for abatement. A. I. R. 1926 All. 217=48 A. 334 (F. B.).

**Scope of Rule 1.**—Continuance of suit depends not on qualification of person claiming to be representative of deceased but on nature of suit. 134 Ind. Cas. 771=13 Lah. 116=33 P. L. R. 1069=A. I. R. 1931 Lah. 293; see also A. I. R. 1925 Mad. 244=47 M. L. J. 745=85 Ind. Cas. 866. Representative suit does not abate by plaintiff's death. 132 Ind. Cas. 289=54 M. 770=60 M. L. J. 654=A. I. R. 1931 Mad. 599; see also 37 P. L. R. 85. The question of abatement can only arise when an appeal is pending in a Court having jurisdiction to entertain it. 152 Ind. Cas. 939=A. I. R. 1935 All. 92. In case of death of one of three plaintiffs where heirs of the deceased plaintiff are the sons of the remaining two plaintiffs, the suit need not abate in spite of the fact the heirs of the deceased plaintiffs are not brought on record. 145 Ind. Cas. 325=A. I. R. 1933 Pat. 270; see also A. I. R. 1933 Lah. 654. "Suit" means proceedings antecedent to decree and "the conclusion of the hearing" of a suit. A. I. R. 1927 Oudh 156=2 Luck. 464=101 Ind. Cas. 174. Cause of action and "right to sue" are synonymous. A. I. R. 1927 Oudh 156=101 Ind. Cas. 176=2 Luck. 464; A. I. R. 1927 Nag. 343; 38 M. 1064=33 Ind. Cas. 45. Appeal abating against one, abates against all, because interest of all respondents are indivisible. 4 Lah. L. J. 221=65 Ind. Cas. 725. Right to an office is personal and ceases on death. A. I. R. 1930 Lah. 703; see also A. I. R. 1929 Lah. 807=31 P. L. R. 134. Suit for damages for malicious prosecution does not survive. 48 A. 630=

A. I. R. 1926 All. 610 ; 31 Ind. Cas. 4 ; 52 Ind. Cas. 348 ; A. I. R. 1926 Mad. 243=49 M. 208=50 M. L. J. 34. In a suit under s. 92 for removing trustee for breach and framing scheme, cause of action regarding scheme survives. A. I. R. 1926 Mad. 162=48 M. 688. If appeal abates regarding injunction it abates regarding costs incurred by appellant. 80 Ind. Cas. 744=2 Rang. 91. Suit does not abate by the death of a member of a committee. The surviving member can continue it. A. I. R. 1934 Cal. 328 ; see also A. I. R. 1934 All. 315. Where plaintiff dies pending appeal, cross-objection abates. A. I. R. 1934 Nag. 119. Right to sue as pauper is personal and does not survive to his heirs. 64 Ind. Cas. 63. Suit for damages for breach of contract of marriage abates on plaintiff's death. 44 B. 446=22 Bom. L. R. 143=55 Ind. Cas. 624. Right to obtain grant of administration belonging to residuary legatee does not survive to his heirs if he dies, pendency of application, being personal. 45 C. 862=51 Ind. Cas. 76. Where one of three members of joint Hindu family in whose favour bond is executed dies, survivors can sue on bond as they represent family sufficiently. 14 A. L. J. 255=33 Ind. Cas. 123. Where a minor plaintiff dies during the pendency of a suit for partition instituted on his behalf, his legal representatives are not entitled to continue the suit, for the rule that the institution of a partition suit affects a severance of the joint status of the family is not applicable to a suit filed on behalf of a minor as in such a suit it is for the Court to determine whether a decree for partition will be beneficial to the minor. 36 Bom. L. R. 738=152 Ind. Cas. 715.

2. [S. 862] Where there are more plaintiffs or defendants than one,

Procedure where one of several plaintiffs or defendants dies and right to sue survives. and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

**Scope.**—If the right to sue or be sued survives to one or more surviving plaintiffs or defendants only after death of one of them, the suit does not abate. Court must make entry to the effect without any application. A. I. R. 1929 All. 347=1929 A. L. J. 618 ; see also A. I. R. 1929 Sind 225=119 Ind. Cas. 537 ; A. I. R. 1926 Lah. 607=27 P. L. R. 688=98 Ind. Cas. 760 ; A. I. R. 1930 Bom. 367=32 Bom. L. R. 698 ; A. I. R. 1925 Mad. 244=47 M. L. J. 745=85 Ind. Cas. 666 ; A. I. R. 1921 Oudh 209=24 O. C. 374=66 Ind. Cas. 24 ; 59 Ind. Cas. 238=11 P. L. R. 1921 ; 15 Pat. 326=17 Pat. L. T. 584=A. I. R. 1936 Pat. 548 ; A. I. R. 1934 Pat. 559=152 Ind. Cas. 289. Cases where right to sue survives against surviving defendant in his own capacity and not as the legal representative of deceased are contemplated by rule 2. A. I. R. 1931 Pat. 164=12 P. L. T. 28=132 Ind. Cas. 100 ; A. I. R. 1933 Pat. 464=12 Pat. 778. This rule applies to appeal. 84 Ind. Cas. 170=3 Bur. L. J. 171=2 Rang. 486 ; 39 C. W. N. 303=60 C. L. J. 556 ; A. I. R. 1935 All. 640=1935 A. L. J. 509 ; A. I. R. 1935 Lah. 879 ; 36 P. L. R. 230 ; 61 C. 879=38 C. W. N. 743 ; A. I. R. 1934 Nag. 119. Where one of the joint debtors sued jointly dies during the pendency of suit, his legal representatives need not be added. A. I. R. 1921 Lah. 357=55 P. L. R. 1921. Joint tort-feasors are liable both jointly and severally ; hence cause of action survives as against others on the death of one of them. 10 P. R. 1915=32 Ind. Cas. 18. Where the legal representatives of one of the deceased respondents are already on record but in different capacity an entry to that effect should be made in accordance with rule 2, rule 4 not being applicable. A. I. R. 1920 Oudh 209=24 O. C. 374=66 Ind. Cas. 24 ; see also A. I. R. 1933 Nag. 95=29 N. L. R. 1. The suit abates where legal representative of the deceased is not brought on record. A. I. R. 1936 Lah. 578=164 Ind. Cas. 971. In a suit to recover certain amount, one of the two defendants died and the application by the plaintiff to bring his legal representatives on the record was filed after the statutory period. The deceased defendant had no fixed place of residence and the plaintiff did not know of his death immediately. There was sufficient cause for the delay in making the applications : *Held* that Order 22, rule 2, had no application, as the suit against the survivor defendant alone could not proceed, and under that rule proceeding abated. But the application to bring the legal representatives on record could be regarded as an application to set aside the abatement and as there was sufficient cause for the delay, plaintiff not being guilty of laches, the abatement should be set aside. A. I. R. 1937 Lah. 455.

## 8. [Ss. 363, 365, 366.]

Procedure in case of death of one of several plaintiffs or of sole plaintiff.

(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

**Scope.**—Rule 3 is applicable to a suit of a representative character. 88 Ind. Cas. 478=26 P. L. R. 732=7 Lah. L. J. 517. This rule applies in case of substitution after the death of a party, and does not apply to a man who does not come in as a legal representative of the deceased but as an assignee from him. A. I. R. 1936 Pat. 123=15 Pat. 82=159 Ind. Cas. 828; see also A. I. R. 1936 Pat. 591. Order 22, rules 3 and 4, do not apply to cases of death of parties after passing of the preliminary decree. A. I. R. 1935 Lah. 712. Where in a suit brought in a representative capacity, one of the plaintiffs dies during the pendency of the appeal by the defendants and no steps are taken to bring his legal representatives on the record, the appeal does not abate in *total*. 152 Ind. Cas. 817=1935 A. L. J. 139=A. I. R. 1935 All. 106. Where one of the plaintiff respondents dies during the pendency of the appeal and the right to sue does not survive the defendant appellants cannot possibly apply under this rule for bringing on the record the legal representatives of the deceased in as much as no such representative in the eye of the law exists and the omission to do what could not legally be done cannot be fatal to the appeal. 152 Ind. Cas. 817=1935 A. L. J. 139=A. I. R. 1935 All. 106. But where during the pendency of the appeal one of the appellants dies and the right to enforce the indivisible contract vested in his legal representatives and the surviving appellant, the appeal must abate in *total* in the absence of the legal representatives of the deceased appellant. A. I. R. 1935 Lah. 478=37 P. L. R. 400=155 Ind. Cas. 610; see also 157 Ind. Cas. 994=A. I. R. 1935 Pesh. 126. The test to determine whether or not failure to bring upon the record the heirs of one of the several parties who has died has the effect of causing the entire appeal to abate or not can the appeal be decided, without bringing the legal representatives of the deceased party on the record without bringing into existence two decrees contrary to each other. If the result of hearing and deciding the appeal would be to bring into existence two decrees of Courts of competent jurisdiction contrary to each other the appeal would abate as a whole. A. I. R. 1935 Pat. 4=158 Ind. Cas. 56. Abatement takes place *ipso facto* if an application for impleading representative of the deceased party is not made within time. A. I. R. 1925 Lah. 598=7 Lah. L. J. 517=88 Ind. Cas. 478. Where in case of death of some plaintiffs or defendants pending appeal, legal representatives are not brought on record, appeal does not abate as a whole. A. I. R. 1933 All. 291. Where sole plaintiff dies and the legal representatives are not brought on record, abatement of suit is automatic and no formal order is necessary. 129 Ind. Cas. 545=1931 A. L. J. 153=53 A. 374=A. I. R. 1931 All. 154. Where decree-holder dies pending execution, legal representative can be substituted in his place and allowed to continue execution. 35 Bom. L. R. 769=57 B. 616=A. I. R. 1933 Bom. 358; A. I. R. 1932 Mad. 73 (F. B.)=62 M. L. J. 1=55 M. 352 (F. B.). Suit does not abate where all the heirs are not substituted by mistake. 37 C. W. N. 138=A. I. R. 1933 Cal. 498; see 37 C. W. N. 679=A. I. R. 1933 Cal. 684. Where judgment appealed against may operate as one *in rem*, substitution should be allowed. 35 C. W. N. 1028=A. I. R. 1932 Cal. 206; A. I. R. 1933 Mad. 114=56 M. 346=63 M. L. J. 899. Appeal does not abate as a whole on death of one of the tenant's plaintiffs. A. I. R. 1932 Cal. 134=58 C. 1341. Where legal representatives of one of the plaintiffs are not brought on record no abatement of whole suit if shares are ascertainable or separate suits could be brought. A. I. R. 1933 All. 938; see also A. I. R. 1933 Lah. 179=34 P. L. R. 149. Pauper plaintiff dying, legal representative can continue as pauper only on fresh application that he is a pauper or on payment of Court-fee. 146 Ind. Cas. 235=A. I. R. 1933 Nag. 334. Where a party dies before hearing by Privy Council and legal representatives are not brought on record, the decree is valid. 13 P. L.

T. 719=A. I. R. 1932 Pat. 261. After decree has been made, suit cannot be dismissed unless it is reversed in appeal. A. I. R. 1931 Pat. 57=11 P. L. T. 796. Rules 3 and 4 have no application in cases where death of the parties takes place after preliminary decree. Once the decree has been passed, there can be no dismissal of suit unless it is set aside in appeal. A. I. R. 1931 Pat. 57=11 P. L. T. 796; A. I. R. 1928 Mad. 914 (F. B.)=51 M. 701=55 M. L. J. 253; A. I. R. 1936 Cal. 540; but see 39 C. W. N. 1284. Where one of several appellants dies during the pendency of appeal, appeal abates only so far as deceased appellant is concerned. A. I. R. 1930 All. 211=125 Ind. Cas. 591; 33 C. W. N. 359=54 C. 622=A. I. R. 1929 Cal. 519. This rule does not apply to proceedings in execution of a decree. A. I. R. 1936 Lrh. 519=36 P. L. R. 281=163 Ind. Cas. 59. This rule does not apply to a man who has not come as a legal representative of a deceased party but as an assignee from him. A. I. R. 1936 Pat. 123=15 Pat. 82=17 Pat. L. T. 73.

**Legal representatives.**—The expression "legal representatives" means one or several persons holding the interest of the deceased person. A. I. R. 1927 Lah. 94=28 P. L. R. 3=100 Ind. Cas. 418. Legal representatives means not only legal representatives or legal representatives of the deceased plaintiff but also the representatives of whom the representatives applying knew or ought to have known. A. I. R. 1929 Cal. 26=32 C. W. N. 1020. A son and not brother is a legal representative. 120 Ind. Cas. 218=A. I. R. 1930 Nag. 17. Only the successor of the magager of the joint Hindu family should be added. A. I. R. 1930 Lah. 561=31 P. L. R. 706. *Benamidar* cannot be substituted by parties. A. I. R. 1930 Mad. 221=58 M. L. J. 57. The words "legal representative" mean the representatives to whom the right to sue survives. A. I. R. 1923 Nag. 101=18 N. L. R. 21=65 Ind. Cas. 542. The substitution of a legal representative at one stage of the suit is effective for all subsequent stages. 45 C. 94=33 M. L. J. 486=15 M. L. J. 777=19 Bom. L. R. 856=10 P. R. 1917=22 C. W. N. 169=44 I. A. 218 (P. C.)=42 Ind. Cas. 43 (P. C.). Where certain legal representatives apply under rule 3 within time allowed by Art. 176, Limitation Act, Court can permit others to be joined as co-plaintiffs even though their application is made after the period of limitation. 145 Ind. Cas. 693=A. I. R. 1933 Rang. 234. In case of death of plaintiff after assignment of interest, assignee must be substituted as legal representative. A. I. R. 1925 Cal. 467=82 Ind. Cas. 991. Executor cannot be testator's representative with regard to portion of the property not disposed of by Will. A. I. R. 1929 Lah. 546=116 Ind. Cas. 558. In the absence of an application by the legal representatives of the appellant under Order 22, rule 3 (1), C. P. Code, it is not competent to the Court to substitute them. A. I. R. 1936 Pat. 266=17 Pat. L. T. 129=162 Ind. Cas. 592.

**Limitation.**—Article 176, Sch. I of the Limitation Act governs an application under rule 3 to bring on record the legal representative of a deceased. 10 Bur. L. T. 27=35 Ind. Cas. 438. The procedure laid down in rules 3, 4 and 11 of Order XXII for substitution of legal representatives of an appellant or respondent is not exhaustive. Such application can be made at any time within the period prescribed by Art. 181, Limitation Act. A. I. R. 1929 Pat. 565 (F. B.)=122 Ind. Cas. 148.

**Appeal.**—Order allowing substitution or setting aside abatement passed cannot be questioned in appeal from decree. 37 C. W. N. 138=A. I. R. 1933 Cal. 498. Order refusing certain persons to be substituted in place of deceased plaintiff under Order 22, rule 3, is not appealable. 1932 A. L. J. 308=A. I. R. 1932 All. 466. Order bringing a certain person on the record as the legal representative of the deceased party passed on an application to set aside an *ex parte* decree is not appealable. 47 A. 741=22 A. L. J. 442=88 Ind. Cas. 95; see also 12 A. L. J. 1113; 64 Ind. Cas. 838=20 A. I. J. 214. Order dismissing an application by legal representative to be brought on record is not appealable. 2 Lah. L. J. 738=57 Ind. Cas. 137.

4. [S. 368.] (1) Where one of two or more defendants dies and the right

Procedure in case of death of one of several defendants or of sole defendant.

to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

*N. B.*—For local amendment in Madras,—*Vide infra*.

**Scope.**—The words "right to sue" in this rule should be taken to mean "right to appeal" in case a party dies after decree in the suit, but pending appeal. 1934 A.L.J. 933=A. I. R. 1934 All. 1029. This rule reproduces in principle s. 368 of the old Code as amended in 1888. A.I.R. 1930 Mad. 930=60 M.L.J. 97=54 M. 212=129 Ind. Cas. 469. This rule applies in proceedings after preliminary decree in a mortgage suit. 33 C. L. J. 115=25 C. W. N. 595=59 Ind. Cas. 177. This rule is applicable where a defendant dies before a decree. 28 M. 361. Where a suit or appeal abates, on some of defendants being dead and their representatives not being brought on record the suit or appeal abates as a whole. A. I. R. 1931 Pat. 17=128 Ind. Cas. 119. Where no application to bring representatives of deceased defendant on record is made within time the decree passed during that time has no effect and suit abates. A. I. R. 1931 Lah. 73. Death of defendant disowning any interest in suit does not cause the whole suit to abate. A.I.R. 1927 Lah. 418=28 P. L. R. 330=102 Ind. Cas. 280. On death of a defendant during the pendency of a suit, the question whether whole suit abates, or it abates only as to that defendant, would depend upon whether the deceased person was such a necessary party that his absence from the record should lead to dismissal of the suit itself. A. I. R. 1926 Mad. 379=91 Ind. Cas. 941; A. I. R. 1931 Nag. 184=27 N. L. R. 720. Rule of total abatement is highly technical rule and should not be applied unless it must be applied. 143 Ind. Cas. 364=A. I. R. 1933 Lah. 129. Where on the death of one of several defendants some representatives were brought on record, suit does not fail even partially. 36 C. W. N. 1138=60 C. 87=A. I. R. 1933 Cal. 325. If a suit for partition of property by heirs of deceased Mahomedan abates against one of defendants it does not abate as a whole. A. I. R. 1933 Sind 384. Order declaring suit to have abated for failure to bring legal representatives of sole defendant dying after preliminary decree, on record in time is a decree and is appealable and no reference lies under Civil Procedure Code, Order 46, Rule 1. 133 Ind. Cas. 767=10 Pat. 471=12 P. L. T. 209=A. I. R. 1931 Pat. 353. The test of abatement is case of not bringing on record the representatives of a deceased defendant is that if suit without impleading such defendant when alive was properly constituted, suit does not abate as a whole. A.I.R. 1933 Sind 384. For setting aside abatement, *vide* A. I. R. 1933 Sind 36=26 S. L. R. 81; A. I. R. 1933 Lah. 224; A. I. R. 1933 Lah. 556=146 Ind. Cas 154; see also A. I. R. 1936 Mad. 336=59 M. 660=43 L. W. 500. In a suit against joint tort-feasors when one dies and his representative is not brought on record, the suit does not abate. A. I. R. 1934 Lah. 941. Cause of action for breach of trust survives against legal representative of deceased trustee. A. I. R. 1934 Mad. 448. The cause of action for breach of trust survives against the legal representatives of a deceased trustee and does not die with him and the legal representatives of a deceased trustee can certainly be proceeded against the respect of breaches of trust by the deceased. 40 L. W. 122=1934 M. W. N. 460=A. I. R. 1934 Mad. 448=67 M. L. J. 222.

**Abatement of suit.**—Where one of the tort-feasors dies during the course of the suit and his legal representatives are not brought upon the record within time, the suit can proceed without them, as the death of one tort-feasor cannot affect the case against another. 36 P. L. R. 182=A. I. R. 1934 Lah 941. Under rule 4 (3) an appeal can abate against a deceased defendant only, but it is only when not possible to go on with the suit in the absence of the deceased defendant's heir, the whole suit will fail. 150 Ind. Cas. 148=A. I. R. 1934 All. 716. It is a settled law that if a respondent dies and his representatives are not impleaded within time the appeal abates automatically as against him on the expiry of the statutory period and it is not necessary for the Court to pass a formal order declaring that the appeal has abated. 152 Ind. Cas. 227=35 P. L. R. 457=A. I. R. 1934 Lah. 442.

**Representative suits.**—Where under Order 1, rule 11, persons out of 237 are allowed to represent the rest, death of some of these persons, other than the representatives and consequent failure to bring their legal representatives on record does not abate suit. A. I. R. 1930 Lah. 18=120 Ind. Cas. 794; see also A. I. R. 1933

Lah. 682=34 P. L. R. 844 ; A. I. R. 1932 Lah. 334=13 Lah. 92=33 P. L. R. 959 ; 33 P. L. R. 302=A. I. R. 1931 Lah. 610=13 Lah. 195. Successor in management of an endowed property may be considered as a legal representative of the prior manager of the same endowed property. A. I. R. 1930 All. 348=1930 A. L. J. 836 ; see also A. I. R. 1929 Mad. 451=1928 M. W. N. 867. Death of partner suing on behalf of firm consisting of two or more partners, does not give rise to question of abatement. A. I. R. 1926 All. 351=93 Ind. Cas. 144 ; see also A. I. R. 1933 Lah. 197=4 Lah. 142=71 Ind. Cas. 951. In a suit in representative capacity in the appellate stage, where some persons die, their representatives need not be substituted. 60 Ind. Cas. 111=3 Lah. 762 ; see also 4 Lah. L. J. 511=A. I. R. 1921 Lah. 390 ; 55 Ind. Cas. 210 ; but see 86 Ind. Cas. 592=A. I. R. 1925 Lah. 124=6 Lah. L. J. 360 ; 89 Ind. Cas. 378=A. I. R. 1926 Lah. 31 ; A. I. R. 1928 Lah. 869 ; A. I. R. 1926 Lah. 216=91 Ind. Cas. 558.

**Dead persons, suit and decree against.**—A suit or appeal abates against a defendant or respondent within the meaning of this rule if he was alive at the time when the suit or appeal was instituted and has since died and not if he died before the institution of the suit or appeal and was erroneously impleaded as a party. A. I. R. 1928 Lah. 359=29 P. L. R. 626 ; see also A. I. R. 1929 Lah. 440=30 P. L. R. 259 ; 16 P. R. 1922=64 Ind. Cas. 359. Decree against dead person is nullity. A. I. R. 1924 Lah. 33=5 L. L. J. 187=74 Ind. Cas. 682 ; see also 69 Ind. Cas. 465=43 M. L. J. 293 ; see also 87 Ind. Cas. 47=4 Pat. 187 ; A. I. R. 1926 Cal. 1053=43 C. L. J. 606 ; A. I. R. 1927 Lah. 200=8 Lah. 54 ; 33 P. L. R. 735=138 Ind. Cas. 444.

**Distinct interest.**—The fact that interest in subject-matter of suit is defined and separate is one which may be of vital importance in deciding whether suit abates as a whole when it abates as against one of the defendants. A. I. R. 1932 Lah. 624=14 Lah. 234=33 P. L. R. 919 ; see also A. I. R. 1931 All. 235=1931 A. L. J. 902 ; 79 Ind. Cas. 462=5 Lah. L. J. 14 ; 77 Ind. Cas. 393=1 Rang. 618 ; A. I. R. 1925 Nag. 299=21 N. L. R. 38 ; 85 Ind. Cas. 678=A. I. R. 1926 Cal. 193 ; 86 Ind. Cas. 1=26 P. L. R. 100=6 Lah. 233 ; A. I. R. 1930 All. 369 ; A. I. R. 1928 All. 172 (F. B.)=50 A. 559=26 A. L. J. 217 ; A. I. R. 1930 Lah. 33=124 Ind. Cas. 338.

**Joint interest.**—If the interests of defendants or respondents are separable, the suit or appeal will abate only as regards the interest of the deceased defendant or respondent while if they are joint, the suit or appeal will abate as regards the whole of the joint interests. A. I. R. 1927 Lah. 581=26 P. L. R. 145 ; see also 85 Ind. Cas. 553 ; 82 Ind. Cas. 26=22 A. L. J. 1033 ; 74 Ind. Cas. 1027 ; 3 Lah. 64 ; 68 Ind. Cas. 194 ; 72 Ind. Cas. 2 ; 73 Ind. Cas. 604 ; A. I. R. 1933 Lah. 805 ; A. I. R. 1933 Lah. 556 ; 74 Ind. Cas. 14 ; 57 Ind. Cas. 199=1 Lah. 225 ; 85 Ind. Cas. 197=26 Bom. L. R. 1217 ; 51 A. 267=A. I. R. 1929 (P. C.) 58=33 C. W. N. 318=56 M. L. J. 304=114 Ind. Cas. 601 (P. C.) ; 1930 A. L. J. 999=130 Ind. Cas. 289 ; 112 Ind. Cas. 605 ; A. I. R. 1927 Lah. 800=28 P. L. R. 9 ; A. I. R. 1927 All. 776 ; A. I. R. 1927 Lah. 87=8 Lah. L. J. 575 ; A. I. R. 1927 Lah. 435=8 Lah. 617 ; 85 Ind. Cas. 397=47 M. L. J. 571 ; 85 Ind. Cas. 553=A. I. R. 1926 Cal. 252 ; 94 Ind. Cas. 253 ; A. I. R. 1926 Cal. 667 ; A. I. R. 1926 All. 152=23 A. L. J. 935 ; 89 Ind. Cas. 236=7 P. L. T. 124=4 Pat. 53 ; 88 Ind. Cas. 959=A. I. R. 1925 Pat. 517 ; 85 Ind. Cas. 563 ; A. I. R. 1928 Lah. 947=111 Ind. Cas. 692 ; A. I. R. 1930 Cal. 346 ; A. I. R. 1930 Lah. 353 ; 52 Ind. Cas. 510=67 P. R. 1919 ; 41 Ind. Cas. 730=96 P. R. 1917 ; 68 Ind. Cas. 815=A. I. R. 1922 Lah. 182 ; 67 Ind. Cas. 290=A. I. R. 1923 Cal. 289 ; 65 Ind. Cas. 121=14 P. W. R. 1923 ; 45 Ind. Cas. 911 ; 32 Ind. Cas. 829=260 P. W. R. 1915 ; 56 Ind. Cas. 927 ; A. I. R. 1921 Lah. 160 ; A. I. R. 1937 Lah. 220. But where liability is joint and several, the whole suit does not abate. A. I. R. 1921 Pat. 350=2 P. L. T. 239=60 Ind. Cas. 722 ; A. I. R. 1926 All. 128=48 A. 81 ; 89 Ind. Cas. 238 ; 72 Ind. Cas. 670.

**Death after preliminary decree.**—This rule does not apply to a case in which the death of the defendant occurs between the passing of the preliminary and final decree of a suit. A. I. R. 1929 Nag. 142 (F. B.)=116 Ind. Cas. 657 ; see also 120 Ind. Cas. 77 ; 122 Ind. Cas. 447=A. I. R. 1929 Nag. 206 ; A. I. R. 1929 Cal. 648 ; A. I. R. 1933 Rang. 318 ; A. I. R. 1933 Pat. 27=13 P. L. T. 692 ; A. I. R. 1927 Oudh 561=4 O. W. N. 1002 ; 64 Ind. Cas. 307=17 N. L. R. 81 ; but see 130 Ind. Cas. 289=(1930) A. L. J. 999 ; 87 Ind. Cas. 818=A. I. R. 1926 Cal. 308 ; 50 Ind. Cas. 529=4 P. L. J. 240 (F. B.). Where one out of the several defendants dies after the preliminary decree but before the final decree and his legal representative

is not brought on record within the time allowed by law ; the suit abates as regards that defendant. A. I. R. 1930 All. 779=1930 A. L. J. 825=126 Ind. Cas. 20. A final decree in a mortgage suit is a "decree" within the meaning of s. 2 (2), C. P. Code and as such, is subject to the general rule that a decree made against dead defendant *i. e.*, defendant died at the date it was made, is a nullity. 63 C. 472.

**Death of party pending appeal.**—Where some respondents die pending appeal and their representatives are not on record the appeal does not abate in *total*. A. I. R. 1924 Lah. 93 ; 5 Lah. L. J. 203=669 Ind. Cas. 495 ; see also A. I. R. 1921 Lah. 390=4 Lah. L. J. 511 ; 38 M. 1064=33 Ind. Cas. 45 ; A. I. R. 1928 Lah. 572 (F.B.)=10 Lah. 7=30 P. L. R. 453 ; 7 P. L. T. 186=4 Pat. 320=89 Ind. Cas. 280. If the result of non-joinder of some defendants in appeal would be that if the appeal is decreed there will be two inconsistent decrees, the non-joinder is fatal to the appeal. A. I. R. 1926 Cal. 667=92 Ind. Cas. 616 ; 1936 A. M. L. J. 19 ; but see 38 P. L. R. 269. Test to determine if appeal abated if representative of one respondents be not brought on record is "could suit *ab initio* have been instituted and prosecuted with the deceased being left out". A. I. R. 1924 Nag. 123=75 Ind. Cas. 820 ; see also 41 Ind. Cas. 430 ; 50 Ind. Cas. 935=41 A. 283=17 A. L. J. 306 ; 3 Lah. L. J. 252 ; A. I. R. 1927 Mad. 505=52 M. L. J. 460 ; A. I. R. 1926 Cal. 893=53 C. 752=43 C. L. J. 401 ; see also A. I. R. 1936 Pat. 191=161 Ind. Cas. 862. Where a respondent dies leaving more than one heir omission to bring some of the legal representatives on record within time allowed will not cause appeal to abate under Order XXII, rule 4. A. I. R. 1926 Pat. 276=7 P. L. T. 746=94 Ind. Cas. 206. If the result of hearing and deciding the appeal without bringing heirs of deceased respondent would be to bring into existence two decrees of Courts of competent jurisdiction contrary to each other, the appeal must abate as a whole for such failure. A. I. R. 1927 All. 331=100 Ind. Cas. 482 ; see also A. I. R. 1926 Lah. 474=94 Ind. Cas. 300. Where the death of one of the respondents to an appeal does not make the representative of the interest incomplete, the appeal does not abate and can proceed ; but where such death renders the representative incomplete, the appeal as a whole abates. A. I. R. 1935 Pat. 241=16 Pat. L. T. 308=154 Ind. Cas. 856 ; see also A. I. R. 1935 Pat. 430 ; 1935 R. D. 5 ; 1935 O. W. N. 297 ; A. I. R. 1935 Oudh. 36=11 O. W. N. 1487=153 Ind. Cas. 54 ; A. I. R. 1935 Pat. 383=16 Pat. L. T. 893 ; A. I. R. 1935 Oudh. 329=1935 O. W. N. 401 ; A. I. R. 1935 All. 640=1935 A. L. J. 501.

**Legal representatives.**—The words "legal representatives" do not mean all legal representatives and there is sufficient compliance if the applicant makes a *bona fide* application to bring on record all the legal representatives known to him so far as he could ascertain them after exercise of due care and industry. A. I. R. 1927 Lah. 6=28 P. L. R. 287. The persons who really represent the estate of deceased at a particular moment ought to be treated as the legal representatives of the deceased debtor. A. I. R. 1926 All. 285=21 A. L. J. 281=92 Ind. Cas. 551 ; A. I. R. 1933 Lah. 356=14 Lah. 543=34 P. L. R. 11. Legal representatives are all persons on whom estate of deceased partly devolves. A. I. R. 1925 Sind. 2=76 Ind. Cas. 319. Legal representatives of the dead person can be added as parties to suit. A. I. R. 1934 All. 25. Persons other than representatives of a deceased defendant cannot be impleaded. 42 A. 497=18 A. L. J. 613=61 Ind. Cas. 947. Substituting representative in memorandum of cross-objections is tantamount to bringing him on record in appeal. 34 M. L. J. 177=45 Ind. Cas. 949=23 M. L. T. 280. Legal representative is barred from putting forth contentions inconsistent with his predecessors. A. I. R. 1924 Mad. 245=73 Ind. Cas. 376 ; see also 46 Ind. Cas. 469=27 C. L. J. 576. Representative can raise plea of co-defendant's death before decree. A. I. R. 1924 Pat. 339=75 Ind. Cas. 321. Legal representative is at liberty to take any defence which may be appropriate to his character as the legal representative of the deceased defendant. A. I. R. 1930 All. 348=1930 A. L. J. 836=123 Ind. Cas. 376. For abatement of suit or appeal for not bringing legal representatives of parties on record, *vide* 49 C. 524=69 Ind. Cas. 885 ; 90 Ind. Cas. 41=26 P. L. R. 832 ; 85 Ind. Cas. 25=6 P. L. T. 313 ; A. I. R. 1933 Pat. 646 ; A. I. R. 1933 Pat. 57=13 P. L. T. 717. For cases where it does not abate, *vide* A. I. R. 1931 All. 235=132 Ind. Cas. 31 ; A. I. R. 1930 Mad. 579=126 Ind. Cas. 486 ; 71 Ind. Cas. 321=45 A. 286 ; 65 Ind. Cas. 542=18 N. L. R. 21 ; A. I. R. 1930 Lah. 709 ; A. I. R. 1928 Mad. 1199 ; A. I. R. 1925 Pat. 765=7 P. L. T. 431. A decree obtained against a person who is not a legal representative of the deceased is not binding on the estate

and on persons rightly entitled to the estate. A. I. R. 1927 Bom. 63=50 B. 802=28 Bom. L. R. 1382 ; 53 C. L. J. 421=A. I. R. 1931 Cal. 782 ; A. I. R. 1933 Cal. 43 ; but see A. I. R. 1930 Mad. 930=60 M. L. J. 97=54 M. 212 (where the mistake was *bona fide*) ; see also A. I. R. 1933 Nag. 73=29 N. L. R. 89. Failure by defendant to take objection to non-joinder of some of the legal representatives at proper time estops him from taking it at subsequent stage. A. I. R. 1930 Sind 147. Where a party takes proper steps to substitute on the record the representatives of an adversary who had died *pendenti lite* he is not to be penalised because he has not brought on record the whole of the representatives. He can act to the best of his knowledge. A. I. R. 1936 Mad. 336=1936 M. W. N. 129=59 Mad. 660=162 Ind. Cas. 214. If in spite of diligence exercised in bringing the legal representatives of the deceased party on the record, any representative is omitted, the omission is venial. A. I. R. 1935 Lah. 712 ; see also 37 Bom. L. R. 288=A. I. R. 1935 Bom. 288. In a case where several legal representatives of a deceased party have been brought on the record if one then dies and the estate continues to be represented by the remaining legal representatives, the omission to implead the heir of the deceased legal representative does not cause abatement of the case. 40 L. W. 604=1934 M. W. N. 901=A. I. R. 1934 Mad. 730=67 M. L. J. 681. An appeal does not become incompetent because the legal representative of a deceased respondent is not impleaded, when such respondent is only a *pro forma* defendant, in respect of whom no decree has been passed either for or against. 60 C. L. J. 225. No application is necessary where one defendant dies but his legal representative is already on the record. 15 Pat. L. T. 380=A. I. R. 1934 Pat. 427.

**Procedure**—The introduction of a party for one stage of a suit is an introduction for all stages. A. I. R. 1927 Oudh 531=101 Ind. Cas. 826. Where the legal representatives of a deceased defendant or respondent are on record, it is sufficient if the plaintiff or appellant at some time or other before the hearing of the suit or appeal states the facts and gets it noted on the record. A. I. R. 1929 Mad. 152=51 M. 347=54 M. L. J. 675=109 Ind. Cas. 372 ; see also 96 Ind. Cas. 41=26 P. L. R. 832 ; A. I. R. 1933 Lah. 765=34 P. L. R. 778 ; A. I. R. 1933 Lah. 710. Where a party to a suit dies and an application intimating his death has taken place in the rank of the opposite party is made, the applicant would be quite competent within his rights to give exact information as to the names, addresses and the other particulars of the persons supposed to be the legal representatives of the deceased party within a reasonable period of time without causing the suit to abate. A. I. R. 1927 Oudh 170=4 O. W. N. 329=100 Ind. Cas. 802. Not only cause-title should be corrected, but plaint also should be amended showing how legal representative is responsible for claim. A. I. R. 1933 Cal. 314=56 C. L. J. 228. It is doubtful whether all the legal representatives must be brought on record. A. I. R. 1933 Lah. 765=34 P. L. R. 778. Objection as to proper representative must be brought at earliest opportunity. 36 C. W. N. 1138=60 C. 87=A. I. R. 1933 Cal. 325.

**Limitation**.—If no representative is brought on record within limitation, time should not be extended. A. I. R. 1922 Lah. 30=5 Lah. L. J. 119. Art. 177 of the Limitation Act governs the case. Where judgment-debtor dies his representative must be brought on record within 90 days. 26 Ind. Cas. 52 ; see also 40 Ind. Cas. 1006=39 A. 550. Originally the period was six months but now it is ninety days. *Vide* 38 Ind. Cas. 7 ; 40 Ind. Cas. 1006 ; 26 Ind. Cas. 52 ; 70 Ind. Cas. 832. No application can be entertained after the period. A. I. R. 1923 Mad. 66=16 L. W. 721=73 Ind. Cas. 863. Where no application for substitution is made within period of limitation the plaintiff must prove that he had no knowledge of the death of the defendant till within three months of the date on which he applies for substitution of the legal representative of the deceased defendant. A. I. R. 1930 All. 779=1930 A. L. J. 825=126 Ind. Cas. 20 ; see also A. I. R. 1928 Mad. 404=54 M. L. J. 234=108 Ind. Cas. 288 ; 87 Ind. Cas. 632=A. I. R. 1925 Lah. 599 ; A. I. R. 1932 Lah. 426=33 P. L. R. 501=14 Lah. 78.

**Sub-rule (3)**.—Suit or appeal abates automatically if no application is filed within limitation. A. I. R. 1937 Nag. 88 ; see also 62 C. 998 ; A. I. R. 1935 Lah. 443. Where the plaintiff has a separate cause of action against every person who has a specified share in the property in dispute and joins all such persons as defendants in one suit only because the ground of attack and defence being common in law permits him to do so with a view to avoid multifariousness, in fact, he claims a separate relief against each one of them and if any one of them dies and his representatives are not impleaded, the plaintiff loses his remedy



against that defendant and not against others. The test in such cases is whether the plaintiff will be debarred from seeking his relief against those persons in a separate suit when he does not join in the previous suit. If so, the suit or appeal would abate *in toto* in the circumstances mentioned above; if not, the abatement will be limited to the share of those defendants only who were not on record. A. I. R. 1935 Lah. 853=16 Lah. 747=37 P. L. R. 850.

5. [S. 367.] Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

*N. B.*—For local amendment in Madras.—*Vide infra*.

**Scope.**—This rule is mandatory. 42 M. 78=35 M. L. J. 632=49 Ind. Cas. 1; see also 43 B. 168=47 Ind. Cas. 757=20 Bom L. R. 902; 44 Ind. Cas. 937. Trial Court to decide who is legal representative and on its failure, Appellate Court can decide. 4 Lah. L. J. 314; 39 Ind. Cas. 893; see also A. I. R. 1922 Pat. 197=3 Pat. L. T. 380=65 Ind. Cas. 131; 42 B. 535=46 Ind. Cas. 750. Re-adjudication of question under rule 5 in regular suit is not allowed. 48 A. 422=94 Ind. Cas. 157; A. I. R. 1933 Oudh 207. When objection is not raised in Court below Privy Council will not entertain it. 49 Ind. Cas. 704 (P.C.). Decision under rule 5 does not work as *res judicata*. A. I. R. 1934 Lah. 465. No appeal lies against order under rule 5. A. I. R. 1931 Lah. 235; 49 M. 450=A. I. R. 1926 Mad. 586; A. I. R. 1926 Lah. 181; 58 Ind. Cas. 498=43 M. 812; 57 Ind. Cas. 137=1 Lah. 493; 38 Ind. Cas. 833=13 N. L. R. 32; 91 Ind. Cas. 366=A. I. R. 1926 Oudh 158; A. I. R. 1931 Lah. 235=131 Ind. Cas. 294. When lower Court omitted to take evidence the order can be revised. A. I. R. 1925 Mad. 456=21 L. W. 21=86 Ind. Cas. 178. The decision of a Court under this section is not *res judicata*. A. I. R. 1934 Lah. 465. The Court is bound to decide who is the legal representative. A. I. R. 1934 Oudh 337=11 O. W. N. 917.

6. [New] Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, No abatement by reason of death after hearing. there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

**Scope.**—Where party dies after conclusion of trial but before decree, decree must be taken to have been passed in his lifetime. 1932 A. L. J. 1069=A. I. R. 1933 All. 112; see also A. I. R. 1933 Lah. 710=144 Ind. Cas. 618; 32 Ind. Cas. 18=106 P. R. 1915=187 P. W. R. 1915. If death occurs during arguments, and if no substitution is made, decree is nullity. 48 Ind. Cas. 859; 43 Ind. Cas. 161=14 N. L. R. 71. Suit does not abate in case of death after preliminary decree and before final decree. A. I. R. 1927 Oudh 561=4 O. W. N. 1002; but see 50 Ind. Cas. 529. Decree is void where hearing takes place after plaintiff's death. A. I. R. 1930 Sind 254=25 S. L. R. 107; 55 Ind. Cas. 498=7 O. L. J. 20; 53 Ind. Cas. 548; 2 Lah. L. J. 144. This rule is also applicable when death occurs after final order. 39 C. W. N. 863=A. I. R. 1935 Cal. 506=61 C. L. J. 319=62 C. 1057=157 Ind. Cas. 876. Where Court makes local inspection during interval of last date of hearing and date of judgment, hearing is not concluded on the last date of hearing. A. I. R. 1936 Lah. 578=164 Ind. Cas. 971.

7. [S. 369.] (1) The marriage of a female plaintiff or defendant shall not cause the suit to abate, but the suit may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

(2) Where the husband is by law liable for the debts of his wife, the decree may, with the permission of the Court, be executed against the husband also; and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband is by law entitled to the subject-matter of the decree.

**8. [370.] (1)** The insolvency of a plaintiff in any suit which the

When plaintiff's insolvency assignee or receiver might maintain for the benefit of his creditors, shall not cause the bars suit.

declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct.

**(2)** Where the assignee or receiver neglects or refuses to continue

Procedure where assignee fails to continue suit or give security.

the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate.

**Scope.**—In case of insolvency of the plaintiff after institution of suit, Court should not dismiss suit without notice to Receiver. 12 L. W. 551=61 Ind. Cas. 300; see also 31 C. W. N. 22. Receiver can continue suit. 16 A. L. J. 440=47 Ind. Cas. 577; 109 Ind. Cas. 589; A. I. R. 1928 Lah. 596=10 Lah. 208. Insolvent can continue appeal after annulment. A. I. R. 1929 Bom. 202=31 Bom. L. R. 357. Party adjudicated insolvent can appeal under the Provincial Insolvency Act but not under Presidency Towns Insolvency Act. 62 Ind. Cas. 854=1921 M. W. N. 535; 97 Ind. Cas. 486=A. I. R. 1928 Mad. 1214; 43 A. 621=64 Ind. Cas. 63; Receiver is entitled to continue suit. A. I. R. 1926 Mad. 1133=50 M. 161; see also A. I. R. 1926 M. 1145=24 L. W. 387. Insolvency of guardian is no bar to him to act as such. A. I. R. 1930 Lah. 205. Assignee adopting proceeding instituted before plaintiff's insolvency is liable to furnish security for costs already incurred. A. I. R. 1926 Bom. 533=28 Bom. L. R. 1074; see also A. I. R. 1927 Mad. 511=110 Ind. Cas. 440. A suit must be dismissed where a Receiver does not continue a suit. 157 Ind. Cas. 900. This rule applies to the case of a suit or appeal which has already been filed before insolvency occurs. A. I. R. 1934 All. 1011=151 Ind. Cas. 579.

**9. [Ss. 371, 372.] (1)** Where a suit abates or is dismissed under this

Effect of abatement or dismissal. Order, no fresh suit shall be brought on the same cause of action.

**(2)** The plaintiff or the person claiming to be the legal representative of a deceased plaintiff, or the assignee or the receiver in the case of an insolvent plaintiff, may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

**(3)** The provisions of section 5 of the Indian Limitation Act, 1877,\* shall apply to applications under sub-rule (2).

**Scope.**—Rule 9 must be strictly construed. 1931 Lah. 79=31 P. L. R. 973.

**No fresh suit shall be brought.**—The abatement of the previous suit brought by the *benamidar* of the plaintiff is a bar to a fresh suit on the same cause of action by the plaintiff. A. I. R. 1937 Mad. 101. The test for the application of Or. 22, rule 9, C. P. Code, is the identity of the cause of action. A. I. R. 1937 Oudh. 248. This rule does not apply to cases where cause of action was restricted to deceased. 31 Ind. Cas. 4; A. I. R. 1928 Nag. 220; A. I. R. 1933 Lah. 752. This rule does not bar fresh suit on dissimilar causes of action. A. I. R. 1933 Lah. 109=34 P. L. R. 156; see also A. I. R. 1929 All. 306=1929 A. L. J. 492.

**Apply to set aside the abatement.**—In case of abatement, remedy is applicable under rule 9. A. I. R. 1930 All. 379=127 Ind. Cas. 419; A. I. R. 1927 Lah. 805=26 P. L. R. 659. A Court after declaring that the suit has abated under this rule does not become *functus officio*, but retains the right of setting aside the

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\* See now the Indian Limitation Act, 1908 (IX of 1908), ss. 4 and 5.

abatement. A. I. R. 1935 Lah. 712. Application for substitution after limitation should be treated as under rule 9. A. I. R. 1928 Lah. 746=112 Ind. Cas. 5. Ordinarily a mere plea of ignorance of the death of the opposite party is not a sufficient ground for setting aside an order that an appeal should abate; but there may be circumstances in which such ignorance might be excusable. 1935 O. W. N. 371; see also A. I. R. 1935 Lah. 478=37 P. L. R. 400; 1935 R. D. 5; 85 Ind. Cas. 1010; A. I. R. 1934 Lah. 934=151 Ind. Cas. 147; A. I. R. 1934 Lah. 998. By virtue of sub-rule (3) the Court is empowered to condone the delay in making the application for setting aside the abatement under s. 5 of the Limitation Act. A. I. R. 1935 Lah. 712; see also 13 Lah. L. T. 22; A. I. R. 1936 Lah. 710=38 P. L. R. 915; 19 N. L. J. 273. Applicant should satisfy Court that there was sufficient cause for continuing suit. A. I. R. 1928 Lah. 746. If error is genuine and unintentional and damage to other side can be repaired, application must be granted. A. I. R. 1928 Mad. 401=54 M. L. J. 234=108 Ind. Cas. 288; see also 97 Ind. Cas. 142. Misconstruction of amended law is good ground for restoration of suit abated. A. I. R. 1923 Lah. 475=83 Ind. Cas. 807; 70 Ind. Cas. 832=A. I. R. 1923 Bom. 40; 75 Ind. Cas. 283. Deceased's residence, not being settled is good ground for delay in applying under rule 9. 80 Ind. Cas. 690=5 Lah. 70; A. I. R. 1933 Sind 36. But residence separated by distance is no ground for delay in application under rule 9. 80 Ind. Cas. 694=6 Lah. L. J. 192. Ignorance of opposite party's death is no ground to set aside abatement. A. I. R. 1923 Lah. 475=83 Ind. Cas. 807; see also 75 Ind. Cas. 909; 79 Ind. Cas. 414=4 P. L. T. 567; 67 Ind. Cas. 596=4 Lah. L. J. 171; but see 72 Ind. Cas. 137=44 M. L. J. 409. Suit cannot be restituted without express petition for same is made. A. I. R. 1924 Mad. 713=57 M. L. J. 235=80 Ind. Cas. 397. In case of automatic abatement after 90 days it must be set aside within 60 days or according to section 5 of the Limitation Act. A. I. R. 1926 Lah. 234=27 P. L. R. 526. Delay caused in obtaining succession certificate may be excused. 26 O. C. 224=73 Ind. Cas. 215. Illiteracy and distance are no grounds to set aside order of abatement. A. I. R. 1923 Lah. 230=71 Ind. Cas. 587. *Bona fide* mistake of pleader is good ground to set aside order of abatement. 20 A. L. J. 801=45 A. 66=70 Ind. Cas. 805; 41 M. L. J. 65=62 Ind. Cas. 795. Sufficient cause must be shown to restore suit abated. A. I. R. 1922 Cal. 325=49 C. 62=63 Ind. Cas. 917. Mistake of Court is sufficient cause for delay. 67 Ind. Cas. 306=77 P. L. R. 1922. Order XXII, rule 9 (2) applies to application made for first time only. 62 Ind. Cas. 303=17 N. L. R. 45. *Bona fide* mistake about customary law is justifiable. 55 Ind. Cas. 883=1 Lah. 481. Fraud of agent of representatives of deceased precluding him to apply in time is sufficient cause. 53 Ind. Cas. 585. Unawareness of respondent's death due to appellant's residence in another district is sufficient cause. 44 Ind. Cas. 9=24 P. L. R. 1918; see also A. I. R. 1932 Lah. 148=32 P. L. R. 822. Ignorance of law or death of respondent is not sufficient cause. A. I. R. 1933 Lah. 356=34 P. L. R. 11; but see A. I. R. 1932 All. 459=54 A. 280; 32 Ind. Cas. 829. Application for setting aside abatement may be made long after the case has actually abated and is governed by the Limitation Act, s. 5. 1932 A. L. J. 883=A. I. R. 1932 All. 608. In case of ignorance of party's death, an extension of 4 days' time is proper. A. I. R. 1933 Lah. 916. Where no reason for delay is offered delay cannot be condoned. A. I. R. 1933 Lah. 356=34 P. L. R. 11. Delay in filing application and affidavit on behalf of minor heirs of appellant, can be condoned. A. I. R. 1933 Lah. 765=34 P. L. R. 778. No revision lies where cause is found sufficient. A. I. R. 1933 Pat. 27=13 P. L. T. 692. The discretion of the Court below under this rule if exercised in favour of the party in default, is open to scrutiny and interference by the appellate Court only if the discretion has been exercised in a perverse or an injudicial manner and where this is not the case the order once made cannot be declared to be illegal, merely because the application to bring the legal representative on the record was submitted beyond time. A. I. R. 1935 Lah. 712. Application to bring on record legal representative of deceased party after expiry of time is application to set aside abatement. A. I. R. 1934 Lah. 315. If owing to ignorance of death appeal is heard and accepted, application by legal representatives for review becomes necessary. A. I. R. 1934 Lah. 442. Ignorance of death, due to negligence is no sufficient cause of delay in applying to set aside abatement. 31 Ind. Cas. 397=12 P. W. R. 1916; 45 Ind. Cas. 594. Order of abatement is condition precedent for application to set aside abatement. A. I. R. 1922 All. 209=49 A.

449=66 Ind. Cas. 554. Order of abatement for causes other than not applying in time for substitution of legal representative is decree and appealable. A. I. R. 1925 Lah. 208=78 Ind. Cas. 22. Application for substitution of legal representative may be made within time after respondent's death coming to knowledge. 6 P. L. T. 313=85 Ind. Cas. 25. No appeal lies against abatement under Order XXII, r. 9. A. I. R. 1925 Cal. 473=40 C. L. J. 588=85 Ind. Cas. 100. An application to bring on the record the legal representatives of the deceased party after expiry of the time fixed for this purpose must be deemed to be an application to set aside the abatement and an order refusing to set aside an abatement is appealable. A. I. R. 1934 Lah. 315.

10. [S. 372.] (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).

**Scope.**—For applicability of rule 10 devolution of interest is necessary. A. I. R. 1930 Cal. 113=57 C. L. J. 208=123 Ind. Cas. 250. Where in a case an order of adjudication was made against the mortgagor after the final decree was passed in the mortgage suit and it was contended that the official assignee ought to have been made a party to the mortgage suit: *Held* that Order 22, rule 10, did not give to the official Assignee a right to be made a party on the ground that the property and the assets of the insolvent had devolved on him by virtue of the order of adjudication. A. I. R. 1937 Cal. 336. Plaintiff is not bound to apply for substitution of assignee or trustee, Court may not allow such application. A. I. R. 1930 Cal. 388=34 C. W. N. 53. Mortgagor may be substituted for his usufructuary mortgagee if during pendency of suit against mortgagee he released mortgagor. A. I. R. 1930 Pat. 145=122 Ind. Cas. 255. After decree and before execution no substitution can be made. A. I. R. 1931 Cal. 51=57 C. L. J. 1143; see also 20 O. C. 31=38 Ind. Cas. 511; (1917) M. W. N. 306=40 Ind. Cas. 846; 43 M. L. J. 559=69 Ind. Cas. 977; A. I. R. 1927 Mad. 824=53 M. L. J. 512. Rule 10 and not rules 3 and 4, apply to death after preliminary decree. 120 Ind. Cas. 77; see also A. I. R. 1929 All. 444=1929 A. L. J. 921=121 Ind. Cas. 689; A. I. R. 1929 Nag. 14=116 Ind. Cas. 657 (F. B.). This rule applies in case of substitution of person claiming to succeed another person who sued in representative capacity and died during the pendency of appeal. 36 C. W. N. 816=A. I. R. 1932 Cal. 783. Execution cannot be issued against transferee from judgment-debtor merely because he takes up position of representation. A. I. R. 1932 Cal. 423=36 C. W. N. 93. It is doubtful whether rule 10 is applicable to execution proceedings. *Ibid*; but see 44 M. 919=69 Ind. Cas. 337; A. I. R. 1926 Bom. 406=28 Bom. L. R. 761.

This rule is not applicable to devolution of interest by death. A. I. R. 1933 Sind 371. Mortgagee of deceased plaintiff's share is entitled to continue appeal and to bear full costs of it. 64 M. L. J. 499=A. I. R. 1933 Mad. 411. On plaintiff's insolvency official assignee is not entitled to be substituted in place of plaintiff. A. I. R. 1933 Nag. 6=28 N. L. R. 340. Real owner may be substituted for the ostensible owner. A. I. R. 1930 Oudh 51. Decree-holder is not precluded from prosecuting proceedings to completion even if decree pending appeal is assigned. A. I. R. 1930 All. 380=122 Ind. Cas. 189. Right to institute suit means interest under rule 9. A. I. R. 1928 Mad. 946. Order is applicable to transfer *inter vivos*. 69 Ind. Cas. 337=44 M. 919 (F. B.). New manager can claim substitution in place of old. A. I. R. 1928 Cal. 651=114 Ind. Cas. 413. In suit for foreclosure subsequent mortgagee paying off prior mortgagee can claim substitution. A. I. R. 1928 Nag. 145=24 N. L. R. 119. Removal of trustee does not preclude him to conduct suit. A. I. R. 1928 Mad. 697; but see A. I. R. 1928 Mad. 246. This rule is applicable where the defendant's interest devolves on Government during suit. A. I. R. 1926 All. 585=24 A. L. J. 726. Companies though going into liquidation continues as plaintiff. A. I. R. 1926 Nag. 303=9 N. L. J. 40. Where preceding rules are not applicable this rule applies. A. I. R. 1926 Lah. 181; A. I. R. 1927 All. 272=49 A. 310. Attaching creditor has no right to be brought on record. A. I. R. 1926

Nag. 67. Rule 10 is not applicable to heir's assignee where heir is not brought on record. 87 Ind. Cas. 402. Where lease is granted by trespasser during the pendency of suit for possession and *mesne profits* against him, lessee cannot be added as a party on ground of interest. 27 C. W. N. 29=43 M. L. J. 589=24 Bom. L. R. 1251=49 I. A. 220=68 Ind. Cas. 973 (P.C.). Pre-emptor making gift of right to continue suit is assignment. 25 O. C. 319=70 Ind. Cas. 53. Widow of judgment-debtor can be substituted by posthumous son. A. I. R. 1926 All. 285=24 A. L. J. 281. New trustee can come on record, Limitation Act has no effect. A. I. R. 1927 Mad. 540; A. I. R. 1927 Oudh 156=2 Luck. 464. Court must enquire into validity of assignment when disputed. A. I. R. 1925 Oudh 143=80 Ind. Cas. 631. In case of assignment during the pendency of suit, appellate Court cannot implead assignee as party under rule 10. A. I. R. 1934 All. 442; see also A. I. R. 1934 Lah. 190. Suit is not confined to cases of undisputed assignment, creation or devolution of interest. A. I. R. 1934 Mad. 337. A receiver who is not a party to a suit brought by the insolvent has no interest in the suit and as such cannot validly assign the interest of the insolvent in the suit. 157 Ind. Cas. 900. This rule has no application to the transfer of a decree. 39 C. W. N. 951. Where a person whose suit is dismissed in the trial Court assigns his interest to a third party during the period intervening between the passing of the decree and the institution of appeal, this rule has no application to such a case. A. I. R. 1935 Lah. 119. But where assignment made after preliminary decree and before final decree, such assignment is valid under this rule. A. I. R. 1935 Pat. 488=159 Ind. Cas. 725. Court has discretion to refuse application under this section if fraud is alleged and proved against the person applying under the rule. 156 Ind. Cas. 152=42 L. W. 340=1935 M. W. N. 994=A. I. R. 1935 Mad. 423. Assumption of superintendence by the Court of Wards does involve a devolution of interest within the meaning of this rule. 1935 O. W. N. 842=156 Ind. Cas. 990=A. I. R. 1935 Oudh. 486. A deed of relinquishment does not amount to any assignment, creation or devolution of interest within the meaning of this rule. 160 Ind. Cas. 801=1936 O. W. N. 183=A. I. R. 1936 Oudh 224. A person who institutes a litigation may prosecute it to its conclusion notwithstanding a devolution of his interest in the property. The litigation will continue on his leave for the benefit of his successor. 15 Pat. 507=163 Ind. Cas. 908=17 Pat. L. T. 564=A. I. R. 1936 Pat. 420. The interest contemplated in rule 10 is interest in the subject-matter of the suit. 30 S. L. R. 170=165 Ind. Cas. 305=A. I. R. 1936 Sind 166; A. I. R. 1936 Lah. 652. The powers of Court to grant permission under this rule are discretionary. When such an application is made after great delay and the delay is not properly complained the discretion should not be exercised. A. I. R. 1936 Lah. 652; see also A. I. R. 1936 Oudh 224=1936 O. W. N. 183; 15 Pat. 607=17 Pat. L. T. 564=A. I. R. 1936 Pat. 420; A. I. R. 1936 Mad. 714=71 M. L. J. 307=1936 M. W. N. 771=164 Ind. Cas. 845; 149 Ind. Cas. 970=1934 A. L. J. 832=A. I. R. 1934 All. 442. Transferee of a legal representative of a party has no right to continue the suit because this rule empowers the Court to grant leave to a person who has taken an assignment from a party (*i. e.*, a party already on the record) to continue the suit. A. I. R. 1936 Pat. 123=17 Pat. L. T. 73=15 Pat. 82.

**Appeal and Revision.**—Exercise of discretion by lower Court cannot be easily interfered with in revision. A. I. R. 1934 Mad. 337. Order on application by mortgagee to be added as party to partition suit is appealable. 35 C. W. N. 296=A. I. R. 1931 Cal. 594. Order of rejection of application under this rule is appealable. A. I. R. 1927 Nag. 307=103 Ind. Cas. 643; 44 M. 919=41 M. L. J. 316=69 Ind. Cas. 337. *Prima facie* so second appeal lies from an appellate order on an application made under this rule. 42 L. W. 340=A. I. R. 1935 Mad. 423=1935 M. W. N. 994.

**Limitation.**—Right to apply under Order XXII, r. 10, arises from day to day and hence is not affected by limitation. A. I. R. 1924 Cal. 90=27 C. W. N. 710=75 Ind. Cas. 255.

**11. [S. 582, First para.]** In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

*N. B.*—For local amendments in Calcutta and Madras.—*Vide infra*,

C. P. Code—84

**Scope.**—Appeal abates wholesale where respondent's legal representatives are not substituted in time in appeal by proprietors of village. 96 Ind. Cas. 932. Appeal against decree for possession and *mesne profits* abates by death of one of respondents. 72 Ind. Cas. 479. Heirs being brought on record on appellant's death during High Court appeal are deemed to be on record of suit. A. I. R. 1927 Bom. 136=29 Bur. L. J. 244. Application to substitute legal representative of respondent dying after decree and before preferring appeal, does not lie. A. I. R. 1926 Lah. 329=93 Ind. Cas. 367. In case of joint decree-holders, abatement of appeal against one operates as abatement against all. A. I. R. 1932 Mad. 212=35 M. L. W. 105; see also 36 C. W. N. 1007=56 C. L. J. 365=A. I. R. 1933 Cal. 61. After abatement of an appeal the trial Court has no jurisdiction to go on with the proceedings taken in pursuance of an order of the appellate Court which was intended to operate only during the pendency of the appeal. A. I. R. 1936 Lah. 618=161 Ind. Cas. 212. Where a decree is for joint possession without specification of shares and there is no mention in it of any specific share to which a co-plaintiff who dies pending appeal is entitled and the appeal has admittedly abated against the deceased co-owner the appeal abates as a whole. A. I. R. 1934 Pesh. 14.

Application of order to 12. [New.] Nothing in rules 3, 4 and 8 proceedings. shall apply to proceedings in execution of a decree or order.

*N. B.*—For local amendment in Allahabad.—*Vide infra.*

**Scope.**—Rule 12 does not introduce new rule of procedure. 55 M. 352=62 M. L. J. 1=A. I. R. 1932 M. 73 (F. B). Rule 12 does not apply to appeals against orders in execution and hence Art. 181, Limitation Act also does not apply. 55 M. 1006=A. I. R. 1932 Mad. 574=63 M. L. J. 827; see also 33 Bom. L. R. 858=A. I. R. 1931 Bom. 425; 65 Ind. Cas. 122=3 Pat. L. J. 445. Legal representative upon decree-holder's death cannot apply for substitution but should apply for conducting execution or for fresh execution. A. I. R. 1926 Cal. 957=30 C. W. N. 735=96 Ind. Cas. 378; see also A. I. R. 1927 All. 165 (F. B.)=49 A. 509=25 A. L. J. 249; A. I. R. 1925 Oudh 448=87 Ind. Cas. 21; 30 C. W. N. 361=88 Ind. Cas. 21 (P. C.); but see A. I. R. 1931 Mad. 303=60 M. L. J. 628=131 Ind. Cas. 610. Execution proceedings in Court of transfer is only suspended where judgment-debtor dies before decree-holder is completely satisfied. A. I. R. 1930 Sind 16=118 Ind. Cas. 221. Application to join legal representatives after preliminary and before final decree is not execution proceedings and is therefore controlled by Order XXII, rules 12 and 4 only. A. I. R. 1926 Sind 20; see also 82 Ind. Cas. 604. Rule 12 excludes rules 3 and 4 from execution proceedings and does not prohibit the substitution of the name of the legal representative of the deceased decree-holder in execution of the latter's death. An execution proceeding does not abate on the death of the decree-holder and there is no bar to the execution continuing at the instance of his representative. A. I. R. 1935 Pat. 117=13 Pat. 777=155 Ind. Cas. 969. The rules of abatement in Order 22, C. P. Code, apply to appeals against orders made in execution proceedings as to other appeals. 38 P. L. R. 946=164 Ind. Cas. 605=A. I. R. 1936 Lah. 1022. Rules 3, 4 and 8 apply in terms to suits while rule 11 makes these provisions applicable to all appeals. As no distinction is made in the Code between appeals from orders in execution and appeals generally, and as rule 11 is without qualification or exception, rules 3, 4 and 8 apply to appeals in execution matters. 38 P. L. R. 946=164 Ind. Cas. 605=A. I. R. 1936 Lah. 1022; 11 O. W. N. 917=A. I. R. 1934 Oudh 337=150 Ind. Cas. 425.

### ORDER XXIII.

#### *Withdrawal and Adjustment of Suits.*

1. [S. 373.] (1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied—

(a) that a suit must fail by reason of some formal defect,

or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

(3) Where the plaintiff withdraws from a suit or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others,

**Scope.**—Order under Order 23, rule 1, is not to be lightly passed and when passed is not to be lightly set aside. A. I. R. 1931 All. 19=132 Ind. Cas. 36. Cause of action is equivalent to phrase "subject-matter." A. I. R. 1930 Lah. 937=130 Ind. Cas. 513. An order for the withdrawal with leave under Order 23, r. 1 (2), restores the parties to the position in which they would have stood if the suit had not been filed and, therefore, plaintiff can include portions of claim in the new suit though omitted in the first suit. 84 Ind. Cas. 483=3 Bur. L. J. 189. Bar created by rule 13 has no application where cause of action in first suit is different from that in second suit. A. I. R. 1933 Lah. 343=34 P. L. R. 805. The test of subject-matter is whether cause of action or transaction is same in both suits. A. I. R. 1932 Lah. 138; see also A. I. R. 1933 Lah. 943; A. I. R. 1932 Lah. 130; A. I. R. 1933 Mad. 3=63 M. L. J. 446. Though the C. P. Code is not applicable to proceedings under the Patents and Designs Act, yet the principles of the Code have to be observed by Controller of Patents. 61 C. 450=38 C. W. N. 729=A. I. R. 1934 Cal. 735. The existence of the conditions laid down in Order 23, rule 1, is essential to the exercise of jurisdiction under that provision of law. A. I. R. 1935 Pat. 438. This rule must be read consistently with the other provisions of the Code. It is well-established law that if a suit is so framed as to be open to the charge of multifariousness the plaintiff must elect the cause of action which he is prepared to prosecute or the defendant against whom he will proceed. A. I. R. 1935 Mad. 696=1935 M. W. N. 737=42 L. W. 696=158 Ind. Cas. 909. Where an Appellate Court calls for a finding on a new issue and an application is made by the plaintiff under Order 23, rule 1, the Appellate Court has jurisdiction to pass orders under it. A. I. R. 1935 Mad. 445=156 Ind. Cas. 799.

**Formal defect.**—If formal defects exist and if it would be fatal to suit must be considered by Court when allowing withdrawal of suit. 35 C. W. N. 112=131 Ind. Cas. 863; see also 32 C. W. N. 1244. The expression "formal defect" connotes defect of various kinds not affecting the merits of the case on substantial questions (including equities and estoppes) reasonably arising between the parties. 81 Ind. Cas. 465=2 Rang. 66; see also A. I. R. 1925 Mad. 617=88 Ind. Cas. 665; A. I. R. 1929 Nag. 72. A suit failing by reason of the cause of action cannot be said to fail by reason of some formal defect. A. I. R. 1925 Oudh 291=27 O. C. 231=79 Ind. Cas. 1033. Objections by defendant do not prove that there are formal defects. Court must be satisfied that there are such defects. 11 O. L. J. 351=79 Ind. Cas. 1031; see also 64 Ind. Cas. 556; 48 Ind. Cas. 97=3 P. L. J. 651; 43 Ind. Cas. 985=7 L. W. 131; 43 Ind. Cas. 346. Objections to jurisdiction and Court-fees are formal defects. 41 M. 701=35 M. L. J. 27=45 Ind. Cas. 265. Formal defects need not be in pleadings. 34 C. W. N. 578=127 Ind. Cas. 549. Institution of suit against insolvent without permission of Court is formal defect. A. I. R. 1925 Rang. 105=2 Rang. 643=84 Ind. Cas. 909. Where neither application, nor order made upon it, stating formal defect, order is bad for material irregularity. A. I. R. 1931 Cal. 107=34 C. W. N. 912=130 Ind. Cas. 142; 34 C. W. N. 912=A. I. R. 1931 Cal. 107. Some necessary parties are not impleaded is not formal defect. A. I. R. 1934 Cal. 59. In such a case no withdrawal is allowed. *Ibid.*

**Grounds for withdrawal.**—Court should state grounds for allowing the suit to be withdrawn with leave to bring fresh suit. A. I. R. 1931 All. 19=132 Ind. Cas. 36. Order granting withdrawal with right to file fresh suit made in absence of formal defect or sufficient cause is absolutely without jurisdiction. A. I. R. 1930 Lah. 175=124 Ind. Cas. 686; see also A. I. R. 1928 Oudh 482=5 O. W. N. 61; 48 Ind. Cas. 1005; A. I. R. 1927 All. 522=49 A. 459=25 A. L. J. 484; 90 Ind. Cas. 217=A. I. R. 1926 Pat. 128; 21 L. W. 282=88 Ind. Cas. 665; 39 C. L. J. 371=84 Ind.

Cas. 372 ; 20 A. L. J. 90=64 Ind. Cas. 948. For an Appellate Court to act under Order XXIII, r. 1, clause (2), there must be either some formal defect or something in the nature of a formal defect *ejusdem generis* under clause (b). Otherwise the Court cannot act under the order. A. I. R. 1922 Cal. 58=76 Ind. Cas. 484. Sufficient grounds must be of the nature of formal defect. A. I. R. 1928 Mad. 1085=112 Ind. Cas. 312 ; see also 46 Ind. Cas. 181=117 P. W. R. 1918 ; 25 C. L. J. 454=39 Ind. Cas. 963 ; A. I. R. 1930 Lah. 75 ; A. I. R. 1926 Bom. 315=50 B. 191=28 Bom. L. R. 440 ; A. I. R. 1925 Mad. 1268=22 L. W. 535=91 Ind. Cas. 292 ; 79 Ind. Cas. 1033=27 O. C. 231. "Other sufficient grounds" in sub-cl. (b) should be *ejusdem generis* with formal defect in sub clause (a). 21 L. W. 282=88 Ind. Cas. 665 ; A. I. R. 1929 A. 683 ; but see 46 Ind. Cas. 265=41 M. 701. Inability to produce important evidence is not "sufficient ground". 61 Ind. Cas. 639=2 P. L. T. 634 ; see also A. I. R. 1927 All. 704=25 A. L. J. 870 ; 50 Ind. Cas. 453 ; 78 Ind. Cas. 121 ; 90 Ind. Cas. 632=26 P. L. R. 319. Leave should not be granted where defect can be cured by amendment of plaint. 46 Ind. Cas. 603=21 O. C. 66. An application to withdraw suit with liberty to bring a fresh suit, on the ground that notices on the heirs could not be served, does not lie. 24 Bom. L. R. 909=47 B. 92=75 Ind. Cas. 283. Where the plaintiff for fear of failure in his case desires to withdraw to be able to bring another suit on completely different allegations, this rule does not apply. 81 Ind. Cas. 276. Withdrawal should be granted only where suit would fail due to defect not for plaintiff's default and such withdrawal would not harass the defendant. 34 C. W. N. 912=A. I. R. 1931 Cal. 107. Permission must be given where plaintiff desires to submit formal proof of document necessary to his success. A. I. R. 1929 All. 133=50 A. 835. The words "subject-matter" mean the cause of action for a claim. A. I. R. 1924 Oudh 181=74 Ind. Cas. 56. The words "other sufficient grounds" are wider than the words used in the preceding clause, namely, "formal defects" and the other ground mentioned in clause (b) must be some ground other than and different from "formal defect." 34 C. W. N. 578=A. I. R. 1931 Cal. 268 ; see also A. I. R. 1934 All. 214.

**Sub-section (2).**—Clauses (a) and (b) must be read together Clause (a) being an illustration of what the legislature thought would be a sufficient reason, may in that way, to some extent limit the generality of the words in clause (b). But there is no justification in going further and limit the very wide discretion which clause (b) confers on the Court. 36 Bom. L. R. 1110. The language of clause (b) is quite plain, and there is scope for the introduction of *ejusdem rule* ; *Ibid.* This clause can be interpreted so as to give the Court authority to pass an order upon any grounds which appears to it to be "sufficient grounds" whether they are in the nature of formal defects or not. 1934 A. L. J. 821=A. I. R. 1934 All. 214 ; see also A. I. R. 1934 Lah. 735 ; 11 O. W. N. 557=A. I. R. 1934 Oudh. 257. A suit may only be withdrawn under clause (b) of sub-rule (2) of rule 1, when the "other sufficient grounds" are closely analogous to the ground given in clause 1. Clause 1 deals with the case where a suit must fail by reason of some formal defect. A. I. R. 1935 Pat. 438=158 Ind. Cas. 986 ; see also A. I. R. 1935 Pat. 251. The failure of the plaintiff to produce documents at the proper time or any other default on his part in properly prosecuting the suit cannot be regarded as a sufficient ground within the meaning of Order 23, rule 1, C. P. Code. 158 Ind. Cas. 280=1935 O. W. N. 1066=A. I. R. 1935 Oudh. 495 ; see also A. I. R. 1935 Nag. 185=18 N. L. J. 149=158 Ind. Cas. 263. The language of rule 1 (2) (a) implies that a Court has jurisdiction to permit withdrawal of a suit only while the suit is pending before it, that is, at any time before it passes a decree. 39 C. W. N. 586. Where a plaintiff has been allowed to withdraw a suit under this rule with liberty to bring a fresh suit on condition that he pays the defendant's cost and the order fixes no date for payment of cost, a suit may be instituted before payment of cost. A. I. R. 1935 Nag. 56=31 N. L. R. 766=157 Ind. Cas. 287.

**Leave to withdraw.**—Withdrawal must be one with permission of Court. A. I. R. 1928 Rang. 273=6 Rang. 494. Order granting withdrawal of suit or appeal must be a sufficient ground and supported on sound reasons. A. I. R. 1931 Cal. 336=35 C. W. N. 112 ; 34 C. W. N. 912. Application to withdraw suit should not be granted in the absence of other parties interested. A. I. R. 1930 Nag. 151=13 N. L. J. 93. Withdrawal of suit or appeal does not amount to decree. A. I. R. 1928 Mad. 416=51 M. 664 ; see also A. I. R. 1928 All. 679=50 A. 608. Court on its own motion can pass an order and an application by plaintiff is not necessary. A. I. R. 1927 Nag. 302=10 N. L. J. 142 ; see also A. I. R. 1926 Mad. 594=23



L. W. 367. Order granting permission under this rule is tantamount to leave to withdraw, with liberty to institute fresh suit on the same cause of action. A. I. R. 1926 Pat. 259=7 P. L. T. 49; see also A. I. R. 1934 All. 292. Effect of conditional order is that the suit is deemed to be pending in Court till the condition is fulfilled. A. I. R. 1926 Pat. 409=5 Pat. 366. A plaintiff should not be allowed to withdraw suit with liberty to bring a fresh suit after an appeal has been filed against the appellate decree. 45 Ind. Cas. 913. Permission to withdraw suit does not mean recognition of maintainability of suit nor can a Court provide to the effect in the order. A. I. R. 1922 Mad. 447=45 M. 90=41 M. L. J. 594=70 Ind. Cas. 432. Application to withdraw suit can itself be withdrawn. 71 Ind. Cas. 288=44 M. L. J. 77. Where the Court is not satisfied that the circumstances contemplated in the rule exist, then it cannot make the order for withdrawal with liberty. 64 Ind. Cas. 337=3 Pat. L. T. 80; see also 61 Ind. Cas. 584=18 N. L. R. 30. Leave can be granted to withdraw a part of the claim with liberty to bring a fresh suit on the ground of misjoinder of causes of action and parties. 64 Ind. Cas. 82. On an application for permission to withdraw a suit with liberty to bring a fresh suit, the Court cannot merely grant such permission without granting also leave to bring a fresh suit. A. I. R. 1921 Pat. 360=56 Ind. Cas. 286. Where a Court in dismissing a suit remarks that the plaintiffs are at liberty to file a fresh suit, but there was no formal application under Order 23, rule 1, for withdrawal the remark does not amount to a permission to bring a fresh suit under Order XXIII, rule 1. A. I. R. 1925 (P. C.) 55=27 Bom. L. R. 725=29 C. W. N. 749=23 A. L. J. 739=91 Ind. Cas. 280. Application should be allowed as a whole or dismissed as a whole. 1931 A. L. J. 956=135 Ind. Cas. 160; 11 O. W. N. 1102. Permission should be given only when defect was not due to any fault of plaintiff especially when a leave is asked in the Appellate Court. 34 C. W. N. 912=A. I. R. 1931 Cal. 107. Application under Order 23, rule 2, must be treated as indivisible. A. I. R. 1933 Mad. 155=135 Ind. Cas. 316. Where suit for permission of three plots of land on basis of sale certificates, plaintiff was allowed to withdraw claim in respect of one of the plots as number having been wrongly entered instead of another number. 145 Ind. Cas. 222=A. I. R. 1933 Oudh 225=10 O. W. N. 311. Where plaintiff is suing in representative character, he cannot put an end to it by merely withdrawing from it. A. I. R. 1934 All. 4. Mere application to withdraw suit does not end the suit. Suit terminates only on order being passed by Court on such application. A. I. R. 1934 All. 4. Where the plaintiff is not prepared to meet the defendant's case it is no ground for withdrawal under this rule. A. I. R. 1934 All. 137. Where the defendants have failed to prove that the withdrawal of previous suit, with reference to which the bar under Order 23, rule 2, has been pleaded, was without permission to bring a fresh suit, the suit is not barred by reason of Order 23, rule 1. A. I. R. 1935 Cal. 744. Where payment of cost within one month was a condition precedent to the fresh suit the Court would have no jurisdiction to entertain a new suit unless the costs have been paid within the period fixed. 39 C. W. N. 330.

**Withdrawal without leave.**—This rule extends to fresh suit only and not to applications. A. I. R. 1928 Mad. 1165. Where a Court allows withdrawal without liberty to bring a fresh suit, a fresh suit in respect of the same matter cannot be brought. 40 M. L. J. 126=62 Ind. Cas. 833; see also 45 Ind. Cas. 913; 40 Ind. Cas. 408=29 C. L. J. 1; A. I. R. 1926 Mad. 490; A. I. R. 1935 Cal. 157; 1935 O. W. N. 661=A. I. R. 1935 Oudh 434; A. I. R. 1935 Cal. 764; A. I. R. 1930 Lah. 755=31 P. L. R. 383; A. I. R. 1930 Lah. 599=129 Ind. Cas. 215; A. I. R. 1929 All. 692; A. I. R. 1928 All. 698=1929 A. L. J. 229; 39 Ind. Cas. 276=1 P. L. W. 741; 53 Ind. Cas. 478=136 P. R. 1919. Where causes of action are different, this rule is no bar to a fresh suit on the ground that permission to bring a fresh suit had not been taken from the Court at the time of the withdrawal of the former suit. A. I. R. 1934 Lah. 721; 151 Ind. Cas. 458=38 C. W. N. 133=A. I. R. 1934 Cal. 433. The withdrawal of a suit instituted by partners who have not been registered as a firm under the Partnership Act is no bar to a fresh suit filed by them on the same cause of action, after they get themselves registered as a firm. The latter suit is technically a suit by a different plaintiff. A. I. R. 1936 Mad. 697=1936 M. W. N. 888=164 Ind. Cas. 748. With respect to the application of Order 23, rule 1, a suit for partition should be treated differently, and a subsequent suit for partition of the same property involved in the previous suit is not barred under Order 23, rule 1 by the dismissal of the previous suit, even though no permission to institute a fresh suit was obtained when the previous suit was dismissed on the ground of compromise, the reason being that the right to bring a suit for partition unlike other suits is a continuing right, and

as soon as the defendants failed to carry out the compromise, the parties are relegated to their rights as they existed prior to the compromise. A. I. R. 1935 Mad. 909=1935 M. W. N. 985=42 L. W. 843=69 M. L. J. 401.

**Form of order.**—Where an application under Order XXIII, rule 1, contains a prayer for permission to bring a fresh suit but the order of the Court on the application only says "withdrawn—file," the permission prayed for is granted. A. I. R. 1927 Oudh 360=130 Ind. Cas. 510; see also 67 Ind. Cas. 1002=21 Lah. L. J. 242; 44 Ind. Cas. 889=34 M. L. J. 515. The Court can impose the limitation of time for institution of the subsequent suit at a time of withdrawal of the first. 44 B. 939=22 Bom. L. R. 939=58 Ind. Cas. 45. Where a plaintiff applies for a withdrawal of suit with permission to bring a fresh suit, the Court has no power to decide the application allowing the suit to be withdrawn and refusing the permission to bring a fresh suit. 56 Ind. Cas. 286=1 Pat. L. T. 292; see also 1 Pat. L. T. 299=56 Ind. Cas. 756. Where there is no application and no withdrawal the suit is dismissed. 10 O. L. J. 132=74 Ind. Cas. 549. A permission for fresh suit must be expressly given. 9 P. R. 1916=37 Ind. Cas. 128. An order recorded after the withdrawal of a claim petition under Order 21, rule 62, that "the proceedings are dropped" is equivalent to an order under this rule. 79 Ind. Cas. 1002=20 N. L. R. 106; but see 74 Ind. Cas. 549=10 O. L. J. 132.

**Effect of order.**—Where a suit is allowed to be withdrawn with leave to bring a fresh suit it should be regarded as never brought. It does not give fresh cause of action nor starts fresh limitation. 29 C. W. N. 755=41 C. L. J. 456=52 Cal. 894 (F. B.)=88 Ind. Cas. 637. Section 14 does not apply to cases where the suit is withdrawn under Order 23, rule 1. A. I. R. 1928 All. 402. Where a prior suit between the parties has been permitted to be withdrawn with liberty to institute a fresh suit, it is not open to the defendant in the subsequent suit to object to the maintainability of the suit on the ground that the previous suit had abated before leave to withdraw the suit was granted to the plaintiff, because he is precluded from going behind the order permitting withdrawal. A. I. R. 1935 Cal. 739=51 C. L. J. 209=A. I. R. 1935 Cal. 216.

**Appellate Court.**—Appellate Court can also grant withdrawal of a suit. A. I. R. 1929 Mad. 36=114 Ind. Cas. 557; see also A. I. R. 1926 Nag. 444; 40 A. 27=15 A. L. J. 809=42 Ind. Cas. 856; 59 Ind. Cas. 210=45 B. 206; 57 Ind. Cas. 530=44 B. 598=22 Bom. L. R. 774; A. I. R. 1924 All. 260=74 Ind. Cas. 894; 38 P. L. R. 319. An appellate Court cannot under Order 23, rule 1 (2), allow a suit to be withdrawn in appeal as distinguished from the appeal itself, with liberty to institute a fresh suit as that would amount to set aside the decree in the suit. 51 Ind. Cas. 579=18 S. L. R. 72; see also 46 Ind. Cas. 392=3 P. L. J. 404; A. I. R. 1934 All. 214. The Court can in appeal allow under Order 23, C. P. Code, to withdraw a suit with liberty to bring a fresh suit but this can only be done in a case where the Appellate Court discovers that the suit ought to fail on the ground of some formal defect and by reason of such discovery it is of opinion that the decree of the trial Court ought to be reversed. A. I. R. 1925 Cal. 711=41 C. L. J. 186=86 Ind. Cas. 1029; see also 60 Ind. Cas. 899=19 A. L. J. 47. An Appellate Court should not allow a suit to be withdrawn with leave to bring a fresh suit, by mere successful plaintiff. 61 Ind. Cas. 584; but see 74 Ind. Cas. 894. Rule 1 does not apply to the case of a plaintiff respondent. 45 M. L. J. 212=46 M. 811=74 Ind. Cas. 4. Effect of appellate Courts leave to withdraw suit with liberty to file fresh suit is to wipe out lower Courts decree. 37 Ind. Cas. 414=44 M. 259.

**Execution proceedings.**—Order 23 does not apply to the execution proceedings. A. I. R. 1922 Pat. 525=1 Pat. 232=65 Ind. Cas. 122.

**Power of co-plaintiffs.**—One of several plaintiffs cannot withdraw a suit without obtaining the consent of all. 2 U. P. L. R. (B. R.) 33=55 Ind. Cas. 926; see also 52 Ind. Cas. 183=1 U. P. L. R. (B. R.) 14; 60 Ind. Cas. 592=2 U. P. L. R. (B. R.) 105; A. I. R. 1928 Mad. 496; 1 Pat. 228=A. I. R. 1922 Pat. 489; A. I. R. 1933 Mad. 824=65 M. L. J. 693. An appellant can withdraw from an appeal under sub-rule (1) of r. 1, Order XXIII, without the consent of the co-appellants, sub-rule (4) of r. 1 does not govern rule 1. A. I. R. 1927 Bom. 244=29 Bom. L. R. 299=101 Ind. Cas. 348.

**Minor.**—Court should jealously guard the interest of minors and should not allow a suit to be instituted on a minor's behalf to be withdrawn without being satisfied that it is for his benefit. 47 Ind. Cas. 508=59 P. R. 1919.

**Late stage.**—A plaintiff has no absolute right to withdraw his suit in appeal. A. I. R. 1923 Oudh 252=77 Ind. Cas. 874 ; see also 46 M. 811=45 M. L. J. 212= A. I. R. 1924 Mad. 79=74 Ind. Cas. 4 ; A. I. R. 1926 All. 548=24 A. L. J. 721. Withdrawal with right to bring fresh suit should not be granted in appeal where suit in trial Court is decided on merits. A. I. R. 1929 Cal. 88=55 C. 1067=113 Ind. Cas. 845 ; 41 C. L. J. 168=86 Ind. Cas. 1029. Plaintiff can withdraw part of his claim to give jurisdiction, even after evidence and arguments are heard. 116 Ind. Cas. 823. Evidence being meagre is no ground to allow withdrawal of the suit under Order XXIII, rule 1 or under s. 151. A. I. R. 1929 Bom. 320=31 Bom. L. R. 613=119 Ind. Cas. 773 ; see also 85 Ind. Cas. 324 ; A. I. R. 1926 Mad. 126. Withdrawal of suit, after reaching Letters Patent appeal cannot be granted unless defendants consent to it. A. I. R. 1930 Pat. 410=12 P. L. T. 280=129 Ind. Cas. 543.

**Order as to costs.**—Where suit was allowed to be withdrawn on payment of cost, cost may be paid after filing second suit. A. I. R. 1929 Nag. 135=25 N.L.R. 171. Where leave to withdraw suit with liberty is granted, Court must follow the event. 25 Bom. L. R. 242=47 B. 559=72 Ind. Cas. 324. When permission is granted to withdraw a suit on payment of costs, the payment of costs is not a condition precedent to the institution of the suit and non-payment will not debar the plaintiff from filing a fresh suit. 45 Ind. Cas. 969=7 L. W. 557 ; see also A. I. R. 1927 Lah. 159=99 Ind. Cas. 420 ; A. I. R. 1933 All. 810=1933 A. L. J. 1350, A. I. R. 1926 Pat. 472=95 Ind. Cas. 875 ; 64 Ind. Cas. 738 (Cal.) ; 44 Ind. Cas. 79=3 Pat. L. J. 63=4 Pat. L. W. 134 ; but see 38 Ind. Cas. 476 ; 83 Ind. Cas. 958=39 C. L. J. 367 ; A. I. R. 1931 Bom. 257=33 Bom. L. R. 278. Cost should ordinarily be allowed to the defendant. A. I. R. 1932 Mad. 714=36 M. L. W. 646.

**Finality of order.**—An appeal does not lie from an order passed under Order XXIII, rule 1, allowing a suit to be withdrawn with liberty to bring a fresh suit. A. I. R. 1926 Oudh. 185=88 Ind. Cas. 1029. The mere fact that the Court may have exercised a wrong discretion is not sufficient to bring the case within the purview of s. 115. A. I. R. 1927 All. 750=25 A. L. J. 838=103 Ind. Cas. 372 ; see also A. I. R. 1931 All. 19. The Court trying the subsequent suit cannot enquire whether the Court which granted the plaintiff's permission to withdraw the first suit had properly made such order. 65 Ind. Cas. 704 ; 58 Ind. Cas. 806=48 C. 138=24 C. W. N. 723 (F. B.). An order under this rule beyond the competency of the Court is an order passed in irregular exercise of jurisdiction as not a nullity. 40 Ind. Cas. 611=32 M. L. J. 434=(1917) M. W. N. 234.

**Mortgage suit.**—*Vide* (1916) 1 M. W. N. 171=32 Ind. Cas. 624.

**Partition suit.**—In a partition suit, after compromise the plaintiff cannot withdraw the suit. 49 B. 672=27 Bom. L. R. 921=89 Ind. Cas. 984. In a partition suit a defendant seeking a share is in the position of a plaintiff and one plaintiff cannot withdraw without the permission of another according to Order 23, rule 1(4). *Ibid* ; see also A. I. R. 1926 All. 582=24 A. L. J. 694 ; 16 A. L. J. 584=47 Ind. Cas. 905. Where a member of a family withdraws a suit for partition, he can bring another suit for the possession of his share of the property by reason of Order 23, rule 1. 20 L. W. 540=83 Ind. Cas. 84.

**Probate Proceedings.**—Order XXIII, rule 1, does not apply to probate proceedings. 67 Ind. Cas. 1002=2 Lah. L. J. 242 ; see also 40 Ind. Cas. 345=2 Pat. L. J. 535=5 Pat. L. W. 230. Where probate application being incomplete was allowed to be withdrawn, a fresh application for letters of administration is not barred. A. I. R. 1932 Lah. 290=132 Ind. Cas. 224.

**Public trust.**—Where in a scheme suit under s. 92 of the Code, the plaintiff applies to withdraw the suit to prevent the Court from deciding the suit on merits, the Court can transpose some of the defendants as plaintiffs and proceed with the suit notwithstanding the withdrawal of the plaintiffs. 12 L. W. 25=59 Ind. Cas. 233.

**Revision.**—The High Court can revise an order passed under this rule if that order proceeds on grounds other than those laid down in rule 1. 90 Ind. Cas. 632=26 P. L. R. 319=7 Lah. L. J. 290 ; see also 92 Ind. Cas. 1030 ; 107 Ind. Cas. 887=5 O. W. N. 61=A. I. R. 1928 Oudh 482=3

Luck. 403=5 O. W. N. 61; A. I. R. 1927 All. 704=25 A. L. J. 870; 95 Ind. Cas. 556; A. I. R. 1925 All. 466=47 A. 329=87 Ind. Cas. 175; 35 Ind. Cas. 843; 44 C. 454=25 C. L. J. 455=39 Ind. Cas. 969; 5 Pat. L. W. 104=3 Pat. L. J. 460=46 Ind. Cas. 179; 72 Ind. Cas. 1034; 70 Ind. Cas. 484; 68 Ind. Cas. 753; 64 Ind. Cas. 337=3 P. L. T. 80=1 Pat. 90 (F. B.); 61 Ind. Cas. 584=18 N. L. R. 30. Where a Court below fails to exercise a judicial discretion an order under this rule can be revised. 79 Ind. Cas. 1031=11 O. L. J. 351. Order under this rule passed without the conditions required by the section being complied with, is without jurisdiction and may be made subject to revision. 78 Ind. Cas. 121; see also 40 Ind. Cas. 77. Where the Court passing the order under Order XXIII, rule 1, has exercised its discretion, no revision lies. A. I. R. 1926 All. 548=24 A. L. J. 721=96 Ind. Cas. 480. Where a judicial discretion has been exercised, the High Court cannot interfere, merely on the ground that had the matter come before that Court as a substantive application, or by way of appeal it might not have taken the same view of the facts of the case in their application to the provisions of Order XXIII, r. 1, commended itself to the Court below. 60 Ind. Cas. 899=19 A. L. J. 47; see also 1930 A. L. J. 1209=125 Ind. Cas. 580; A. I. R. 1934 All. 214. It is material irregularity to grant permission of withdrawal without recording reasons. A. I. R. 1928 All. 98=50 A. 109=106 Ind. Cas. 431; see also 35 C. W. N. 112=A. I. R. 1931 Cal. 336. Entertaining plaintiff's application to withdraw suit and bringing fresh one owing to defect in plaint amounts in exercising jurisdiction. A. I. R. 1932 Lah. 360=136 Ind. Cas. 1=33 P. L. R. 275. Where Court acts with material irregularity, mistake can be corrected under ss. 151 and 152. A. I. R. 1934 Rang. 108. No appeal lies against an order passed under Order 23, rule (1), dismissing a suit as withdrawn by the plaintiffs. 1935 O. W. N. 842=156 Ind. Cas. 990=A. I. R. 1935 Oudh 486.

2. [S. 374.] In any fresh suit instituted on permission granted under Limitation law not affected by first suit. the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

**Scope.**—The rule contained in this rule *viz.*, that when a suit is withdrawn with leave to bring a fresh suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been brought does not apply to execution proceedings. 10 B. 62; see also 17 A. 106. As regards whether section 14 of the Limitation Act applies, *vide* 29 B. 219; 35 C. 924.

3. [S. 375.] Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by compromise of suit, any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded and shall pass a decree in accordance therewith so far as it relates to the suit.

*N. B.*—For local amendment in Rangoon.—*Vide infra*.

**Scope.**—Order 23, rule 3, contemplates an adjustment by a lawful agreement or compromise that is an adjustment by act of parties and not an adjustment which has a statutory operation. A. I. R. 1937 Cal. 381. Whether the compromise under Order 23, rule 3, C. P. Code, in a suit does or does not relate to the suit within the meaning of Order 23, rule 3, is in each case a question of fact depending upon the particular facts of each case. A. I. R. 1937 Sind 190. A decree dismissing the suit on the ground that a plea in bar of the suit on the basis of an alleged compromise is established is not one made under Order XXIII, rule 3. 46 Ind. Cas. 775. Suit in rule 3, includes appellate stages and execution proceedings that follow a decree. 62 Ind. Cas. 608=6 Pat. L. J. 253=2 Pat. L. T. 273. Under rule 1 the Court deals with plaintiff alone, but under rule 3 it deals with plaintiff and defendant and finds out if there is any agreement between them for compromise. 37 Ind. Cas. 421. Injunction can be passed with the consent of the parties; but it must be by order of Court. A. I. R. 1934 Cal. 402. Where party has no interest, his consent to compromise is not necessary. A. I. R. 1934 Lah. 34. Compromise not recorded under rule

3 is still agreement. Party taking advantage of such agreement is estopped from challenging its binding nature. A. I. R. 1924 Lah. 218. This rule is intended to meet cases where parties, having agreed to compromise subsequently fall out. Where a legal compromise subsequent to the suit is alleged by one party and denied by the other, the Court has power to frame an additional issue as to its existence, and if it is proved, to give effect to it. 19 M. 419=4 M. L. J. 263. This rule applies only to a case in which the adjustment or satisfaction is made in Court, and cannot and ought not to be extended so as to specifically perform agreements made out of Court. 24 C. 908=1 C. W. N. 597 (F. B.). "Lawful" in rule 3 refers to the nature of the compromise arrived at and not to the procedure which the parties followed in bringing it about. A. I. R. 1927 Bom. 565 (F. B.)=51 B. 908=29 Bom. 1254=105 Ind. Cas. 516. Rule 3 of Order XXIII refers to cases where the parties themselves come to an agreement. In reference to arbitration it is the unity of the minds of the parties that constitutes the adjustment. A. I. R. 1927 All. 614=25 A. L. J. 787=102 Ind. Cas. 608; see also A. I. R. 1929 Lah. 806; A. I. R. 1930 All. 162=(1930) A. L. J. 397=52 A. 735. "So far as it relates to the suit" mean "so far as it relates to the adjustment or settlement of matters litigated in the suit," the settlement may take any form which is lawful and fair and which satisfies the parties. 64 Ind. Cas. 391=A. I. R. 1922 L. B. 22. A contract of parties is none-the-less a contract because there is superadded to it the command of the Judge. A. I. R. 1924 Pat. 231=81 Ind. Cas. 298. Rule 3 is applicable to suits, but under s. 141 the procedure applicable to suits, so far as it can, should be applicable to in miscellaneous proceedings. A. I. R. 1926 Oudh 311=13 O. L. J. 138=92 Ind. Cas. 732. The provisions contained in rule 3 of Order 23, are applicable to execution proceedings. 44 Ind. Cas. 164; 80 Ind. Cas. 454; but see A. I. R. 1927 Nag. 31=97 Ind. Cas. 768. Once a compromise decree has been passed with reference to the rights of the parties to a suit, no suit but execution is the remedy of the parties. 52 Ind. Cas. 188=151 P. R. 1919. Where a decree includes matters covered by the suit and also matters outside it, the decree can be executed only to the extent of the matters included in the suit and not in respect of the matters outside it. A. I. R. 1925 Cal. 286=78 Ind. Cas. 317. A dismissal under Order 23, Civil Procedure Code, does not amount to an adjudication but only precludes the institution of a second suit on the same cause of action. A. I. R. 1937 Mad. 438. This rule is mandatory in its terms, and if the Court is satisfied that the parties executed the compromise the terms of which were known to them and which is a perfectly valid and binding document, adjusting the suit or appeal, the Court has no option but to order the compromise to be recorded and to pass a decree in accordance thereof. A. I. R. 1935 All. 137=1934 A. L. J. 1183. The word "lawful" in this rule does not merely mean binding or enforceable. The rule refers to agreements which in their very terms and nature are not "unlawful" and may include agreements voidable at the option of one of the parties. 154 Ind. Cas. 746=57 A. 426=A. I. R. 1936 All. 137=1934 A. L. J. 1183. An agreement which purports to deal with the rights of certain minors who are not parties to the suit is not a lawful agreement which can be recorded under Order 23, rule 3, C. P. Code. 61 C. L. J. 88. The provisions of rule 3 are imperative and the special procedure therein prescribed is not affected by the general procedure laid down in Order 23, rule 1. 57 M. 892=39 L. W. 521=150 Ind. Cas. 582=A. I. R. 1934 Mad. 337=66 M. L. J. 517. Where portion of the compromise is valid, and the rest is invalid, valid portion can be executed. A. I. R. 1928 Lah. 792=112 Ind. Cas. 695. Rule 3 gives speedier remedy than suit. A. I. R. 1933 Pat. 306=12 Pat. 356.

"Any other law" in s. 89 include Order 23, rule 3. A. I. R. 1931 Oudh 127=6 Lah. 591=131 Ind. Cas. 443; see also A. I. R. 1927 Bom. 565=29 Bom. L. R. 1254=51 B. 908=105 Ind. Cas. 516. A consent decree does not come within the rule of *res judicata* as contained in s. 11. It, however, raises an estoppel as much as a decree is passed *in invitum*. A. I. R. 1926 Cal. 672=43 C. L. J. 116=94 Ind. Cas. 844. Where parties to a suit arrive at a compromise, a Court does not make declarations based on such compromise; because Court not having proved the case cannot form its own opinion as to the merits of the case. A. I. R. 1929 Bom. 350=31 Bom. L. R. 621=119 Ind. Cas. 663. Consent decree requiring personal skill can be passed. A. I. R. 1933 Pat. 306=12 Pat. 359. Duty of Court is to see what party was in the right before thrusting compromise on one party or other.

34 C. W. N. 1068=A. I. R. 1931 Cal. 205. A party in whose favour a decree or order is passed can set it aside by adjustment or compromise under this rule. 47 Ind. Cas. 817.

**Adjustment.**—Adjustment cannot be refused if lawful. 12 Pat. 359=A. I. R. 1933 Pat. 306. Question whether compromise amounts to adjustment depends on intention of parties and not on question whether terms are to be performed in future or in present. A. I. R. 1933 Lah. 732. Valid award even without intervention of Court can be given effect to adjustment. A. I. R. 1931 Nag. 66=13 N. L. J. 237; A. I. R. 1931 Bom. 343=55 B. 503=33 Bom. L. R. 759; 67 Ind. Cas. 123=3 Lah. L. J. 162; but see 31 P. L. R. 225=A. I. R. 1930 Lah. 225. In a full Bench of the Allahabad High Court, it has been held that an award arrived at by a reference if the subject-matter of an appeal to an arbitration pending the appeal cannot be recognised as an 'adjustment by lawful agreement' by the parties to the appeal or as a "compromise". A compromise is the direct result of an agreement between the parties. Giving the words of r. 3 their plain meaning, an arbitration cannot come within the purview of rule 3. 47 A. 637=23 A. L. J. 561=88 Ind. Cas. 768 (F. B.). This rule restricts the Court's power only to such agreements as are lawful. If an agreement is not legally probable the parties cannot make it the subject of an adjustment so as to oust the Court's jurisdiction to deal with the merits of the case. A. I. R. 1926 Nag. 194=90 Ind. Cas. 378. Where an agreement during suit does not terminate litigation it creates no right and is not compromise. A. I. R. 1926 Bom. 24=27 Bom. L. R. 1441; see also A. I. R. 1928 Cal. 108=46 C. L. J. 353. A compromise under which a plaintiff agrees to withdraw his suit against some defendants only is valid. A. I. R. 1930 Sind 217=123 Ind. Cas. 693. Parties cannot adjust a preliminary decree between themselves out of Court and get such adjustment enforced under this rule, in as much as this rule relates to adjustment of suit and not to a satisfaction of a decree. A. I. R. 1930 Mad. 105=30 L. W. 551=1929 M. W. N. 867. Where a decision of Court of Justice depends on an agreement depending upon contingencies beyond the control of parties, it is not an adjustment. A. I. R. 1927 Oudh 222=102 Ind. Cas. 470; see also 78 Ind. Cas. 540=27 O. C. 157=11 O. L. J. 306. An agreement between the parties to a suit to abide by the decision which may be made in another proceeding is tantamount to an adjustment of the suit when that decision is actually passed. 51 Ind. Cas. 540=8 L. W. 470; see also 80 Ind. Cas. 16=A. I. R. 1924 All. 570; A. I. R. 1930 Bom. 431=32 Bom. L. R. 389=54 B. 696. Courts will not allow an agreement entered into by parties prior to decree to treat the decree to be passed as in part inexecutable. 43 M. 725=39 M. L. J. 222=56 Ind. Cas. 976. The payment of the mortgage money, due on a preliminary decree, made out of Court, if certified by the decree-holder, can be treated as an adjustment of the suit under this rule. 1935 O. W. N. 1087=158 Ind. Cas. 419. Where the parties to the suit request the Court to adopt a certain procedure and to decree, the suit in case a certain event happen, and make an endorsement to that effect on the plaint, they cannot afterwards go behind it or appeal against the decree passed in pursuance of that agreement. 164 Ind. Cas. 611=44 L. W. 351=A. I. R. 1935 Mad. 856=71 M. L. J. 281.

**Arbitration.**—If the parties in a suit have referred their differences to arbitration without an order of the Court, the award can be recorded under Order XXIII, rule 3. A. I. R. 1931 Oudh 127=8 O. W. N. 71; see also A. I. R. 1931 Rang. 58=9 Rang. 39=131 Ind. Cas. 57; A. I. R. 1931 Nag. 66=13 N. L. J. 237; A. I. R. 1927 Bom. 565=51 B. 908=29 Bom. L. R. 1254; A. I. R. 1927 Mad. 1126=53 M. L. J. 444=104 Ind. Cas. 674; A. I. R. 1928 Nag. 173=24 N. L. R. 55; A. I. R. 1928 Mad. 1025=51 M. 800=55 M. L. J. 429; A. I. R. 1931 Nag. 66=13 N. L. J. 237; A. I. R. 1930 Lah. 860=31 P. L. R. 225; A. I. R. 1926 Nag. 405=23 N. L. R. 100; A. I. R. 1921 Sind 65=16 S. L. R. 174 (F. B.); A. I. R. 1925 Mad. 50; A. I. R. 1932 Pat. 205=11 Pat. 237; 25 Bom. L. R. 452=75 Ind. Cas. 102; A. I. R. 1922 Oudh 189=25 O. C. 213=68 Ind. Cas. 209; 49 Ind. Cas. 746; but see 69 Ind. Cas. 808; 88 Ind. Cas. 768=47 A. 637=23 A. L. J. 561 (F. B.); A. I. R. 1933 All. 956; A. I. R. 1936 Nag. 8=31 N. L. R. (Sup) 72. Arbitration in pending suit is subject to the control of the Court. Parties cannot deprive the Court of its jurisdiction by private reference to arbitration, and no award made on such reference, unless consented to by both parties, can be enforced in suit, either by treating it as an adjustment of the matters in dispute under rule 3, Order XXIII, or under the general law of contracts. A. I. R. 1927 Cal. 887=47 C. L. J. 59=104 Ind. Cas. 360; see also 88 Ind. Cas. 61=18 S. L. R. 111; 60 C. L. J. 173. Where after the parties

to a suit refer to arbitration a compromise is arrived at between them, but there is no order superseding the arbitration, the Court cannot record the compromise. 51 C. 432=83 Ind. Cas. 606; but see A. I. R. 1927 Lah. 156=99 Ind. Cas. 1002. If after the award has been given there is any dispute between the parties as regards the validity of it, the Court has to determine the objections raised against the award just in the same way as it has to determine the objections raised against the validity of a compromise simpliciter filed before it. A. I. R. 1931 Oudh. 127=8 O. W. N. 71=131 Ind. Cas. 443. An award made on a reference to arbitration without the intervention of the Court, pending a suit, does not come within the purview of Order 23, rule 3, C. P. Code and cannot be enforced unless consented to by both parties. A. I. R. 1934 Cal. 643=38 C. W. N. 648=151 Ind. Cas. 661.

**Lawful agreement.**—The Court, before it records a compromise, must be satisfied that the suit has been adjusted wholly or in part by any lawful agreement or compromise. 83 Ind. Cas. 606=51 C. 432; 53 Ind. Cas. 833=4 P. L. J. 580; 55 Ind. Cas. 504; A. I. R. 1924 Cal. 159=38 C. L. J. 272=80 Ind. Cas. 307. Where all parties do not assent to a compromise the compromise is not lawful. 86 Ind. Cas. 361=6 Lah. L. J. 604; see also 69 Ind. Cas. 395. Where the claim is beyond the jurisdiction of the trial Court, it cannot pass a compromise decree. (1922) M. W. N. 83=16 L. W. 155=66 Ind. Cas. 837. Compromise between plaintiff and one defendant cannot be accepted as prejudicial to other defendants. A. I. R. 1923 Oudh. 252=77 Ind. Cas. 874. Lawful agreements may include agreements which are voidable. 1932 A. L. J. 509=A. I. R. 1932 All. 478; A. I. R. 1928 All. 494=50 A. 748. Strength and weakness of case is irrelevant to decide fact and lawfulness of compromise. A. I. R. 1933 Pat. 306=12 Pat. 359=14 P. L. T. (Sup) 1=A. I. R. 1933 Pat. 306. Lawful means legally enforceable and not necessary specifically enforceable. *Ibid.* Repudiating party cannot insist on trial of suit to decide lawfulness of compromise. *Ibid.* A compromise is not illegal only because among its terms there is withdrawal of certain criminal prosecutions, compoundable by law. A. I. R. 1930 Lah. 860=31 P. L. R. 225. Where a compromise decree is attacked on the ground that the compromise is brought about by undue influence, coercion and compulsion, a regular suit will lie. 85 Ind. Cas. 557=A. I. R. 1925 All. 266. As regards what compromise is not lawful, *vide* A. I. R. 1927 Lah. 546=103 Ind. Cas. 80; 106 Ind. Cas. 645=9 P. L. T. 214 (*mohant* exceeding his power); A. I. R. 1930 Mad. 305=53 M. 805. Where an agreement to compromise is inchoate, it should be proved by evidence that after the date the agreement was completed and in the absence of such proof the agreement cannot be given effect to. A. I. R. 1930 Sind 217=123 Ind. Cas. 693. Where a compromise is filed in Court but repudiated by some of the parties to it, the Court must hold an enquiry under Order 23, rule 3. A. I. R. 1929 Pat. 102=116 Ind. Cas. 524. For instances of lawful agreement, *vide* A. I. R. 1929 Oudh. 63=5 O. W. N. 1081; A. I. R. 1929 Pat. 495; A. I. R. 1927 P. C. 204=32 C. W. N. 93=24 Bom. L. R. 1376 (P. C.); A. I. R. 1927 P. C. 57=51 B. 442=52 M. L. J. 466=31 C. W. N. 649 (P. C.); A. I. R. 1926 All. 278=24 A. L. J. 210; A. I. R. 1924 P. C. 202=26 Bom. L. R. 772=45 M. L. J. 136 (P. C.)=83 Ind. Cas. 380; 55 Ind. Cas. 716. A compromise affecting the rights of a person who is not a party to it cannot be considered to be lawful, and a decree passed thereon is liable to be set aside. 38 P. L. R. 283.

**Duty of Court.**—A Court to which a petition of compromise is presented should not delay in passing order for recording the compromise. Under this rule the Court is to pass an order directing the compromise to be recorded and this should be done at once. 15 Pat. 456=163 Ind. Cas. 675=A. I. R. 1936 Pat. 401. The Court is also to pass a decree in accordance with the compromise so far as it relates to the suit and the passing of the decree may, if necessary, be postponed till the hearing of the suit if there is a question as to how the interest of other parties to the suit, who would have not entered into the compromise, would be affected by it, but this is no reason to defer the actual recording of the agreement of compromise. *Ibid.* The Court has no jurisdiction, except in the case of minors, etc., to investigate the fairness or unfairness of a compromise which has been accepted by both the parties. 1936 M. W. N. 199=43 L. W. 386=A. I. R. 1936 Mad. 347=70 M. L. J. 471. The general rule, that evidence should be recorded before a decision is made and not after, should also be followed in cases in which the Court records compromises arrived at between the parties. 29 S. L. R. 437=A. I. R. 1936 Sind 59=163 Ind. Cas. 240. If a compromise is alleged it is a question of fact for investigation. 39 C. L. J. 526=83 Ind. Cas. 948; 151 Ind. Cas. 661=38 C. W. N. 648

=A. I. R. 1934 Cal. 643 ; see A. I. R. 1934 Pat. 582=152 Ind. Cas. 288. Court has no discretion in recording a compromise and passing a decree according to it where the suit has been adjusted either wholly or in part by a lawful compromise. It is the duty of the Court to record the agreement and pass a decree in accordance therewith. A. I. R. 1930 P. C. 158=34 C. W. N. 453=32 Bom. L. R. 645=51 C. L. J. 309=123 Ind. Cas. 545 (P. C.) ; see also 50 M. L. J. 59=92 Ind. Cas. 311=A. I. R. 1926 Mad. 341. A Court should not proceed to thrust the compromise on one party or the other. 34 C. W. N. 1068=A. I. R. 1931 Cal. 205=131 Ind. Cas. 257. In the case of private individual a Court should see that there is in fact a compromise and the adjustment is a lawful one. A. I. R. 1930 Mad. 629=58 M. L. J. 410=53 M. 398=124 Ind. Cas. 602 ; see also 25 C. W. N. 806=34 C. L. J. 96=66 Ind. Cas. 273 ; 52 Ind. Cas. 105 ; 61 Ind. Cas. 118=14 S. L. R. 245 ; 50 Ind. Cas. 363. Court cannot permit parties to divide the testator's property under a compromise before the will is proved. 20 C. W. N. 986=1 Pat. L. J. 377=37 Ind. Cas. 12. The Court can decide the fact of settlement of a pending suit where plaintiff denies and defendant affirms it and grant a decree in accordance therewith, if it is established. 21 C. W. N. 366=36 Ind. Cas. 375.

**Effect of Compromise Decree**—Consent decree has no greater validity than compromise itself. A. I. R. 1931 Lah. 628=134 Ind. Cas. 827=32 P. L. R. 936=12 Lah. 403. Court has no power to grant extension of time for payment of instalments. A. I. R. 1933 Pat. 677. A consent decree is binding on parties to the suit until it is set aside after contest. 40 M. 177=30 M. L. J. 274=34 Ind. Cas. 57 ; 31 Ind. Cas. 21 ; A. I. R. 1928 Oudh 48=4 O. W. N. 1119. Where consent decree is set aside, Court can proceed with the original suit. 6 P. L. T. 150=82 Ind. Cas. 181. A compromise having merged in a decree does not become extinct when the decree is set aside. Where a decree is based on agreement of compromise the Court must be deemed to adopt the agreement with all its incidents. A. I. R. 1930 Lah. 937=12 Lah. L. J. 203=130 Ind. Cas. 513. Court is not bound to pass a formal decree in the exact terms of a compromise, but the decree should be passed in accordance with it. A. I. R. 1929 Bom. 350=31 Bom. L. R. 621=119 Ind. Cas. 663 ; see also 65 Ind. Cas. 47=38 C. L. J. 72 ; 89 Ind. Cas. 926=A. I. R. 1926 Nag. 20 ; A. I. R. 1928 Nag. 51=23 N. L. R. 124 ; A. I. R. 1928 Rang. 43=5 Rang. 662=106 Ind. Cas. 163 ; A. I. R. 1926 Cal. 666=30 C. W. N. 307. Compromise made under undue influence, coercion or compulsion is good so long as it has not been avoided. The Court can pass a decree on such compromise. 85 Ind. Cas. 557=A. I. R. 1925 All. 266. Where there is no allegation of fraud or collusion, a compromise decree is as effective as one after contest. 80 Ind. Cas. 447=10 O. L. J. 252.

**Matters outside suit.**—A compromise decree in so far as it deals with other matters cannot operate as *res judicata*. 48 C. 1059=25 C. W. N. 990=66 Ind. Cas. 705 ; see also 81 Ind. Cas. 459 ; see also A. I. R. 1921 Pat. 320=2 P. L. T. 38=60 Ind. Cas. 652. Where a petition includes matters not in suit the Court can pass a decree with regard to matters in suit only and not reject the petition entirely. 40 Ind. Cas. 675=112 P. L. R. 1917. Though it relates to matter outside the suit a compromise decree constitutes an estoppel by matter of record between the parties to the compromise. 42 Ind. Cas. 223=(1917) M. W. N. 751=6 L. W. 635 ; see also 3 Pat. L. J. 43=3 Pat. L. W. 141=43 Ind. Cas. 282 ; 4 Pat. L. J. 667=52 Ind. Cas. 20 ; 46 Ind. Cas. 358=3 Pat. L. J. 255 ; 53 Ind. Cas. 354. "Matters relating to suit" is synonymous with either relating to suit or not collateral to suit. 145 Ind. Cas. 441=14 P. L. T. 23=A. I. R. 1933 Pat. 176. Whether particular clause relates to suit or not is a question of fact. 33 Bom. L. R. 463=A. I. R. 1931 Bom. 295. Where part of compromise does not relate to the suit, the decree is not *ultra vires*. A. I. R. 1933 All. 649 (F. B.)=1933 A. L. J. 728 ; see also A. I. R. 1932 Bom. 466 ; A. I. R. 1932 Mad. 557=1933 M. W. N. 623. Whether terms go beyond subject-matter in suit should be determined on facts of a particular case. A. I. R. 1932 Bom. 47=33 Bom. L. R. 1457.

**Partial compromise.**—Where a plaintiff compounds his difference with some of the defendants and prays for withdrawal of suit, the Court should dismiss the suit for want of prosecution. 20 C. W. N. 752=34 Ind. Cas. 186 ; but see 2 Pat. L. T. 471=62 Ind. Cas. 933. A compromise does not bind a person who is not a party to it. 45 Ind. Cas. 33. Where not the whole but only part of a compromise is recorded in the order of the Court, the compromise cannot be enforced. A. I. R. 1929 Lah. 291=30 P. L. R. 112=11 Lah. L. J. 50=117 Ind. Cas. 240. Compromise with some is lawful. A. I. R. 1933 Pat. 306=12 Pat. 359=14 P. L. T. (Sup.) 1.



**Record of compromise.**—Court must record compromise so far as it relates to suit. A. I. R. 1931 Bom. 295=33 Bom. L. R. 463=132 Ind. Cas. 434. Policy of law is not to discourage compromises. *Ibid.* Court in its inherent powers can confirm any reasonable agreement between the parties appearing before it. A. I. R. 1931 Rang. 58=9 Rang. 39=131 Ind. Cas. 57. A joint petition by both the parties to a suit requesting the Court to adjourn the case for enabling the parties to arrive at the terms of a contemplated settlement does not by itself amount to a compromise when nothing further has been done by the parties in furtherance of their original intention. A decree based on the original petition itself as if it were a compromise is without jurisdiction. 34 C. W. N. 1068=131 Ind. Cas. 257=A. I. R. 1931 Cal. 205. Under rule 3 a decree can be passed only after an order that the compromise be recorded. 43 C. 85=33 Ind. Cas. 769. But when the parties enter into a compromise and the suit is decreed in the terms of the compromise, the omission to record the compromise is not fatal to the validity of the decree. The omission to record the compromise does not affect the merits of the case or the jurisdiction of the Court, and the defect is therefore cured by s. 99. A. I. R. 1935 All. 738=1935 A. L. J. 962. Where a compromise collateral to suit offered by one party in the course of the appeal was accepted by *Karpardaz* of the other party but the document of compromise was not recorded and a decree was merely drawn up and it was the only document brought into existence: *Held* that the provisions of Order 23 were not complied with and that the Court should not in pursuance of rule 3 make a decree. 62 I. A. 196=14 Pat. 545=A. I. R. 1935 P. C. 119=37 Bom. L. R. 845=39 C. W. N. 1185=1935 A. L. J. 865=1935 M. W. N. 778=16 Pat. L. T. 479. Under this rule, the Court is under a duty to record a compromise and pass a decree in terms thereof. Omission on the part of the Court to prepare a decree is not however, fatal, and is a purely formal matter not affecting the merits of the case as between the parties. 15 Pat. L. T. 457=A. I. R. 1934 Pat. 380. A compromise cannot be recorded under rule 3 on the basis of a draft compromise petition filed in Court, when it is found that the suit was not really completely adjusted. 61 C. 910=59 C. L. J. 421=A. I. R. 1934 Cal. 846. A compromise though not recorded as required by rule 3 can still be looked upon as an agreement between the parties and a party taking advantage of such an agreement and getting the suit of another party thrown out is estopped from pleading in a subsequent suit that he was not bound by that agreement. 35 P. L. R. 150=A. I. R. 1934 Lah. 218. Where a case is still pending for want of a delivered judgment, the Court can receive a petition for compromise and pass necessary orders on it. 41 M. L. J. 385=65 Ind. Cas. 82. In a case where some only of the parties to the suit join in a petition of compromise the other parties can object to the compromise being recorded, and if they show good cause the Court can refuse to grant a decree in terms of the compromise. A. I. R. 1925 Cal. 193=85 Ind. Cas. 678. Wrong order of Court passed through mistake can be amended under ss. 151 and 152. A. I. R. 1923 Pat. 135. Party receiving benefit under compromise cannot be allowed to retain the advantage on compromise being not recorded, but cannot be prevented from resisting recording of compromise. A. I. R. 1933 Pat. 305=12 Pat. 359=14 P. L. T. (Sup) 1. Although under rule 3 Court has to pass a decree in terms of compromise after it has been recorded, the passing of the decree need not be simultaneous with the recording of the compromise and Court may postpone the passing of a decree in a proper case. A. I. R. 1930 Pat. 395=125 Ind. Cas. 521. For a compromise two things are required: (1) that the Court shall order such compromise to be recorded; and (2) that it shall pass a decree in accordance therewith, so far as it relates to the suit. There should be an enquiry as to the terms being lawful or not and the Court should direct formally a compromise to be recorded after its satisfaction that it was a lawful compromise. The omission to comply with the requirements of the rule goes to the root of the jurisdiction of the Court to pass a decree in accordance with the compromise. A. I. R. 1927 Pat. 354=6 Pat. 108=105 Ind. Cas. 271; see also A. I. R. 1929 Sind. 12; 75 Ind. Cas. 461. Refusing to record a lawful compromise is acting illegally or with material irregularity. A. I. R. 1929 Lah. 885. Even in declaratory suits a compromise directing one party to pay a certain sum of money to the other party can be allowed by the Court and such a provision can be included in an operative part of the decree. A. I. R. 1928 Nag. 73=24 N. L. R. 55.

**Who can compromise.**—A guardian of a minor cannot enter into a compromise on behalf of the minor without the leave of the Court. 62 Ind. Cas. 638; see also A. I. R. 1929 Bom. 350=31 Bom. L. R. 621. A compromise entered into with

a minor is entirely void and cannot be given effect to in a Court of law. A. I. R. 1927 Pat. 271=8 P. L. T. 730=102 Ind. Cas. 449. Where a stranger applies to be made a party and objects to acceptance of compromise, application should be rejected. 1932 A. L. J. 509=A. I. R. 1932 All. 478. Where a suit has been instituted in the name of a firm, one partner alone has no power to compromise. A. I. R. 1933 Lah. 618=144 Ind. Cas. 1.

**Binding on parties.**—A consent decree binds the parties thereto as a decree after a contentious trial. It cannot have a greater validity than the compromise itself. A. I. R. 1921 Cal. 356=33 C. L. J. 244=60 Ind. Cas. 864; see also 29 C. W. N. 597=88 Ind. Cas. 369; 87 Ind. Cas. 174=47 A. 456; 47 A. 921=88 Ind. Cas. 611; 60 Ind. Cas. 22. If the compromise decree is not tainted with fraud, no suit lies to set it aside. A. I. R. 1927 Lah. 602. If a right compromise is doubtful, an agreement not to carry on any dispute about it is valid. A. I. R. 1930 Bom. 43=32 Bom. L. R. 389=54 B. 695. A compromise in probate case is binding only upon the parties to it. 23 C. L. J. 82=33 Ind. Cas. 273. A consent decree wrongly passed owing to some legal or technical defect is not a nullity. 51 Ind. Cas. 439. The Court can set aside an order made by consent not in the nature of final order or judgment but merely an interlocutory order in the suit, provided proper grounds are made out. 32 Bom. L. R. 667=A. I. R. 1930 Bom. 362.

**Compromise in partition Suit**—A compromise of a partition suit is not ineffectual only because every party to the action does not join in it. Each case must depend upon its own facts. A. I. R. 1928 Mad. 594=108 Ind. Cas. 221.

**Mortgage decree.**—Rule 3 applies to proceedings after preliminary decree in mortgage suit. 43 Ind. Cas. 399; see also 58 Ind. Cas. 299=2 Pat. L. T. 38; 16 Pat. L. T. 311=14 Pat. 488=A. I. R. 1935 Pat. 385. Order XXXIV, rule 4, must be taken as subject to the provisions of Order XXIII, rule 3. A. I. R. 1921 Pat. 320=2 P. L. T. 38=60 Ind. Cas. 652; see also 89 Ind. Cas. 889=27 Bom. L. R. 943.

**Public trust.**—No compromise can be said to be lawful which sacrifices its interest in the case of public trust. A. I. R. 1930 Mad. 629=58 M. L. J. 410=53 M. 398; see also 60 Ind. Cas. 22=12 L. W. 562.

**Preliminary decree.**—Order XXIII, rule 3, does not necessitate two decrees; *i. e.*, a preliminary and a final; but only one decree. 29 O. C. 26=94 Ind. Cas. 317.

**Pleader's authority to compromise.**—Express authority is not needed for a counsel to enter into a compromise within the scope of the suit. Where there is limitation of authority and that limitation is communicated to the other side, consent by counsel outside the limits of his authority would be of no effect. 3 Pat. L. T. 371=A. I. R. 1922 Pat. 232=67 Ind. Cas. 96; see also 29 C. W. N. 566=52 C. 386=A. I. R. 1925 Cal. 696=88 Ind. Cas. 413; A. I. R. 1927 Cal. 714=55 C. 113=31 C. W. N. 953; A. I. R. 1929 Oudh 211; 19 A. L. J. 63=60 Ind. Cas. 912; 60 Ind. Cas. 22. An agreement to compromise a suit must be established by general principles governing formation of contracts, though there are special rules governing intrinsic nature. If the agreement is on behalf of one or both of the parties by their legal advisers, the first two questions that arise are (1) had the agent, the actual authority of his principal, express or implied, to conclude the contract; (2) If no actual authority, had he ostensible authority so as to bind his principal against the other party, relying on ostensible authority. A. I. R. 1930 P. C. 158=34 C. W. N. 453=1930 A. L. J. 489=58 M. L. J. 551=32 Bom. L. R. 645 (P. C.). Where a compromise has been made by advocate but there is mis-understanding between the advocate and his client, the Court can refuse to give effect to the compromise. A. I. R. 1935 Rang. 150=13 Rang. 319.

**Appeal.**—Appeal lies from order recording compromise. A. I. R. 1929 Lah. 472; see also A. I. R. 1929 Nag. 275=12 N. L. J. 124; A. I. R. 1929 Pat. 318=8 Pat. 528=10 P. L. T. 293; A. I. R. 1929 Sind 32; A. I. R. 1933 Cal. 94=36 C. W. N. 1013=57 C. L. J. 26; A. I. R. 1929 Sind 32; A. I. R. 1926 Cal. 412=29 C. W. N. 928=87 Ind. Cas. 248; 80 Ind. Cas. 696=6 Lah. L. J. 187. Where Court holds that the compromise is invalid and not binding on the parties and refuses to record the same, an appeal lies under Order 43, rule (1) (m), assailing the grounds for refusal to record. A. I. R. 1927 Lah. 546; see also A. I. R. 1928 Lah. 39=28 P. L. R. 580. No appeal lays against a consent decree. A. I. R. 1926 Bom. 39=27 Bom.

L. R. 1279 ; see also A. I. R. 1933 Bom. 205=57 B. 206. An order finding that there has been no compromise is not an order under rule 3 and is not appealable. 73 Ind. Cas. 177. There is no second appeal from an order recording a compromise. 60 C. L. J. 173.

Proceedings in execution of decrees not affected. 4. [S. 375A.] Nothing in this Order shall apply to any proceedings in execution of a decree or order.

Sub-section (2).—*Vide* 13 Ind. Cas. 188.

## ORDER XXIV.

### *Payment into Court.*

1. [S. 376.] The defendant in any suit to recover a debt or damages may, at any stage of the suit, deposit in Court such sum of money as he considers a satisfaction in full of the claim.  
Deposit by defendant of amount in satisfaction of claim.

**Scope.**—Deposit under Order XXIV must be unconditional so as to be the disposal of the decree-holder desiring to withdraw it. A. I. R. 1927 Cal. 72 ; see also A. I. R. 1927 Rang. 278=5 Rang. 753. Rules 1 and 3 do not apply to execution proceedings and save defendant from costs of original suit. A. I. R. 1927 Cal. 72=97 Ind. Cas. 479. On analogy of these rules judgment-debtor can be relieved from the payment of interest on amount deposited by him and immediately payable to judgment-debtor. 40 A. 125=16 A. L. J. 15=43 Ind. Cas. 520. The word "debt" in this rule applies to secured debt as well as to unsecured debt. 10 Luck. 350=11 O. W. N. 1550=A. I. R. 1935 Oudh. 93.

2. [S. 377.] Notice of the deposit shall be given through the Court by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.  
Notice of deposit.

**Notes.**—*Vide* 45 Ind. Cas. 638=35 M. L. J. 459 ; A. I. R. 1935 Mad. 342 (when notice is not required).

3. [S. 378.] No interest shall be allowed to the plaintiff on any sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.  
Interest on deposit not allowed to plaintiff after notice.

**Notes.**—Interest ceases running only if admitted amount is deposited in Court. A. I. R. 1928 Cal. 874=32 C. W. N. 1082=117 Ind. Cas. 687 ; 10 Luck. 350=11 O. W. N. 1550=A. I. R. 1935 Oudh 93. Where the defendant deposits the amount in Court but stipulates such conditions as will make plaintiffs unable to get payment and is thus himself responsible for non-payment to plaintiff, he cannot escape payment of interest from date of such deposit. This rule has no application to such a case. A. I. R. 1936 Lah. 76. This rule does not apply to execution proceedings. A. I. R. 1927 Cal. 72.

4. [S. 379.] (1) Where the plaintiff accepts such amount as satisfaction in part only of his claim, he may prosecute his suit for the balance ; and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit incurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.  
Procedure where plaintiff accepts deposit as satisfaction in part.

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Court a statement to that effect, and such statement shall be filed and the Court shall pronounce judgment accordingly ; and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the litigation.  
Procedure where he accepts it as satisfaction in full.

*Illustration.*

(a) A owes B Rs. 100. B sues A for the amount, having made no demand for payment and having no reason to believe that the delay caused by making a demand would place him at a disadvantage. On the plaint being filed, A pays the money into Court. B accepts it in full satisfaction of his claim, but the Court should not allow him any costs, the litigation being presumably groundless on his part.

(b) B sues A under the circumstances mentioned in illustration (a). On the plaint being filed, A disputes the claim. Afterwards A pays the money into Court. B accepts it in full satisfaction of his claim. The Court should also give B his costs of suit, A's conduct having shown that the litigation was necessary.

(c) A owes B Rs. 100, and is willing to pay him that sum without suit. B claims Rs. 150 and sues A for that amount. On the plaint being filed A pays Rs. 100 into Court and disputes only his liability to pay the remaining Rs. 50. B accepts the Rs. 100 in full satisfaction of his claim. The Court should order him to pay A's costs.

Notes.—*Vide* 26 C. 766 ; 13 Ind. Cas. 188.

## ORDER XXV.

*Security for Costs.*

1. [Ss. 380, 382.] (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immovable property within British India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India within the meaning of sub-rule (1).

(3) On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immovable property within British India.

Local amendments in Rangoon.—For "British India" read "British Burma"—*Vide* G. B. Order of 1937.

N. B.—For local amendments in Allahabad, Madras and Rangoon—*Vide infra*

Notes.—Circumstances should be considered for requiring security under wide provision of Order XXV. A. I. R. 1926 Lah. 960=113 Ind. Cas. 911. Absence of *prima facie* good cause on appeal by pauper is good ground for security. A. I. R. 1933 Mad. 519=56 M. 523=64 M. L. J. 433. Poverty or insolvency of plaintiff is no sufficient ground for ordering him to give security or costs for proceeding with suit. 26 S. L. R. 21=A. I. R. 1932 Sind 33. Section 151 will apply even in cases when this order is not applicable. A. I. R. 1932 Sind 127=6 Luck. 591=8 O. W. N. 71. Plaintiff's temporary residence in British India does not save him from the rule. A. I. R. 1922 Bom. 299=28 Bom. L. R. 1253=46 B. 589=54 Ind. Cas. 703; see also 32 Bom. L. R. 411=A. I. R. 1930 Bom. 220. Ground of pauper plaintiffs being assisted by relation is absurd and security cannot be asked in the absence of very special grounds. 75 Ind. Cas. 309=2 Bur. L. J. 78; 1928 Lah. 960. There is no inflexible rule that only if plaintiff appellant is mere puppet for other's litigation security for costs can be demanded. 32 Ind. Cas. 786. As regards what are suits for money, *vide* 68 Ind. Cas. 607; 89 Ind. Cas. 620. Costs can be taken from plaintiff only under this rule. 50 C. 853=A. I. R. 1924 Cal. 251=79 Ind. Cas. 298. Order 25

imposes an exceptional disability upon plaintiffs and therefore must be strictly construed. It is not to be applied to circumstances which do not clearly come within its purview. A suit in which there are male and female plaintiffs cannot properly be described as a suit in which the plaintiff is a woman. A. I. R. 1937 Cal. 58; 63 C. 809. There is no absolute rule that a pauper plaintiff cannot be asked to furnish security under clause (3) of this rule. A. I. R. 1935 Mad. 230=69 M. L. J. 38=41 L. W. 135=1935 M. W. N. 513. The discretion allowed to the Court by rule 1 of Order 25, is a discretion which is unfettered and unqualified. 63 C. 897=40 C. W. N. 511.

2. [S. 381.] (1) In the event of such security not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff or plaintiffs are permitted to withdraw therefrom.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The dismissal shall not be set aside unless notice of such application has been served on the defendant.

*N. B.*—For local amendments in Bombay, C. P., and Rangoon.—*Vide infra*.

Notes.—Order 25, r. 2 (1), applies to the suit as a whole. So where a suit is by a male minor and mother, if the suit is to be dismissed for default in furnishing security for costs, it cannot be dismissed so far as against the female only and allowing it to be continued against the male. A. I. R. 1937 Cal. 58.

## ORDER XXVI.

### *Commissions.*

#### *Commissions to Examine Witnesses.*

1. [S. 383.] Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

**Scope.**—Witnesses should not be allowed to be examined on commission without adequate reason. The grounds for the issue of commission are ordinarily those specified in rule 1. 43 Ind. Cas. 729=42 B. 136=20 Bom. L. R. 1. Commission cannot be issued simply because witnesses are old, unless Court is satisfied of their inability to attend from sickness or infirmity. A. I. R. 1927 Mad. 524=1927 M. W. N. 218. Evidence of plaintiff ought not to be generally taken on commission unless very strong reasons. Mere inconvenience or great distance from Court to the plaintiff's residence is not sufficient ground. 13 Bur. L. T. 33=57 Ind. Cas. 955. Evidence on commission should be allowed only if witness is too ill to give evidence in Court or is absent or for other sufficient reason, and it is improper to allow principal defendant charged with fraud to be examined on commission before opening of plaintiff's case so as to conceal his demeanour from Court and himself from confronting accusers. 45 M. L. J. 363=28 C. W. N. 327=39 C. L. J. 165=73 Ind. Cas. 391 (P. C.). When an application for the examination on commission of a material witness residing within the jurisdiction of the Court is made, before a commission is issued, the Court is under the obligation of considering and coming to a definite conclusion whether the witness is suffering from any illness or if he is so suffering, whether the nature of the illness would prevent the witness from attending Court or would make it risky to his life to do so especially when the issue of the commission is for the examination of the plaintiff or a defendant in a suit. 39 C. W. N. 595. Issue of commission is a question of exercise of jurisdiction, and not of mere discretion. Grounds alleged and objection raised

by parties or witnesses as also advantages and risk of issue or non-issue of commission should be carefully examined. A. I. R. 1924 Cal. 971=39 C. L. J. 598=84 Ind. Cas. 9. But the Court has no power to take away *pardanashin* ladies' privilege under s. 132 to be examined on commission. A. I. R. 1928 Cal. 814=114 Ind. Cas. 95; see also 1933 A. L. J. 1384=A. I. R. 1933 All. 551. Where a *pardanashin* lady while being examined on commission tutored by some body, Court may exclude evidence but cannot insist on personal attendance of the lady. A. I. R. 1933 All. 551=1933 A. L. J. 1384. Parties even if women should be examined by Court. A. I. R. 1933 Mad. 48=63 M. L. J. 707=141 Ind. Cas. 456. A *pardanashin* lady has no right to dictate place of her examination by Commissioner at her own choice. 64 Ind. Cas. 228=48 C. 448=A. I. R. 1921 Cal. 229. Plaintiff who is a *ghosa* lady within s. 132, should be allowed to examine herself on commission. 86 Ind. Cas. 513=A. I. R. 1925 Mad. 905. It is not for Court to decide whether party will be benefited or not by issue of commission as it is a matter entirely for the party. Word "may" in rules 1 and 4 means "is given authority to". 46 M. 574=44 M. L. J. 202=71 Ind. Cas. 530. Facts of commission being ordered for witness's sickness or infirmity is useless, unless witness is on that account prevented from giving evidence normally. 55 C. 748=32 C. W. N. 128=A. I. R. 1928 Cal. 421. Order issuing commission by Judge exercising discretion as to its issue or non-issue after being satisfied that witness was ill, unable to attend, is not, although incomplete, open to revision. 55 C. 748=32 C. W. N. 128=A. I. R. 1928 Cal. 421. Witness living at a distance specified in Order XVI, r. 19 (b) and not under party's control should be allowed to be examined on commission as it is an abuse of process of Court, and Court's wrongful refusal to open to correction on revision. 46 M. 574=44 M. L. J. 202=71 Ind. Cas. 530. Commissioner to examine witness can stop proceedings to consult Court on finding cross-examining pleader abusing his position and exceeding limits of his propriety. A. I. R. 1924 Pat. 284=72 Ind. Cas. 748. Commission should be issued where the witness is in foreign territories although within 200 miles from Court. A. I. R. 1933 Mad. 366=65 M. L. J. 334=1933 M. W. N. 677. Essential witness can be examined on commission even after the conclusion of the hearing. 35 C. W. N. 703=54 C. L. J. 516=A. I. R. 1932 Cal. 236. No revision lies from an order refusing commission for examination of witness. A. I. R. 1927 Sind 264; A. I. R. 1934 All. 37. Application cannot be refused for mere lapse of time. A. I. R. 1934 All. 37. When handwriting expert is to be examined on commission by written interrogatories, no Court acts without jurisdiction if it orders the defendants to file cross-interrogatories. The defendant can insist on opportunity to cross-examine the witness only. A. I. R. 1934 Pat. 60=150 Ind. Cas. 788.

2. [S. 384.] An order for the issue of a commission for the examination of a witness may be made by the Court either Order for commission. of its own motion or on the application, supported by affidavit or otherwise, of any party to the suit or of the witness to be examined.

**Scope.**—Rule 2 only says that application for the issue of commission is to be supported by affidavit or otherwise and not that it must be accompanied. A. I. R. 1927 Rang. 175=5 Bur. L. J. 242=103 Ind. Cas. 141. Court has discretion to issue commission. 11 L. B. R. 65=64 Ind. Cas. 65. Commissioner cannot try issue with aid of assessors. 139 Ind. Cas. 804=1932 A. L. J. 117=A. I. R. 1932 All. 264. Order 26 does not prevent Court from accepting evidence on debatable point though Commissioner is appointed to inspect accounts. 53 A. 54=A. I. R. 1932 All. 128. As regards examination of experts on commission by interrogatories, *vide* A. I. R. 1934 Pat. 60.

3. [S. 385.] A commission for the examination of a person who resides Where witness resides within the local limits of the jurisdiction of the Court issuing the same may be issued in Court's jurisdiction. to any person whom the Court thinks fit to execute it.

*N. B.*—For amendment in C. P.—*Vide infra*.

**Notes.**—*Vide* A. I. R. 1934 Mal. 399.

Persons for whose examination commission may issue, 4. [S. 386.] (1) Any Court may in any suit issue a commission for the examination of—

(a) any person resident beyond the local limits of its jurisdiction ;  
 (b) any person who is about to leave such limits before the date on which he is required to be examined in Court ; and

(c) "any person on the service of the Crown"\* who cannot, in the opinion of the Court, attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court.

**Amendment in Burma.**—In British Burma for "a High Court" read "the High Court."—*Vide* G. B. Order of 1937.

**Court may issue a commission.**—The issue of commission to examine a witness or witnesses in a suit is a matter of judicial discretion. An application for the examination of a witness by commission will not be granted unless the Court is satisfied, first that the application is made *bona fide* ; secondly, that the issue in respect of which the evidence is required is one which the Court ought to try ; thirdly, that the witness to be examined would give evidence material to the issue, and fourthly, there are some good reasons why the witness cannot be examined in Court. 23 Ind. Cas. 643 ; see also 84 Ind. Cas. 9=39 C. L. J. 598 ; A. I. R. 1929 All. 44 ; 103 Ind. Cas. 141=A. I. R. 1927 Rang. 175=5 Bur. L. J. 242. Commission can be issued on the ground of illness of a witness, when it is based on medical certificate. A. I. R. 1929 Mad. 192=114 Ind. Cas. 843. Defendant living outside the jurisdiction of the Court should be allowed to be examined on commission in a suitable place. 35 C. L. J. 78=68 Ind. Cas. 9 ; see also 73 Ind. Cas. 723=A. I. R. 1924 Lah. 475 ; 78 Ind. Cas. 407=46 M. L. J. 131=1924 M. W. N. 191. Plaintiff who has his choice of forum should not be allowed to be examined on commission but if he has not commission should be issued. A. I. R. 1926 Pat. 277=7 P.L.T. 677=94 Ind. Cas. 229. Witness material to the case residing outside the Court's jurisdiction can be examined on commission. A. I. R. 1926 Mad. 345=23 L.W. 219=93 Ind. Cas. 446. Order refusing commission is not judgment and hence not appealable under Letters Patent (Bombay), cl. 15. A. I. R. 1934 Bom. 168. Interlocutory order fixing a certain place where a witness is to be brought for examination on commission, can be revised by the High Court. 85 Ind. Cas. 619=A. I. R. 1925 Cal. 1118. The case of the plaintiff stands on a different footing from that of a defendant as witness when the question arises as to whether a commission should issue for examination or not then the plaintiff has a choice of forum and has filed a suit in the forum of his own choice he is not entitled to have a commission issued unless under very exceptional circumstances. A. I. R. 1935 Pat. 220. An order refusing the issue of a commission to examine witness is not a "judgment" within clause 15 of the Letters Patent, and no appeal lies from such an order. 152 Ind. Cas. 264=36 Bom. L. R. 272=A. I. R. 1934 Bom. 168.

5. [S. 387.] Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.

**Amendment in British Burma.**—For "British India" read "British Burma."—*Vide* G. B. Order of 1937.

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\* Substituted in British India for the words "any Civil or military officer of the Government" by G. I. Order of 1937. But read the original words "any civil or military officer of the Government" have been retained in British Burma.

**Notes.**—*Vide* 30 C. 934=7 C. W. N. 806; 15 B. 209; 84 Ind. Cas. 993=6 Pat. L. T. 520.

Court to examine witness pursuant to commission.

6. [S. 388.] Every Court receiving a commission for the examination of any person shall examine him or cause him to be examined pursuant thereto.

7. [S. 389.] Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order, and the commission and the return thereto and the evidence taken under it, shall (subject to the provisions of the next following rule) form part of the record of the suit.

**Notes.**—*Vide* 35 C. 28.

8. [S. 390.] Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

(a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is "a person in the service of the Crown"\* who cannot, in the opinion of the Court, attend without detriment to the public service, or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

**Scope.**—A Commissioner is entitled by law to note his observations as to the demeanour of the witnesses examined by him. 28 C. L. J. 303=48 Ind. Cas. 561. Proceedings before the Commissioner after the date of the death of the defendant is invalid and illegal. A. I. R. 1929 Pat. 101=10 Pat. L. T. 57=115 Ind. Cas. 240. Section 75 does not authorise a Court to delegate to the Commissioner the trial of any material issue which it is bound to try itself. 68 Ind. Cas. 802=3 Lah. 209. Court has the power under clause (b) of rule 8 to dispense with the proof of any of the circumstances mentioned in clause (a) but the exercise of that discretion must appear from the record. 44 C. L. J. 288=A. I. R. 1927 Cal. 43; see also A. I. R. 1930 Sind 89; 47 C. L. J. 457=A. I. R. 1928 Cal. 341. When the witness was ill, *vide* A. I. R. 1929 Cal. 591. Objection to Commissioner's report should be considered even though Commissioner is dead. A. I. R. 1933 Sind 327=27 S. L. R. 194. Evidence taken on commission does not *ipso facto* become evidence in case. It has to be accepted by Court after hearing opposite party. A. I. R. 1934 Cal. 116; see also 44 C. L. J. 288=A. I. R. 1927 Cal. 43; 90 Ind. Cas. 64=A. I. R. 1926 Sind 34. It must first of all be determined by the Court by a reference to provisions of rule 8 of Order 26, whether or not the evidence taken on commission should be read as evidence in the suit before that evidence could be looked at or used for any purpose whatsoever. The Court should not look into evidence taken on commission in order to enable itself to come to conclusion as to whether or not it would order that witness to attend in person. A. I. R. 1937 Cal. 163; 63 C. 914. The expression "beyond jurisdiction of the Court" in this rule must be read with reference to Order 16, rule 19. Where therefore a witness is living a few hundred yards outside the territorial jurisdiction of the Court but within 200 miles from the Court, he cannot be said to live beyond the jurisdiction of the Court. *Ibid.*

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\* Substituted in British India for the words "a civil or military officer of the Government" by G. I. Order of 1937; but the latter words have been retained in British Burma.



*Commissions for Local Investigations.*

9. [S. 392.] In any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount of any *mesne profits* or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court :

Provided that, where the Local Government has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

*N. B.*—For local amendment in Calcutta.—*Vide infra.*

**Notes.**—This rule does not give power to a Court to itself hold a local inspection. 15 Ind. Cas. 241. Local inspection if made by a Judge, it must be to understand the evidence and not for the purposes of basing decisions. 35 Ind. Cas. 344. Judge cannot delegate any of his functions to the Commissioner and ask him to take evidence and try an issue. A. I. R. 1930 Pat. 557=11 Pat. L. T. 456. After evidence is closed and the case is ready for judgment, commission for local inspection cannot be issued. 51 Ind. Cas. 399. The commission may be issued in any case the Judge deems fit to do so. 44 M. L. J. 554=13 L. W. 520=6 Ind. Cas. 790. C. P. Code does not contemplate the issue of a succession of Commissioners to value improvements all covering the same ground. A. I. R. 1929 Mad. 661=118 Ind. Cas. 296 ; see also A. I. R. 1933 All. 65. Determination of the period of a tenant's cultivation is not a proper subject for local inspection. L. R. 2A. 213 (Rev.). In a fit case the High Court can interfere. 83 Ind. Cas. 124=1924 Pat. 217. To determine question whether structures are old or new, commission must be issued under Order 39, rule 7 and not under rule 26. A. I. R. 1933 Cal. 475=37 C. W. N. 143. Wrong exercise of discretion in not issuing commission cannot be agitated for first time in second appeal. A. I. R. 1933 Pat. 542. A Commissioner for local investigation is to throw light upon matters in dispute. A. I. R. 1930 Cal. 764=53 C. L. J. 229.

10. [S. 393] (1) The Commissioner, after such local inspection as he deems necessary and after reducing to Procedure of Commissioner. writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him to the Court.

(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be Report and depositions to be evidence in suit. evidence in the suit and shall form part of the record ; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the Commissioner may be matters referred to him or mentioned in his examined in person. report, or as to his report, or as to the manner in which he has made the investigation.

(3) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

**Scope.**—No second commission should be issued unless first Commissioner's report is unsatisfactory, in which case earlier commission should be wiped out altogether. Judge balancing one Commissioner's report against that of other acts with great impropriety and contrary to what is contemplated by rule 10 (3). 54 M. 239=60 M. L. J. 450=A. I. R. 1931 Mad. 73 ; see also A. I. R. 1930 Mad. 236 ; A. I. R. 1926 Pat. 462=7 Pat. L. J. 795 ; see also A. I. R. 1935 All. 422=1935 A. L. J. 427. Where the Court thinks that the report of the Commissioner is not accurate, Court should not reject the report without allowing the Commissioner an opportunity to substantiate his case. 38 Ind. Cas. 491 ; see also 50 Ind. Cas. 301. Parties who were present before the Commissioner, can object to his report and prove these

objections. 16 P.W.R. 1917=42 Ind. Cas. 221 ; see also 60 Ind. Cas. 434 ; A.I.R. 1929 Lah. 782=30 P. L. R. 501 ; A. I. R. 1927 Pat. 135=7 Pat. L. T. 739 ; 60 Ind. Cas. 434. Appellate Court if it refuses the report, may rely upon other evidence. 28 C. L. J. 203=47 Ind. Cas. 650. Careful report of the Commissioner should not be lightly interfered with. A. I. R. 1924 Cal. 620=28 C. W. N. 318=80 Ind. Cas. 755. Commissioner for ascertainment of *mesne profits* may base his report on local inspection as well as crop experiment conducted by him. A. I. R. 1925 Mad. 145=47 M. 800=48 M. L. J. 89. Report of a Commissioner, appointed for local investigation, is only admissible after verification of the report by him. 1935 R. D. 319. Under this rule the Commissioner's report is evidence in the suit and shall form part of the report. 163 Ind. Cas. 36=1936 M. W. N. 935=A. I. R. 1935 Mad. 918. But when a Commissioner is appointed for ascertaining whether the suit land is within the plaintiff's lease and for relaying the settlement map in order to determine under what plot it falls, evidence of possession recorded by him is not admissible as evidence in the suit. 40 C. W. N. 582.

**Clause (3)**—Where a pleader Commissioner had to relay a large number of days of an old *chita* from inadequate materials and the Court found that the relaying was not quite accurate, but there was no finding of incompetence or carelessness or negligence or improper motive : *Held* that the Commissioner's fees could not rightly be disallowed. 40 C. W. N. 928.

#### *Commissions to Examine Accounts.*

11. [S. 394.] In any suit in which an examination or adjustment of Commission to examine or accounts is necessary, the Court may issue a commission to such person as it thinks fit directing him to make such examination or adjustment.

**Scope.**—This rule merely entitles the Court to appoint a Commissioner to examine the accounts when it is necessary to examine the accounts, but it had first to be shown that it is necessary to examine them. A. I. R. 1937 Nag. 136. In a suit for dissolution of partnership it is the duty of the trial Court to record the evidence on question of possession of account books itself and not to appoint a Commissioner for that purpose. This is a matter which cannot be left to the Commissioner and does not fall within the ordinary duties of the Commissioner, whose business is merely to examine the accounts produced before him and to report to the Court the result of the examination of the accounts and also to suggest a proper scheme for the winding up of the scheme. A. I. R. 1936 Lah. 458. In a suit for accounts between principal and agent, the Commissioner can determine the extent of the liability. A. I. R. 1929 Cal. 418=49 C. L. J. 245 ; see also 95 Ind. Cas. 944=52 C. 766. Commissioner can take accounts from guardian of property. A. I. R. 1929 Pat. 626=11 Pat. L. T. 561. Commissioner must himself examine the account books, and must not have it examined by his *munim*. A. I. R. 1927 Lah. 736=9 Lah. L. J. 339=104 Ind. Cas. 39. Before issuing commission, the terms of the order to the Commissioner should be settled. A. I. R. 1925 Sind 265=91 Ind. Cas. 766. Court cannot delegate all his powers to the Commissioner. 89 Ind. Cas. 343=7 Pat. L. T. 161=3 Pat. L. R. 136. Official Referee, who is only a permanent Commissioner has no higher powers than those conferred on Commissioners. 73 Ind. Cas. 903. In a suit for accounts the questions whether certain contracts are authorized or not is a question for the trying Court to decide and not a question which should be referred to a Commissioner for taking accounts under rule 11. The proceedings of a Commissioner are an enquiry for the information of the Court and not a trial. 17 S. L. R. 316=75 Ind. Cas. 1014 ; see also A. I. R. 1926 Cal. 349=87 Ind. Cas. 764. Appointment of commission by Appellate Court to examine accounts and to give findings on question of mixed fact and law is irregular. The proper course is to frame issue and to refer it to trial Court under Order 41, rule 25. A. I. R. 1931 P. C. 136=53 A. 190=61 M. L. J. 665=35 C. W. N. 841=1931 A. L. J. 458=33 Bom. L. R. 988. (P. C.),

12. [S. 395.] (1) The Court shall furnish the Commissioner with such Court to give Commissioner part of the proceedings and such instructions as appear necessary, and the instructions shall necessary instructions. distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry, or also to report his own opinion on the point referred for his examination.

Proceedings and report to be evidence.  
Court may direct further inquiry.

(2) The proceedings and report (if any) of the Commissioner shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

**Scope.**—If it is found that the Commissioner's report is unsatisfactory, the proper procedure is to appoint another Commissioner who would carry out the work more satisfactorily. A. I. R. 1926 Pat. 156=90 Ind. Cas. 834. Court can decide objections against Commissioner's report in open Court. 68 Ind. Cas. 469=45 M. 79=14 L. W. 620. Appellate Court can consider whether the Commissioner acted within his jurisdiction, A. I. R. 1929 Mad. 492=114 Ind. Cas. 232.

#### *Commissions to make Partitions.*

13. [S. 396, first para.] Where a preliminary decree for partition has been passed, the Court may in any case not provided for by section 54, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree.

Notes — *Vide* A. I. R. 1931 Cal. 170=34 C. W. N. 909; 52 Ind. Cas. 614.

14. [S. 396, second and third paras.] (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

(2) The Commissioner shall then prepare and sign a report or the Commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the reports or reports it shall either issue a new commission or make such other order as it shall think fit.

**Scope.**—The duty of the Commissioner is to allot properties according to shares and not to decide shares. A. I. R. 1934 Pat. 32. A party cannot be heard in the Appellate Court unless he had filed his objections to the report of the Commissioner in the original Court. 12 Bur. L. T. 228=56 Ind. Cas. 972. Order by a Court confirming or varying a report of a Commissioner to make a partition passed under rule 14 (3) is not appealable. A. I. R. 1926 Oudh 195=91 Ind. Cas. 317. Under this rule the Court may order the production of any documents in the possession of any party relating to any matter in question in such a suit, but until it is known what the promissor's defence is and what the points in issue will be, it is impossible for the Court to say that the plaintiffs accounts are relevant. Hence in such a case there is no justification for an order directing the plaintiff to produce his accounts. A. I. R. 1937 Nag. 136. Although there is no provision in the Civil Procedure Code entitling a party who objects to the report of the Commissioner to produce evidence in support of his objections, Order 26, rule 14, provides that the Court after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same. This implies that the parties are entitled to substantiate their objections, but in such case, as a rule of practice, the Commissioner should first be examined with reference to objections, if any, and if it appears from the statement of the Commissioner that there is ground for further inquiry into any matter which is raised in the objections, then the parties should be allowed to produce evidence or the Commissioner directed to amend his report accordingly. A. I. R. 1935 Lah. 501.

*General Provisions.*

15. [S. 397.] Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

*N. B.*—For local amendment in Madras.—*Vide infra.*

**Scope.**—Court should not alter Commissioner's fees already agreed to by parties, behind their backs. A. I. R. 1933 Pat. 681. It is necessary to determine the fee of the Commissioner before the final disposal of the case. 1 P. L. T. 171=57 Ind. Cas. 291. The Court is not prevented from making any terms that it chooses as a condition precedent to the granting of the prayer for local investigation. A. I. R. 1927 Cal. 907=104 Ind. Cas. 814. Before commission is issued, the Court must see that the Commissioner's fees and diet money of the witnesses have been duly deposited. If the party declines to pay, the proper thing for the Court to do is to make the amount costs of the suit and enter it in the decree. A. I. R. 1926 Lah. 62=89 Ind. Cas. 479; see also A. I. R. 1925 Cal. 57=52 C. 269=40 C. L. J. 180=84 Ind. Cas. 724; 82 Ind. Cas. 852=25 Bom. L. R. 713. The District Judge has no power to disallow a portion of the remuneration claimed by a Commissioner for local investigation in connection with a suit pending in the Court of the Subordinate Judge. 23 C. W. N. 203=44 Ind. Cas. 496. For nominal or worthless work by Commissioner no remuneration can be allowed. A. I. R. 1934 Pat. 316. Order demanding commission fee after return of commission can be executed by Commissioner. A. I. R. 1934 Lah. 46. In order to determine what amount a party applying for commission should be directed to pay under Order 26, rule 15 of the Civil Procedure Code, the Court has to take into consideration not only the labour expended by the Commissioner but also the return which the applicant has got for his money; the Court has also to consider whether the work was done efficiently and with due diligence in accordance with the directions of the Court. 40 C. W. N. 1216=63 C. L. J. 563. An application was made by a party to a suit for examination of his witnesses on commission. The Court directed the applicant to file interrogatories which he wished to put to the witnesses and these being filed the opposite party was directed to file cross-interrogatories within four days. Instead of filing these the opposite party objected to the issue of commission. The Court thereon ordered that commission should issue only on condition that the applicant paid Rs. 200 to the opposite party as his cost in attending the commission: *Held* that the order was within the competence of the Court. 159 Ind. Cas. 179=A. I. R. 1936 Pat. 33.

16. [S. 398.] Any Commissioner appointed under this order may, unless otherwise directed by the order of appointment, —

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of inquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.

**Scope.**—Where Commissioner has been appointed to take accounts, questions of liability should be determined by Court. But if question of quantum involves question of liability, Commissioner can determine both. A. I. R. 1934 Pat. 35. It is always the duty of a Commissioner before executing the commission to obtain definite instruction from the Court and to act accordingly. 109 Ind. Cas. 733. The delegation of power to the Commissioner by the Court cannot extend to the delegation to the Commissioner of the Court's duty of deciding questions which have been raised or which are sought to be raised as definite issues in the suit. A. I. R. 1935 Mad. 888. Where a case is remanded to the lower Court for taking accounts, the latter Court has jurisdiction to appoint a Commissioner for such purpose. A. I. R. 1934 Pat. 35.

17. [S. 399.] (1) The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence, or to produce documents under this Order whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court.

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion, issue such process as it considers reasonable and proper.

**Local amendment in British Burma.**—For “British India” read “British Burma” and for “a High Court” read “the High Court.”—*Vide* G. B. Order of 1937.

**Notes.**—Provisions of order XVIII, r. 5, as in force in Oudh apply also to witnesses examined on commission. 9 O. L. J. 593=74 Ind. Cas. 445.

18. [S. 400.] (1) Where a commission is issued under this Order, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear, the Commissioner may proceed in their absence.

*N. B.*—For local amendments in Allahabad, Oudh and Rangoon.—*Vide infra*.

**Notes.**—This rule is mandatory and the Court cannot issue an *ex parte* commission. 40 L. W. 358=1934 M. W. N. 155=A. I. R. 1934 Mad. 548.

*‘Commissions issued at the Instance of Foreign Tribunals’.*

19. (1) If a High Court is satisfied—

(a) that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it,

(b) that the proceeding is of a civil nature, and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction, it may, subject to the provisions of rule 20, issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub-rule (1)—

(a) by a certificate signed by the consular officer of the foreign country of the highest rank in India and transmitted to the High Court through the “Central Government”,\* or

(b) by a letter of request issued by the foreign Court and transmitted to the High Court through the “Central Government”,\* or

(c) by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceeding.

**Amendment in British Burma.**—For “in India” read “in Burma” and for “a High Court” read “the High Court.”—*Vide* G. B. Order of 1937.

20. The High Court may issue a commission under rule 19—

(a) upon application by a party to the proceeding before the foreign Court, or

\* Substituted for “Governor-General in Council” by G. I. Order of 1937. In British Burma for the words within quotations read “Governor”.—*Vide* G. B. Order of 1937.

(d) upon an application by a law officer of the "Provincial Government" \* acting under instructions from the "Provincial Government." \*

21. A commission under rule 19 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or, where † the witness resides within the local limits of "the ordinary original civil jurisdiction of the High Court," ‡ to any person whom the Court thinks fit to execute the commission.

22. The provisions of rules 6, 15, 16, 17 and 18 of this order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and when any such commission has been duly executed it shall be returned together with the evidence taken under it, to the High Court, which shall forward it to the "Central Government," § along with the letter of request for transmission to the foreign Court." ||

*N. B.*—For additional order in Madras and Lahore.—*Vide infra*

## ORDER XXVII.

*Suits by or against "the Crown" ‡ or Public Officer in their official capacity.*

1. [*New.*] In any suit by or against "the Crown" ‡ the plaint or written statement shall be signed by such person as "the Crown" ‡ may, by general or special order, appoint in this behalf, and shall be verified by any person whom "the Crown" ‡ may so appoint and who is acquainted with the facts of the case.

Notes.—*Vide* A. I. R. 1928 Mad. 96=105 Ind. Cas. 84.

2. [*S. 417.*] Persons being *ex officio* or otherwise authorized to act for the "Crown" ‡ in respect of any judicial proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of the "Crown." ‡

3. [*S. 418.*] In suits by or against the "Crown" ‡ instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it shall be sufficient to insert the words "the appropriate name as provided in section 79, or, if the suit is against the Secretary of State, the words "the Secretary of State". ‡

"4. [*S. 419.*] The Crown pleader in any Court shall be the agent of the Crown for the purpose of receiving processes against the Crown issued by such Court." ¶

\* Substituted for "Local Government" by G. I. Order of 1937. In British Burma for the words within quotations read "Governor."—*Vide* G. B. Order of 1937.

† After this the words "the High Court is established under the Indian High Courts Act, 1851, or the Government of India Act, 1915, and" have been omitted by G. I. Order of 1937 and G. B. Order 1937.

‡ Substituted by G. I. Order of 1937 and G. B. Order of 1937.

§ Substituted for "Governor-General in Council" by G. I. Order of 1937. In British Burma for the words within quotations read "Governor".—*Vide* G. B. Order of 1937.

|| Inserted by Act X of 1932.

¶ Substituted by G. I. Order of 1936 and G. B. Order of 1936.

5. [S. 420.] The Court, in fixing the day for "the Crown"\* to answer the plaintiff, shall allow a reasonable time for the necessary communication "with the Crown"\* through the proper channel, and for the issue of instructions to the "Crown pleader"\* to appear and answer on behalf of "the Crown"\* or the Government, and may extend the time at its discretion.

**Amendment in Burma.**—The word "Government" in the last time has been omitted in Burma by G. B. Order of 1937.

*N. B.*—For local amendment in Madras.—*Vide infra.*

6. [S. 421.] The Court may also, in any case in which the "Crown pleader"\* is not accompanied by any person on the part of "the Crown"\* who may be able to answer any material questions relating to the suit, direct the attendance of such a person.

7. [S. 423.] (1) Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to "the Crown"\* before answering the plaintiff, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary.

8. [Ss. 426, 427.] (1) Where "the Crown"\* undertakes the defence of a suit against a public officer, "the Crown pleader"\* upon being furnished with authority to appear and answer the plaintiff, shall apply to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits.

(2) Where no application under sub-rule (1) is made by "the Crown pleader"\* on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in a suit between private parties :

Provided that the defendant shall not be liable to arrest, nor his property to attachment, otherwise than in execution of a decree.

*N. B.*—For additional rules in Allahabad.—*Vide infra.*

"†8A. No such security as is mentioned in rules 5 and 6 of Order XLI shall be required from the Crown or, where the Crown has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity."

"†8B. In this Order 'Crown' and 'Crown pleader' mean respectively—

(a) in relation to any suit by or against the Secretary of State or the Central Government, or against a public officer in the service of that Government, the Central Government and such pleader as that Government may appoint whether generally or specially for the purposes of this order ;

(b) in relation to any suit by or against the Crown Representative, or against a public officer employed in connection with the exercise of the functions of the Crown in its relations with Indian States, the Crown Representatives and such pleader as he may appoint, whether generally or specially for the purposes of this order ; and

\* Substituted by G. I. Order of 1937 and G. B. Order of 1937.

† New rule 8 A has been inserted by G. I. Order of 1937 and G. B. Order of 1937.

‡ Inserted for "British India" by G. I. Order of 1937.

(c) in relation to any suit by, or against a Provincial Government or against a public officer in the Service of a Province, the Provincial Government and the Government pleader, or such other pleader as the Provincial Government may appoint, whether generally or specially, for the purposes of this order."

The following rule 8. B. has been inserted in British Burma by G. B. Order of 1937.

"8 B.—In this order "Crown" and "Crown pleader" mean respectively :—

(a) in relation to any suit by or against the Secretary of State, the Secretary of State and such pleader as the Secretary of State may appoint, whether generally or specially, for the purposes of this order ;

(b) in relation to any suit by or against the Railway Board or any officer or against any public officer employed in connection with the affairs of the Railway Board, the Railway Board or such pleader as that Board may so appoint ;

(c) in relation to any other suit, the Government of Burma and such pleader as the Court may so appoint."

#### ORDER XXVIII.

##### *Suits by or against Military "or Naval"\* Men or "Airmen."*

1. [S. 465.] (1) Where any officer, "soldier, sailor or airman"† actually "serving under the Crown"‡ in such capacity is a party to a suit, and cannot obtain leave of absence for the purpose of prosecuting or defending the suit in person, he may authorize any person to sue or defend in his stead.

(2) The authority shall be in writing and shall be signed by the officer soldier, "sailor"\* or airman† in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer,\* soldier sailor\* or "airman"† is serving in military, "naval"\* or airforce staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier "sailor"\* or airman† by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in person.

**Explanation.**—In this Order the expression "commanding officer" means the officer in actual command for the time being of any regiment, corps, "ship",\* detachment or depot to which the officer or soldier, "sailor"\* or airman"† belongs.

2. [S. 466.] Any person authorized by an officer soldier, "sailor"\* or airman† to prosecute or defend a suit in his stead may prosecute or defend it in person in the same manner as the officer, soldier "sailor"\* or airman could do if present ; or he may appoint a pleader to prosecute or defend the suit on behalf of such officer, "soldier"\* "sailor"\* or airman.†

\* Added by Act 35 of 1934.

† Added by Act X of 1927.

‡ Substituted by G. I. Order of 1937 for the words "Serving the Government" which words are retained in British Burma.—*Vide* G. B. Order of 1937.

§ Substituted by Act 35 of 1934.



3. [S. 467.] Processes served upon any person authorized by an officer soldier "sailor or airman" under rule 1 or upon any pleader appointed as aforesaid by such person shall be as effectual as if they had been served on the party in person.

## ORDER XXIX.

### *Suits by or against Corporations.*

1. [S. 435.] In suits by or against a corporation, any pleading may be signed and verified on behalf of the corporation by the secretary, or by any director or other principal officer of the corporation who is able to depose to the facts of the case.

*N. B.*—For local amendment in Madras.—*Vide infra*

**Notes.**—Rule 1 requires suit to be properly framed against company with proper description. 43 C. 441=22 C. L. J. 241=31 Ind. Cas. 35. Defendants questioning competency of director to sign and verify plaint are entitled to cross examine him so as to expose all facts relating to that question. A. I. R. 1931 Rang. 54=130 Ind. Cas. 843. Order XXIX, rule 1, is merely permissive and not mandatory and agent is allowed to sign without express authority. A. I. R. 1930 Bom. 566=32 Bom. L. R. 1305=55 B. 151; but see A. I. R. 1927 Sind 263. Order XXIX deals with the manner in which the suit is to be framed. A. I. R. 1921 Pat. 485=2 P. L. T. 679=64 Ind. Cas. 125. As regards when register of joint-stock company can represent the company, *vide* A. I. R. 1929 Nag. 185=116 Ind. Cas. 427. A company in liquidation can sue in *forma pauperis* through its liquidator. 41 M. 624=45 Ind. Cas. 164. A pleading filed on behalf of a corporation must be supported by an affidavit to prove that the person signing it is duly authorised to do so. A. I. R. 1927 Cal. 780=31 C. W. N. 1030=105 Ind. Cas. 568. Where in a suit against the Railway Company, the plaint describes the defendant as Agent of the Railway, frame of the suit is bad. 52 C. 783=29 C. W. N. 614=90 Ind. Cas. 426. Where the description of the defendant amounts to merely a misdescription, plaint should be allowed to be amended. 25 Bom. L. R. 513=73 Ind. Cas. 1027=47 B. 785. An unregistered body cannot sue or be sued as a corporation; all its members must be impleaded. A. I. R. 1925 All. 337=23 A. L. J. 37=47 A. 342=86 Ind. Cas. 255; see also A. I. R. 1927 All. 789=103 Ind. Cas. 45; 32 P. L. R. 655=135 Ind. Cas. 41; A. I. R. 1933 Lah. 98. Defect of form is of no importance. 84 Ind. Cas. 532=75 Ind. Cas. 936. Provisions of Order 29, rule 1, are permissive and do not exclude operation of Order 6, rule 14 in a proper case to a company. 26 S. L. R. 58=A. I. R. 1931 Sind 178. As regards what particulars which heading of plaint should contain in suits by or against corporation or firm *vide* A. I. R. 1933 Sind 102=26 S. L. R. 436. Rule 1 comes into operation only after the proceedings have been validly started and cannot be utilized to authorize an authorised person to institute suits on behalf of the corporation. 158 Ind. Cas. 346=A. I. R. 1935 Lah. 345. Where the manager of a Bank is authorized by the Articles of Association to file a suit with the previous sanction of the executive board, a suit instituted by him without such sanction is instituted without proper authority and the fact that the act of the manager was ratified by a resolution of the Board of directors after the expiry of the period of limitation, is of no avail. 37 P. L. R. 446. Where Secretary is empowered by Articles of Association to verify pleading, plaint may be signed and verified by him. 40 C. W. N. 930. The rule in Order 29 is clearly permissive and not imperative in its terms, and it lays down mere procedure. The rule, however, does not exclude the operation of the provisions of Order 6, rr. 14 and 15. In the case of ordinary pleadings if the signature on the plaint or verification of the pleading is defective, the defect can be cured at a subsequent time. There is nothing in the Code which requires a particular course to be followed by the person who verifies the plaint. All that is required is that the plaint should be verified by a principal officer and he should be able to depose to the facts of the case. A *de facto* Secretary of a firm who verifies a plaint in the absence of the Secretary is a principal officer. A. I. R. 1936 Bom. 418=38 Bom. L. R. 894.

2. [S. 436.] Subject to any statutory provisions regulating service of process, where the suit is against a corporation, the summons may be served—

(a) on the Secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

**Scope.**—Service of notice on a corporation should be according to this rule. 43 C. 411=22 C. L. J. 241=31 Ind. Cas. 35; see also 90 Ind. Cas. 680=A.I.R. 1926 Pat. 40=5 Pat. 128; A. I. R. 1928 Sind 111=108 Ind. Cas. 660. The mode of service provided by rule 2 should not be availed of where there is a mode of service provided by another statute. A. I. R. 1928 Sind 111. "Carries on business" means, where it has got principal place of business in British India. A. I. R. 1928 Sind 111.

3. [S. 436, last para.] The Court may, at any stage of the suit, require the personal appearance of the secretary or of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.

#### ORDER XXX.

*Suits by or against Firms and Persons carrying on business in names other than their own.*

1. [R. S. C. O. 48A, r. I.] (1) Any two or more persons claiming or being liable as partners and carrying on business in British India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct.

(2) Where persons sue or are sued as partners in the name of their firm under sub-rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons.

**Amendment in Burma.**—For "British India" read "British Burma."—*Vide* G. B. Order of 1937.

**N. B.**—For local amendment in Lahore.—*Vide infra*.

**Scope and Object.**—The committee have adopted with the necessary alterations the English procedure in relation to suits against firms."—*Report of the Special Committee*. The suit is in effect a suit against the individual partners of the firm sued. A. I. R. 1925 Sind 298=87 Ind. Cas. 932. The effect of the provisions is merely to give a compendious mode of describing in the writ the partners who compose the firms; in effect the partners are sued individually. The firm's name is not a legal entity but a mere expression. 49 C. 524=69 Ind. Cas. 885; see also 77 Ind. Cas. 1055=25 Bom. L. R. 1081. The provisions of Order XXX relating to suits by or against firms do not in any way militate against sub-rule (2) of Order XXI, r. 50. 19 S. L. R. 1=86 Ind. Cas. 1013. Firm is materially different from registered company. A. I. R. 1933 All. 523=1933 A. L. J. 1264. The order allows partners collectively to sue or to be sued in the name which the partners collectively adopt for the purpose of transacting their business. It is a facility given by the legislature in order to avoid mentioning large number of names either in the category of plaintiffs or in that of defendants. But the Code does not allow the firm to sue or to be sued. It only allows the individuals constituting the firm to sue or to be sued in the name

of the firm. The privilege is given to persons, but the Code does not treat the firm as *juristic persona*. 16 P. L. T. 649=158 Ind. Cas. 25; see also A. I. R. 1935 Sind 225. Hindu joint family is not firm within the meaning of Order 30, rule 1. 35 Bom. L. R. 569=A. I. R. 1933 Bom. 304. One man cannot constitute firm and hence cannot sue in firm's name. A. I. R. 1932 Bom. 516=34 Bom. L. R. 1112; see also 32 Bom. L. R. 212=127 Ind. Cas. 412; A. I. R. 1934 Lah. 157. Suit by individuals composing firm can sue in firm's name. 36 C. W. N. 459=A. I. R. 1932 Cal. 768. Order 30, rule 1, does not destroy the effect of the provisions of Order 21, rules 1 and 15. A. I. R. 1934 Mad. 330. A plaintiff bringing a suit against a firm can implead all the members of the firm as defendants in that suit. A. I. R. 1930 Pat. 239=9 Pat. 717=127 Ind. Cas. 575. Rule 1 does not apply to foreign firms. A. I. R. 1927 Bom. 428=29 Bom. L. R. 660=104 Ind. Cas. 94. The proper title of suit against defendant's firm is to describe the firm with partners therein. 27 Bom. L. R. 998=94 Ind. Cas. 969. Where partner in business refuses to join as plaintiff, correct procedure is to make him a defendant in the suit. 92 Ind. Cas. 569=26 P. L. R. 699=7 Lah. L. J. 280. Rule 1, sub-clause 2, does not empower one partner to refer the case to arbitration so as to bind the other partners although the suit is against the firm. A. I. R. 1926 All. 238=48 A. 239=24 A. L. J. 235=91 Ind. Cas. 930. One partner can receive payment in satisfaction of decree and can certify payment. A. I. R. 1926 Sind 167=92 Ind. Cas. 387. One partner of a firm can sue for a debt that is due to the firm. A. I. R. 1929 Bom. 177=53 Bom. L. R. 110=30 Bom. L. R. 1560. A suit is maintainable against a firm even if one of its partners is dead on the date of the institution of the suit. 27 A. L. J. 73=112 Ind. Cas. 715. Decree in favour of partners individually can be set off against a decree against the firm composed of same individuals. A. I. R. 1927 Bom. 255=29 Bom. L. R. 306. Payment to one partner is good, even after dissolution. A. I. R. 1928 Sind 37=105 Ind. Cas. 892. A suit by a firm on a promote in favour of one of the partners is maintainable. 55 C. 551=A. I. R. 1928 Cal. 148. In the case of change of partners, the new firm cannot enforce the contract entered into by the old. 65 Ind. Cas. 26=15 S. L. R. 152. It is permissible to sue only the solvent members of a firm when a decree is sought against it. 35 M. L. J. 581=48 Ind. Cas. 756. In a suit against a firm, name of the proper representative can be corrected at any time. A. I. R. 1928 Nag. 319=109 Ind. Cas. 785. Where a suit is instituted against a firm in the firm's name it is a suit filed against every partner of the firm and a decree against the firm has the same effect as a decree against all the partners. A. I. R. 1926 Sind 75=90 Ind. Cas. 242. Firm is no artificial person distinct from the members composing it. A. I. R. 1924 Bom. 109=25 Bom. L. R. 7=85 Ind. Cas. 464. Non-appearance of one of the partners of a firm does not make a decree *ex parte* as against him. 26 Bom. L. R. 388=80 Ind. Cas. 773. A firm may be sued in the name of the manager. 25 Bom. L. R. 1081=77 Ind. Cas. 1055; see also 71 Ind. Cas. 734=5 Lah. L. J. 5; A. I. R. 1931 Sind 121=25 S. L. R. 104; 68 Ind. Cas. 750. In a suit in the name of a shop, one of the partners can sue on behalf of others. 68 Ind. Cas. 425. A bank being a limited company can be sued only in its own corporate personality and not in the name of its manager. 40 Ind. Cas. 549. In a suit in firm's name, one partner can sign it. A. I. R. 1932 Nag. 137=28 N. L. R. 116. Decree in favour of dissolved firm can be executed by any one of the partners for the benefit of all. A. I. R. 1932 Lah. 596=33 P. L. R. 290. Persons carrying on business as firm in British India are liable to be sued in British India irrespective of whether they are non-resident foreigners. A. I. R. 1932 Nag. 114=28 N. L. R. 118. Order 30, only applies to a firm or contractual partnership and does not apply to a joint Hindu family business. 38 C. W. N. 914=A. I. R. 1934 Cal. 810=61 C. 975=152 Ind. Cas. 991; 1935 A. L. J. 280; A. I. R. 1936 Nag. 292. The provisions of Order 30 relating to suits by and against "firm" evidently assume that the so-called "firm" is legally constituted and do not have any bearing on the question of the maintainability of a suit against an "illegal" association. 36 P. L. R. 149=A. I. R. 1934 Lah. 882. This rule is not applicable to foreign firms. 36 Bom. L. R. 983=A. I. R. 1934 Bom. 467; see also A. I. R. 1935 Sind 225. A suit cannot be instituted in the name of a firm when out of two partners there is only one partner left. A. I. R. 1934 Lah. 157; see also A. I. R. 1935 Rang 240; A. I. R. 1936 Pat. 140; 38 Bom. L. R. 529. When all the owners of the firm happen to be minors there is no partnership as contemplated by the Partnership Act, and the procedure prescribed by Order 30 cannot apply, so as to make the minors liable under a decree passed in a suit in the firm name. 71 M. L. J. 373=A. I. R. 1936 Mad. 707=44 L. W. 320=1936 M. W. N. 669=164 Ind. Cas. 806. Under rule 1, it is competent for one partner alone to sue in the firm's

name even though other partners refuse to sue. 40 C. W. N. 824=A. I. R. 1936 Cal. 353. The correct way of bringing a suit under Order 30, rule 1, is to bring it in the name of the firm as plaintiff, and no other name should be mentioned as plaintiff at the head of the plaint, but in the signature and verification of the plaint, the person signing and verifying should describe himself as one of the partners of the firm which brings the suit. 157 Ind. Cas. 166=A. I. R. 1935 Rang. 209. Rule 1, clause (2) of Order 30, has no reference to a decree passed in the suit or to any proceedings in execution of the decree. There is nothing in rule 1, Order 30, which would take away the effect of the provisions of rule 1, and rule 15, Order 21. A. I. R. 1934 Mad. 330=57 M. 692=148 Ind. Cas. 860=1934 M. W. N. 286=39 L. W. 383=66 M. L. J. 656.

2. [R. S. C. O. 48A, r. 2.] (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their Disclosure of partners' names. pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted.

(2) Where the plaintiffs or their pleader fail to comply with any demand made under sub-rule 1, all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct.

(3) Where the names of the partners are declared in the manner referred to in sub-rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint :

Provided that all the proceedings shall nevertheless continue in the name of the firm.

**Scope.**—Rule 2 deals with plaintiff. A. I. R. 1927 Bom. 447=51 B. 794=29 Bom. L. R. 921. A wrong declaration is not fatal to the suit. A re-declaration by the partner, whose name has not been disclosed formerly, can be allowed. A. I. R. 1930 Bom. 152=32 Bom. L. R. 56 ; see also A. I. R. 1934 Cal. 253. Rule 2 (3) does not govern Order 21, rule 50. A. I. R. 1927 Bom. 447=51 B. 794=29 Bom. L. R. 921. As to what particulars while hearing of plaint should contain, *vide* A. I. R. 1933 Sind 102=25 S. L. R. 431. Once a declaration of partners has been made under rule 2 of Order 30, a suit for dissolution can proceed although the plaintiffs in the first instance had described themselves as a firm. 37 P. L. R. 663=157 Ind. Cas. 1113. Where a person serving as managing partners of a firm when requested to give the names of his partners under this rule merely gave the initials of the persons or firms, which were partners in the firm and their addresses and their respective shares and the description was not questioned by the defendant in the lower Court but was accepted as sufficient : *Held* that the duty of the trial Court at most was to stay the case until the names of the partners had been properly furnished and the case would not be dismissed for non-joinder of parties. A. I. R. 1937 Rang. 137.

3. [R. S. C. O. 48A, r. 3.] Where persons are sued as partners in the name of their firm, the summons shall be served either—

(a) upon any one or more of the partners, or

(b) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there, as the Court may direct ; and such service shall be deemed good service upon the firm so sued whether all or any of the partners are within or without British India :

Provided that in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be served upon every person within British India whom it is sought to make liable.

**Amendment in British Burma.**—For “British India” read “British Burma”—*Vide* G. B. Order of 1937.

**Scope.**—Service effected as per directions of the Court on the firm is good service. 54 C. 1057=34 C. W. N. 1004. In case of death of one partner, his legal representatives should be joined in order to make his private property liable. 51 B. 986=29 Bom. L. R. 1296=A. I. R. 1927 Bom. 581; see also A. I. R. 1929 Lah. 149; 87 Ind. Cas. 1051=27 Bom. L. R. 541. This rule does not apply where a suit is brought in the names of various partners of the firm. A. I. R. 1925 Cal. 1136=88 Ind. Cas. 489; 1 Pat. 48=3 Pat. L. T. 29=62 Ind. Cas. 927. Under rule 3, the only way of service is either upon a partner or by serving it at the principal place at which the partnership business is carried on in British India on a person having at the time of service the control or management of the partnership business. 49 C. 394=69 Ind. Cas. 236; see also A. I. R. 1926 Sind 208; 105 Ind. Cas. 305=A. I. R. 1927 Bom. 581=51 B. 986; 59 C. 496=A. I. R. 1932 Cal. 541. Proviso to rule 3 overrides Order 21, rule 50. A. I. R. 1927 Bom. 581. The provisions contained in this rule refer to a true auctioneer to the decree and are not applicable to an award which has been filed and which has become enforceable as a decree. 62 C. 833=61 C. L. J. 518. Although rule 3 provides that there must be individual service of summons upon a person who was a partner of a dissolved partnership, it cannot be said that the decree cannot be both against the firm and the partner personally. The question to be decided by the form of the plaint. If in the plaint the plaintiff sues, not only the firm but also a partner personally, then there may be decree not only against the firm but against the partner individually in his personal capacity. Order 30 contemplates a suit against a firm as such, and even if the firm be dissolved before the institution of the suit, there may still be property of the firm against which execution may proceed and merely because the partnership has been dissolved the whole of and nature of the suit is not altered. Where the partner appears not only on behalf of the firm but also in his personal capacity and puts in a personal defence, the Court is entitled to pass a decree not only against the firm but also against him. A. I. R. 1936 Sind=165 Ind. Cas. 907=30 S. L. R. 296.

**Proviso.**—All that the proviso to Order 30, rule 3, requires is that the summons shall be served upon every person whom it is sought to make liable which means every person “whom it is sought to make personally liable.” The proviso to this rule must be read along with and in the light of Order 21, rule 50, C. P. Code and so far as the property of a dissolved firm is sought to be liable, there is no need for serving each and every partner of that firm. A. I. R. 1936 Sind 34=161 Ind. Cas. 324.

4. [*New.*] (1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872,\* where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have,—

- (a) to apply to be made a party to the suit, or
- (b) to enforce any claim against the survivor or survivors.

**Scope.**—Rule 4 contemplates the existence of partnership and so it is competent for a surviving partner to file a suit in respect of partnership debts without joining the legal representatives of the deceased partner. A. I. R. 1929 Rang. 310=7 Rang. 558=120 Ind. Cas. 910; see also 48 C. L. J. 357=A. I. R. 1929 Cal. 11. But this rule has no application where partnership no longer existed. 148 Ind. Cas. 333. Order 30 is confined to cases where suits are brought not by individuals but in the name of the firm under which they are trading. 8 Lah. L. J. 1=28 P. L. R. 455. This rule applies only to firms owned by two or more persons. On the death of a sole proprietor, the firm ceases to exist. A. I. R. 1927 Lah. 556=103 Ind. Cas. 142.

\* IX of 1872.

Where legal representatives are not brought on record, assets of the deceased partner are not liable. 57 M. L. J. 344=A. I. R. 1929 Mad. 733=52 M. 885 ; see also A. I. R. 1931 All. 65=52 A. 954=1930 A. L. J. 913. Rule 4 is enacted to remove the doubt that existed in connection with s. 45, Contract Act, in regard to suits by and against firms. A. I. R. 1927 Bom. 581=51 B. 986=29 Bom. L. R. 1296. This rule is applicable where a suit is instituted in the name of a firm. A. I. R. 1926 Sind 81=20 S. L. R. 238 ; see also 76 P. R. 1915=31 Ind. Cas. 209 ; 19 A. L. J. 266=60 Ind. Cas. 745 ; 71 Ind. Cas. 951=4 Lah. 142. Article 176, Limitation Act, governs application under Order XXX, r. 4 (2) (a). 34 C. L. J. 405=67 Ind. Cas. 10 ; A. I. R. 1933 Lah. 356=34 P. L. R. 11.

5. [R. S. C. O. 48A, r. 4.] Where a summons is issued to a firm and Notice in what capacity is served in the manner provided by rule 3, every person upon whom it is served shall be served. informed by notice in writing given at the time of such service, whether he is served as a partner or as a person having the control or management of the partnership business, or in both characters and, in default of such notice, the person served shall be deemed to be served as partner.

Notes.—*Vide* A. I. R. 1929 Lah. 228=115 Ind. Cas. 536.

6. [R. S. C. O. 48A, r. 5.] Where persons are sued as partners in the name of their firm, they shall appear individually in their own names, but all subsequent proceedings shall, nevertheless, continue in the name of the firm.

Scope.—Where persons are sued as partners in the name of their firm, they may file different written statements, not on their own behalf, but on behalf of the firm. 54 C. 1057=31 C. W. N. 1004=A. I. R. 1927 Cal. 258 ; 94 Ind. Cas. 969=27 Bom. L. R. 998 ; A. I. R. 1930 All. 701 ; A. I. R. 1933 All. 573=1933 A. L. J. 1264 ; A. I. R. 1929 Sind 192=125 Ind. Cas. 801. Word "individually" does not mean "in person". A. I. R. 1928 Lah. 528 ; but see 78 P. R. 1918=47 Ind. Cas. 422. Not to allow partners to examine plaintiff's witnesses is not to act according to law. 1933 A. L. J. 1264=A. I. R. 1933 All. 523. Under this rule in a suit against a firm in the name of firm name, the appearance of partner is appearance of the firm, *i.e.*, of all partners of the firm. 62 C. 510=39 C. W. N. 606.

7. [R. S. C. O. 48A, r. 6.] Where a summons is served in the manner provided by rule 3 upon a person having the control or management of the partnership business, no appearance by him shall be necessary unless he is a partner of the firm sued.

Scope.—*Vide* A. I. R. 1929 Lah. 149 ; A. I. R. 1926 Sind 51=89 Ind. Cas. 401.

8. [R. S. C. O. 48A, r. 7.] Any person served with summons as a partner under rule 3 may appear under protest, denying that he is a partner, but such appearance shall not preclude the plaintiff from otherwise serving a summons on the firm and obtaining a decree against the firm in default of appearance where no partner has appeared.

Notes.—Where a person who has been served as a partner under r. 3 appears under protest, the service on him as service on the firm, is a nullity, and such person is not entitled to file a written statement on his own behalf denying that he is a partner. 54 C. 1057=31 C. W. N. 1004 ; but see A. I. R. 1926 Sind 154=93 Ind. Cas. 380 (allowed to take alternative defences) ; A. I. R. 1921 Bom. 48=23 Bom. L. R. 1249=64 Ind. Cas. 688 (he is entitled to have it decided whether he was a partner). A. I. R. 1932 Bom. 269=34 Bom. L. R. 640. In a suit against a firm and its partners there is nothing in law to prevent the Court from arriving at a finding in the suit itself that a particular person is a partner in the firm, although such person appears to protest and although his protest is not struck off. A. I. R. 1936 Sind 206=30 S. L. R. 296=165 Ind. Cas. 907.

9. [R. S. C. O. 48A, r. 10.] This Order shall apply to suits between

Suits between co-partners. a firm and one or more of partners therein and to suits between firms having one or more partners in common ; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and inquiries may be directed to be taken and made and directions given as may be just.

**Scope.**—Suit by director against other directors is competent. A. I. R. 1920 Mad. 1215=55 M. L. J. 385. If two firms have common partner, an action can be maintained by one firm against the others. A. I. R. 1927 Mad. 1096=52 M. L. J. 303 ; see also A. I. R. 1929 Sind 192 ; 44 Ind. Cas. 428. No suit lies as between partners or between firms having common partners for recovery of monies without asking for accounts. 34 M. L. J. 408=45 Ind. Cas. 86. A surety bond executed in a partnership suit enures for the benefit of all those who eventually get a decree. 42 Ind. Cas. 436=167 P. W. R. 1917. Where a person is a common partner in two firms, no action can be brought by one firm against the other firm upon any transaction which was between them while such individual was a common partner. This rule is however subject to an exception in equity in certain cases where it might be possible to ascertain the rights and liabilities of a member of a firm when all the parties are before the Court, but the above equity does not apply in case which cannot be adequately dealt with merely by a declaration of right to a credit in the partnership. A. I. R. 1936 Bom. 246=36 Bom. L. R. 486 ; see also 38 P. L. R. 857=A. I. R. 1936 Lah. 648=164 Ind. Cas. 832. The provisions of this rule which provides that execution will not be taken without the leave of the Court and that the Court may order all accounts to be given and give such directions as it considers just and sufficient to safeguard the interests of the defendant. 38 P. L. R. 857.

10. [R. S. C. O. 48A, r. 11.] Any person carrying on business in a name

Suit against person carrying on business in name other than his own.

or style other than his own name may be sued in such name or style as if it were a firm name ; and, so far as the nature of the case will permit, all rules under this order shall apply.

**Scope.**—A person carrying on business in a firm's name is only a person who has got an *alias* and a person desiring to sue him can sue him in his own name. A. I. R. 1930 Cal. 327=51 C. L. J. 30=34 C. W. N. 36=57 C. 931 ; A. I. R. 1934 Lah. 147=149 Ind. Cas. 998. After the death of the sole proprietor, a suit cannot be instituted under this rule in the old name of the firm. 23 A. L. J. 961=A. I. R. 1926 All 161 ; see also 25 Bom. L. R. 7=85 Ind. Cas. 464 ; A. I. R. 1930 Cal. 327=51 C. L. J. 30=34 C. W. N. 36=57 C. 931. It is doubtful whether the words "any person carrying on business" apply to person carrying on business as guardian or agent of another. A. I. R. 1924 Mad. 386=57 M. 973=66 M. L. J. 609. In the eye of law a firm has no existence apart from the members which constitute that firm. A firm is not a person either natural or artificial and it is a person who can sue and be sued. Firm is not a *juristic persona* to be taken cognizance of as such by the law as an idol or corporation is. Although the C. P. Code allows partners collectively to sue or to be sued in the name which the partners collectively adopt for the purposes of transacting their business, it is facility given by the legislature in order to avoid mentioning large number of names either in the category of the plaintiffs or in the category of the defendants. Yet it is to be noted that the Code does not allow the firms to sue or be sued. It allows the individuals constituting the firm to sue and be sued in the name of the firm. The privilege is given to persons, but the Code does not treat the firm as a *juristic persona*. A. I. R. 1936 Pat. 194=158 Ind. Cas. 25=16 P. L. T. 649. Rule 10 is subject to the same restrictions as rule 1 of Order 30. If the case of a single proprietor is to be treated as a firm for the purpose of Order 30, then the case is clearly covered by rule 1, which requires that the firm suing or being sued should be carrying on business in British India, if it is to sue or to be sued under an abbreviated title as a firm. A. I. R. 1934 Bom. 467=36 Bom. L. R. 983. A person who carries on business in a name other than his own must sue in his own name. If a mistake has been made by the plaintiff in suing in another name, the defendants are justified in filing the appeal against the firm and is not open to the plaintiff to contend that he could not sue

in the name of the firm and therefore the death of the proprietor of the firm necessitated the substitution of his legal representatives in his place. A. I. R. 1934 Lah. 147=149 Ind. Cas. 998. This rule is applicable only to the case of a single individual. 161 Ind. Cas. 806=1936 M. W. N. 669=44 L. W. 310=A. I. R. 1936 Mad. 707=71 M. L. J. 373. Where on the death of the proprietor of a firm, the business of a firm is carried on by his minor son and widow under the old name of the firm, the members of the firm can be sued in the name of the firm, and it is not necessary to sue the minor in his individual capacity and as one of the heirs of the proprietor. A. I. R. 1936 Oudh. 245=1936 O. W. N. 221=160 Ind. Cas. 893.

### ORDER XXXI.

#### *Suits by or against Trustees, Executors and Administrators.*

1. [S. 437.] In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made parties.

**Scope.**—This rule is confined when the contention is between persons beneficially interested and third person. 39 Ind. Cas. 779=2 P. L. J. 305; 18 M. 266. Under this rule no one but the executor is competent to prosecute a suit as representative of the deceased. 55 Ind. Cas. 504=2 U. P. L. R. (Pat) 31; see also 50 Ind. Cas. 509=11 Bur. L. T. 249; A. I. R. 1932 Cal. 337=58 C. 77. An administrator of an estate can maintain a suit to recover rent with the consent of the other administrators who are impleaded as *pro forma* defendants. 53 Ind. Cas. 478; see also A. I. R. 1924 Pat. 343=4 Pat. L. T. 731=2 Pat. L. R. 27=80 Cas. Ind. 652.

2. [S. 438.] Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them:

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties.

**Amendment in British Burma.**—For 'British India' read "British Burma."—*Vide G. B. Order of 1937.*

**Scope.**—In a suit against a temple all the trustees are necessary parties. A. I. R. 1922 Mad. 405=77 Ind. Cas. 942; see also A. I. R. 1934 All. 1.

3. [S. 439.] Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix shall not as such be a party to a suit by or against her.

Husband of married executrix not to join.

### ORDER XXXII.

#### *Suits by or against Minors and Persons of Unsound Mind.*

1. [S. 440, first para.] Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

**N. B.**—For local amendments in the Punjab and Peshwar.—*Vide infra.*

**Scope.**—Order XXXII has no direct application to proceedings in execution. 109 Ind. Cas. 521; see also A. I. R. 1927 Cal. 930; 35 C. L. J. 9=64 Ind. Cas. 25; A. I. R. 1926 Cal. 109=30 C. W. N. 86. A minor must institute a suit through his next friend. 30 A. 55; 21 B. 88; 61 Ind. Cas. 605=A. I. R. 1921 Nag. 152; 81 Ind. Cas. 1052=A. I. R. 1924 Bom. 114. The question of there being no decree against the minors for want of their proper representative in suit, can be raised in



execution. A. I. R. 1928 Mad. 1057. A minor plaintiff is bound by the result of the suit in the absence of fraud on the part of the next friend. A. I. R. 1926 All. 36=48 A. 44=23 A. L. J. 901=90 Ind. Cas. 749. The Court in a proper case can order that the cost of the suit be paid by the next friend personally. A. I. R. 1927 Mad. 1023. Appeal by minor without next friend is not a nullity. A. I. R. 1927 Lah. 663. A suit by minor with next friend for possession against a defendant claiming to be in possession as minor's guardian is not maintainable. 21 N. L. R. 75=89 Ind. Cas. 55. Demand of security from next friend for costs is outside Court's jurisdiction. A. I. R. 1934 All. 458. Minor can sue as a pauper. 70 Ind. Cas. 919=37 C. L. J. 394. This order has no application when the minor happens to be a ward under the Court of Wards, and a Civil Court in which such a minor is sued has no power to appoint a guardian *ad litem* for him or to remove a guardian who has been acting for him. 15 Pat. 667=17 Pat. L. T. 899. There is no provision in the C. P. Code for calling upon the next friend to provide security for costs though it is open to the Court to make an order after the hearing for costs against a next friend and to call on him to provide security in the event of retiring. A. I. R. 1934 All. 458.

2. [S. 442.] (1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented.

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

**Scope.**—Where there is certificated guardian, no other person can act as guardian of the minor. 115 Ind. Cas. 456. Order 32, rule 2, applies to cases under the Punjab Tenancy Act. 35 P. L. R. 428. Decree against minor without appointment of guardian *ad litem* is a nullity. A. I. R. 1937 Rang. 126. One minor cannot act as a next friend of another minor. 80 Ind. Cas. 602. Rule 2 applies when on the face of the plaint the plaintiff appears to be a minor. If on an issue raised and tried in the case, the Court finds that the plaintiff is a minor, it should not dismiss the suit at once but should allow a reasonable time for a next friend to come on record and go on with the suit and it is only if no one comes forward that it should reject the plaint. Such suit a minor can continue after attaining majority. 44 M. L. J. 515=74 Ind. Cas. 309; see also 69 Ind. Cas. 401; 26 C.W.N. 631=60 Ind. Cas. 889; 46 Ind. Cas. 747=16 A.L.J. 737; 75 Ind. Cas. 1028; 89 Ind. Cas. 870=3 Rang. 239. Application for substitution by minor representative without next friend can be rejected. 47 M. L. J. 370=80 Ind. Cas. 942. Where a suit was instituted in the name of joint family firm consisting of R and his minor son G, or holding a power of attorney on behalf of R, and it was found during the pendency of the suit that R was of unsound mind but was not so at the time the suit was instituted: *Held* that in the absence of any finding that the suit had not been properly instituted the Court had no power to order the plaint to be taken off the file: *Held* further that the rules relating to suits on behalf of minor should not be strictly applied under Order 32, rule 15 to the circumstances of the case and that Order 32, rule 2, did not apply as the suit was properly instituted. A. I. R. 1936 Lah. 7.

3. [S. 443, first para, S. 446.] Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where, there is no such guardian

upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

"\*(5) A person appointed under sub rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional Court and any proceedings in the execution of a decree".

*N. B.*—For local amendments in Allahabad, Bombay, C. P., Lahore, Madras, Oudh and Rangoon.—*Vide infra.*

**Scope**—When minors are before the Court, the Court is bound to see that the minors are represented by guardian *ad Mem.* A. I. R. 1928 Mad. 105. The provisions of this rule are mandatory and leave no option to the Court, and it cannot be ignored or overlooked. 11 O. W. N. 1236=151 Ind. Cas. 1065=A. I. R. 1934 Oudh 475 ; see also 57 M. 973=A. I. R. 1934 Mad. 386=66 M. L. J. 609. Where minor is unrepresented, the decree against him is a nullity. A. I. R. 1931 Mad. 674=34 M. L. W. 317. Where proper person not appointed guardian, decree whether nullity or not depends on whether minor has been prejudiced by such irregularity. *Ibid* ; see also A. I. R. 1933 Mad. 170=145 Ind. Cas. 394. The object of the rule is that the minor should be represented by a fit person so that his interests will be properly guarded. 56 Ind. Cas. 313=7 O. L. J. 219. A compromise not expressly sanctioned by the Court, though beneficial is not binding on the minors. 3 Pat. L. J. 255=46 Ind. Cas. 358 ; see also 33 Ind. Cas. 941=9 Bur. L. T. 158. When suit is filed against minor in respect of whom proper guardian has already been appointed but whose identity or appointment is not known, Court is competent to appoint an officer of the Court as a guardian *ad litem*. 33 Ind. Cas. 481. A decree against a minor without a guardian *ad litem* at the time is void. 31 M. L. J. 39=35 Ind. Cas. 154 ; see also 35 Ind. Cas. 707=38 A. 315 ; A. I. R. 1929 Cal. 586 ; 83 Ind. Cas. 913=17 S. L. R. 211 ; 82 Ind. Cas. 516=45 A. 744=22 A. L. J. 665 ; 55 C. 1241=32 C. W. N. 665. Absence of formal order appointing a person guardian *ad litem* is not fatal to the suit. 1 Pat. L. J. 573=35 Ind. Cas. 868 ; 4 Pat. L. J. 213=48 Ind. Cas. 245 ; 49 Ind. Cas. 954. There is no rule that only the natural or certificated guardian of a minor can act as his next friend for the purpose of legal proceedings. 48 Ind. Cas. 39=5 O. L. J. 551. Before appointing a guardian *ad litem* for a defendant who is alleged to be but never adjudged, of unsound mind, there must be a Court's finding that he is incapable of protecting his own interest. 62 Ind. Cas. 770. When there has been no formal appointment and no appearance on behalf of a minor in a suit, it cannot be held that the minor has been properly represented. 2 Pat. L. T. 617=63 Ind. Cas. 484 ; see also 44 B. 202=22 Bom. L. R. 266=56 Ind. Cas. 399 ; 64 Ind. Cas. 90 ; 65 Ind. Cas. 18=26 C. W. N. 781=34 C. L. J. 293 ; 66 Ind. Cas. 137=3 Pat. L. T. 451 ; 3 Lah. 417=69 Ind. Cas. 561 ; A. I. R. 1936 Rang. 237=163 Ind. Cas. 499.

Guardianship enures for whole *lis* unless revoked. 78 Ind. Cas. 780=7 N. L. J. 110 ; see also 75 Ind. Cas. 457=44 A. 619=20 A. L. J. 599 ; A. I. R. 1930 All. 456=1930 A. L. J. 771=52 A. 594. Mere irregularity in the appointment of guardian will not be a ground for setting aside the decree in the absence of prejudice to minor. A. I. R. 1925 All. 351=47 A. 357=23 A. L. J. 44=86 Ind. Cas. 86 ; see also 88 Ind. Cas. 295 ; 80 Ind. Cas. 541=40 M. L. J. 363=19 L. W. 678 ; 5 Lah. 38=75 Ind. Cas. 449 ; 74 Ind. Cas. 821=A. I. R. 1924 Oudh 178 ; 74 Ind. Cas. 821=9 O. & A. L. R. 463 ; 71 Ind. Cas. 705=2 Pat. 335=4 P. L. T. 147 ; 71 Ind. Cas. 7 ; 9 O. L. J. 141=67 Ind. Cas. 808 ; 42 Ind. Cas. 421=6 L. W. 272 ; 31 Ind. Cas. 45=61 P. R. 1915 ; 97 Ind. Cas. 514=49 A. 123=24 A. L. J. 970 (F. B.)=A. I. R. 1926 All. 545. Though the manager of a joint family represents the whole family where a minor member is impleaded as such, but no attempt is made to get a guardian appointed for him decree in the suit cannot bind the minor. A. I. R. 1931 All. 166=1931 A. L. J. 152. Where the natural guardian does not wish to represent the minor, the Court can appoint another person as his guardian. 30 P. L. R. 590=126 Ind. Cas. 565. Decree passed against a minor respondent represented by a

guardian *ad litem* who enters appearance and defends appeal but dies during pendency of appeal without fresh guardian being appointed is voidable only and is binding unless avoided. A. I. R. 1930 Pat. 473=11 P. L. T. 361. There is nothing in the Code permitting the appointment of joint guardian *ad litem*. Where in a suit on mortgage against two persons and their minor children, the Court without issuing any notice to the minors or other persons who might be fitted to act as guardians of the minors and without taking any steps to comply with the provisions of Order 32, rules 3 and 4 passes an *ex parte* order appointing the two persons as guardians *ad litem* jointly for the same minors and the interest of the guardians *ad litem* are adverse to those of the minors, the appointment of the guardians *ad litem* is defective. A. I. R. 1936 Rang. 237=163 Ind. Cas. 499. Where such guardians fail to put forward, while representing the minors' a substantial defence which is available to the minors and which ought to have been raised on their behalf, the decree passed in such suit is not binding on the minors, although the guardian *ad litem* may have substantially represented the minor in that suit. A suit by the minor for a declaration that the decree is not binding on them is competent. *Ibid.* The appointment of a guardian *ad litem* is not irregular merely for the reason that the wishes of the natural guardian were not considered by the Court. 61 C. 227=59 C. L. J. 9=A. I. R. 1934 Cal. 474. Where a minor is not in any way prejudiced by not having a guardian during the comparatively short period of three months when he was a minor, the suit does not fall under Order 32, rule 3. 36 P. L. R. 315=A. I. R. 1934 Lah. 274. Guardian *ad litem* is to be appointed before the minors are asked to file a written statement. A. I. R. 1934 Oudh 171=11 O. W. N. 393=148 Ind. Cas. 456. In order to have a decree passed against a minor after appointment of guardian *ad litem*, it must be shown that actual prejudice was caused to the minor. A. I. R. 1934 Lah. 132. Before appointing a person as a guardian *ad litem* of a minor the Court must satisfy itself that the proposed guardian is a fit and proper person to represent the minor. 36 Bom. L. R. 84=A. I. R. 1934 Bom. 390. The absence of a formal order by the Court appointing a guardian *ad litem* for a minor defendant is only an irregularity and not an omission fatal to the suit. 10 Luck. 293=152 Ind. Cas. 839=11 O. W. N. 1403=A. I. R. 1935 Oudh 183. Where a minor having certificated guardian sues under guardianship of another and suit is not dismissed, permission of Court is implied. A. I. R. 1935 All. 649=155 Ind. Cas. 365.

Non-appointment of guardian objected to during proceedings cannot be condoned. A. I. R. 1933 Pesh. 63. Where guardian is not proper and negligent, an *ex parte* decree against a minor can be set aside and a new guardian can be appointed. 1932 A. L. J. 1128=55 A. 136=A. I. R. 1933 All. 116; but see 59 C. 1108=1932 Cal. 888. Rule 3 applies to revenue proceedings. A. I. R. 1931 All. 656=1931 A. L. J. 1152. Decree against a minor can be set aside on the ground of fraud. A. I. R. 1932 All. 293 (F. B.)=1932 A. L. J. 437. Where defendant was minor at the time of the institution of the suit but attained majority within 3 months and no guardian was appointed, the suit does not fail in the absence of any prejudice to the minor. A. I. R. 1934 Lah. 274; see also A. I. R. 1934 Oudh 171. Rules under Order XXXII do not expressly apply to execution proceedings and after passing of decree trial Court becomes *functus officio* for the purposes of removing the guardian and appointing a fresh guardian in his place. A. I. R. 1930 All. 456=1930 A. L. J. 771=52 A. 494; see also 84 Ind. Cas. 68=28 C. W. N. 963=39 C. L. J. 590; 35 C. L. J. 9. Where there is a guardian appointed under the Guardians and Wards Act and another person is appointed as a guardian *ad litem* decree obtained against the minor is a nullity. A. I. R. 1929 Mad. 213 (F. B.)=53 M. 275=56 M. L. J. 175. Costs cannot be awarded personally against a guardian *ad litem*. A. I. R. 1929 All. 18=26 A. L. J. 705=50 A. 733. The provisions of Order XXXII have also no application to proceedings under s. 40 of the Bengal Tenancy Act. A. I. R. 1927 Cal. 374. The provisions of Order XXXII, rule 3, are mandatory. L. R. 2 A. 180 Rev.; but see 93 Ind. Cas. 848=A. I. R. 1926 Lah. 435. The improper appointment of guardian invalidates the proceedings in suit including decision, from the point that improper appointment is made. 45 A. 606=76 Ind. Cas. 765. If guardian *ad litem* is appointed when defendant is a major without giving any notice of such appointment decree is not binding on him. 2 O. L. J. 562; 32 Ind. Cas. 380; see also 49 Ind. Cas. 627. Where a person has executed a document on behalf of a minor and a suit is filed on that document against the minor, the question whether that person can be validly appointed guardian *ad litem* is not a pure question of law, but one of fact

and no hard and fast rule can be laid down. 36 Bom. L. R. 844=A. I. R. 1934 Bom. 390 ; see also A. I. R. 1935 Oudh 183=11 O. W. N. 1403=10 Luck. 293 ; but see A. I. R. 1937 All. 374.

**Notice.**—It is not correct to order a substituted service on a person to show cause why he should not be appointed a guardian. A. I. R. 1930 All. 609=1930 A. L. J. 1020. Fraud in service of notice vitiates the proceeding against the minor. A. I. R. 1929 M. W. N. 139 ; see also A. I. R. 1922 Mad. 485 ; A. I. R. 1923 Mad. 553. Where all the near relatives are parties to suit and having no interest adverse to minor notice need not be issued against them. A. I. R. 1929 Sind 32 ; see also A. I. R. 1934 Lah. 132. Where appointment of guardian is properly made, but no notice was served upon the minor or his natural guardian, the appointment is not irregular. A. I. R. 1934 Pat. 111 ; see also A. I. R. 1934 Pat. 427=15 P. L. T. 380. No notice is necessary in case of appointment of new guardian, in place of old one. 14 P. L. T. 441=A. I. R. 1933 Pat. 473. Appointment without notice to minor or the person appointed guardian is irregular and the decree is not binding on the minor. A. I. R. 1932 Lah. 521=33 P. L. R. 551 ; see also 53 A. 427=1931 A. L. J. 152=A. I. R. 1931 All. 136 ; see also A. I. R. 1935 Oudh 287=1935 O. W. N. 333. The appointment of a guardian without notice to the minors merely amounts to an irregularity which will not justify setting a decree aside except upon proof of fraud or collusion on the part of the guardian. A. I. R. 1928 All. 621=26 A. L. J. 834 ; 109 Ind. Cas. 521 ; A. I. R. 1923 Lah. 575 ; see also A. I. R. 1927 Bom. 613=29 Bom. L. R. 1357 ; A. I. R. 1927 Cal. 865=46 C. L. J. 287. Notice to minor after appointment of guardian *ad litem* is not necessary. 4 Pat. L. T. 329=71 Ind. Cas. 341 ; see also 42 Ind. Cas. 421=6 L. W. 272. Notice under rule 3 (4) for appointment of a guardian *ad litem* must be served upon the natural guardian, 45 Ind. Cas. 253=4 Pat. L. W. 373 ; see also 36 Ind. Cas. 253=4 Pat. L. W. 373 ; see also 36 Ind. Cas. 794=4 L. W. 362 ; 41 A. 237=17 A. L. J. 249=50 Ind. Cas. 101 ; 56 Ind. Cas. 313=7 O. L. J. 219 ; 59 Ind. Cas. 737 ; 59 Ind. Cas. 936 ; 59 Ind. Cas. 757 ; 70 Ind. Cas. 867 ; 73 Ind. Cas. 409=44 M. L. J. 299.

**Clause (5).**—"Rule 3 of Order XXXII of the First Schedule to the Code of Civil Procedure, 1908, lays down that where the defendant is a minor, the Court shall appoint a proper person to be guardian for the suit for such minor. It has been held by the High Courts that an appointment made during the course of original suit endures during proceedings in appeal. There is no provision in the Code requiring fresh appointment of guardians for the execution proceedings following suits. It might therefore be thought that a guardian *ad litem* appointed during a suit continues as such till the termination of execution proceedings. But some High Courts follow a different interpretation and one of them has held that the guardian *ad litem* appointed by a Court for a minor defendant does not continue to be the guardian for the suit in execution proceedings without a fresh appointment. The Bill purposes to make it clear that the appointment endures throughout all proceedings arising out of the suit, including those in any appellate or revisional Court and those in the execution of a decree.—*Statement of Objects and Reasons.*

4. [Ss. 443, 444, 445, 456, 457 and R. S. C O 65, r. 13.] (1) Any person

Who may act as next friend  
or be appointed guardian for  
the suit.

person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent be appointed guardian for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and

may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require.

*N. B.*—For local amendments in Allahabad, Calcutta, C. P., Lahore, Oudh, Patna and Rangoon.—*Vide infra.*

**Scope.**—This rule does not apply to non-contentious probate proceedings. 24 C. W. N. 538=59 Ind. Cas. 435. Non-representation of a minor by a guardian is fatal. 25 C. W. N. 525; see also 63 Ind. Cas. 484=2 P. L. T. 617. Irregularity in appointment and prejudice to minor are factors to be considered in cases of setting aside decree against minors on the ground of improper appointment of guardian. 83 Ind. Cas. 323. Consideration of minor's wishes is desirable. 6 P. L. J. 82=2 P. L. T. 116=59 Ind. Cas. 936; A. I. R. 1929 Lah. 257=30 P. L. R. 17. Paternal grandmother is preferable in the absence of mother. *Pardanashin* lady can be appointed. 6 P. L. J. 82=59 Ind. Cas. 936. Appellate Court can *suo moto* set aside decree against minor if not properly represented. 51 Ind. Cas. 583. *Ex parte* decree against minor if properly represented by guardian *ad litem* binds him. 37 Ind. Cas. 389. But defect in appointment is not always fatal. 12 L. W. 243=39 M. L. J. 375=43 M. 842=59 Ind. Cas. 962. Misdescription as minor does not invalidate decree if within his knowledge. 66 Ind. Cas. 433=34 C. L. J. 302. An insolvent can be appointed as a guardian *ad litem* of an infant. 88 Ind. Cas. 254. Question whether certain person should or should not be appointed next friend is ancillary to suit and the decision thereon is revisable. A. I. R. 1929 Lah. 257=11 Lah. L. J. 130=113 Ind. Cas. 901.

**Sub-section (1).**—In order to invalidate the appointment, adverse interest of the guardian must be proved. A. I. R. 1927 Mad. 668=52 M. L. J. 709; see also A. I. R. 1926 Mad. 1146=97 Ind. Cas. 703; A. I. R. 1929 Mad. 213 (F. B.)=52 M. 275; A. I. R. 1925 All. 214=83 Ind. Cas. 323. Guardian with adverse interest is no guardian. 47 M. 79=45 M. L. J. 625=76 Ind. Cas. 1018; 56 Ind. Cas. 97. Interest is not adverse because minor is *benamidar* for next friend. 68 Ind. Cas. 191. In mortgage suit father cannot represent minor as he cannot plead illegality and irregularity. 3 P. L. T. 709=66 Ind. Cas. 945; see also 66 Ind. Cas. 372=44 A. 525=20 A. L. J. 329. Minor is not properly represented when guardian is nominated by adverse party. 45 C. 538=21 C. W. N. 1043=41 Ind. Cas. 503. Where uncle having adverse interest is appointed, the appointment is not proper. A. I. R. 1934 All. 212.

**Sub-section (2).**—Certificated guardian alone can be guardian *ad litem* unless welfare of minor requires otherwise. 46 Ind. Cas. 316=5 P. L. W. 92; see also 43 M. 808=39 M. L. J. 239=59 Ind. Cas. 842; 83 Ind. Cas. 290=2 Pat. 296. Appointment of certificated guardian without his consent is invalid and decree is not binding on minor, sub-rule (3) being mandatory. 26 C. W. N. 781=34 C. L. J. 293=65 Ind. Cas. 18. Under the old Code certificated guardian's consent could be presumed. 34 C. L. J. 302=66 Ind. Cas. 433. If guardian is proper, reason under rule (2) may not be recorded. 44 M. L. J. 515=17 L. W. 558=74 Ind. Cas. 309. The fact that the guardian of the minor is his step-brother would not alone be sufficient justification for holding that he is intentionally possessing the interests of the minor or that his interest is in any way adverse to that of the minor especially where he himself is to be equally affected by the decree with the minor. A. I. R. 1935 Lah. 44=157 Ind. Cas. 301. The interest of every litigant in a partition suit is naturally exclusive and is into conflict with that of other. In such suits, there a brother is disqualified to act as next friend of sister. 37 P. L. R. 112=A. L. R. 1935 Lah. 215. The effect of Order 32, rule 4(2) is that, normally if a minor wishes to institute a suit and he has a certificated guardian, then that certificated guardian is the right person to act as the next friend of the minor. If, however, a suit is brought against a minor, who already has a certificated guardian then he is the person who must be appointed guardian for the suit unless the Court otherwise decides. The mere fact that such guardian subsequently ceases to be the certificated guardian and some body else is appointed in his stead, does not of itself, impose such absolute and fundamental disquali-

fication that he automatically vacates his office and becomes *functus officio*. 39 C. W. N. 293 = A. I. R. 1935 Cal. 160 = 61 C. 1023 = 155 Ind. Cas. 882.

**Sub-section (3).**—No person can be appointed without his consent. 24 C. W. N. 541; 43 Ind. Cas. 563; 40 Ind. Cas. 2; 72 Ind. Cas. 475 = 37 C. L. J. 496; 4 P. L. T. 575 = 72 Ind. Cas. 637; 84 Ind. Cas. 68 = 28 C. W. N. 963; 87 Ind. Cas. 238; 54 C. 450 = 31 C. W. N. 634; A. I. R. 1931 Oudh 50 = 7 O. W. N. 1109. The representation of a minor by a non-consenting guardian is no representation at all and all proceedings while the minor is under such guardianship are null and void against him. 161 Ind. Cas. 200 = A. I. R. 1936 Pesh. 40. Consent under rule 4, clause (3), need not be express; it is a pure question of fact to be decided on evidence. A. I. R. 1925 Mad. 30 = 47 M. 783 = 47 M. L. J. 273 = 83 Ind. Cas. 312; see also A. I. R. 1924 Lah. 97 = 5 Lah. L. J. 487 = 79 Ind. Cas. 572; 59 Ind. Cas. 671 = 43 A. 104; 25 C. W. N. 525 = 62 Ind. Cas. 464; 77 Ind. Cas. 628 = 47 M. 476; 83 Ind. Cas. 323 = A. I. R. 1925 All. 214; 47 M. 783 = 47 M. L. J. 273 = 83 Ind. Cas. 312; A. I. R. 1927 Oudh. 173; 52 M. L. J. 709 = A. I. R. 1927 Mad. 668; A. I. R. 1927 Oudh 560 = 4 O. W. N. 791; A. I. R. 1931 Oudh 50 = 7 O. W. N. 1109. Want of consent of guardian is not fatal unless prejudice is caused. 2 P. L. J. 390 = 40 Ind. Cas. 227.

**Sub-section (4).**—Under this rule it is necessary to sue first that the father or any other person, the mother, with whom the minor is living, should be appointed as guardian. A. I. R. 1934 All. 212 = 149 Ind. Cas. 988. If the father is not a fit person, the Court is bound to protect the interest of the minor against the act of the father. A. I. R. 1929 Mad. 738 = 52 M. 845; see also A. I. R. 1929 Mad. 393 = 29 L. W. 393. A *shebait* is not a proper person to institute a suit on behalf of the idol, where he is actually a defendant in the case. A. I. R. 1930 Pat. 97 = 118 Ind. Cas. 279. Where the minor is not properly represented the Court can restore the case to its original number and file. A. I. R. 1930 All. 644 = 1930 A. L. J. 938. Where proposed guardian does not appear though served and the Court without enquiry if there was any other person willing to act appoints officer of Court, appointment is irregular but not null and void. A. I. R. 1929 Pat. 360 = 10 P. L. T. 79 = 8 Pat. 558; see also 110 Ind. Cas. 345; A. I. R. 1926 Mad. 950 = 93 Ind. Cas. 84. Where natural guardian is unwilling to act, appointment of clerk of Court is valid. 46 M. L. J. 12 = 77 Ind. Cas. 464. False affidavit of absence of "person fit and willing to act" vitiates decree. A. I. R. 1923 Mad. 553 = 44 M. L. J. 513 = 74 Ind. Cas. 309. Absence of affidavit alleging there was no other person fit and willing to act as guardian is immaterial. 73 Ind. Cas. 409 = 44 M. L. J. 299. A *vakil* is an officer of the Court for purposes of rule 4. 45 A. 395 = 71 Ind. Cas. 975. Order as to costs to be incurred by pleader as guardian can be made under the rule. A. I. R. 1923 All. 298 = 71 Ind. Cas. 975; see also A. I. R. 1933 Nag. 329 = 16 N. L. J. 206. As regards effect of non-appearance of natural or certificated guardian on notice, *vide* 4 P. L. T. 127 = 83 Ind. Cas. 290.

5. [Ss. 441, 444.] (1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub-rule (2), shall be made by his next friend or by his guardian for the suit.

(2) Every order made in a suit or on any application, before the Court in or by which a minor is in any way concerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such minority, with costs to be paid by such pleader.

**Scope.**—Words "every application" includes execution application. A. I. R. 1930 Nag. 185 = 26 N. L. R. 173. Application for setting aside execution sale against minor can be made by person interested in minor if guardian *ad litem* neglects his duty. A. I. R. 1930 Nag. 185 = 26 N. L. R. 187. Application by discharged guardian is not tenable. 3 P. L. T. 61 = 6 P. L. J. 171 = 62 Ind. Cas. 235. None but guardian *ad litem* can prefer appeal. 44 A. 619 = 20 A. L. J. 599 = 75 Ind. Cas. 457. Award binds minors if properly represented in arbitration proceedings. A. I. R. 1930 Mad. 38 = 30 L. W. 868.

No separate appointment of guardian need be made in execution if manager representing joint property is a party to it. A. I. R. 1929 Mad. 275 = 30 L. W. 995.

Decision of a suit filed by guardian's agent with his knowledge or permission does not bind minor. A. I. R. 1930 All. 875=128 Ind. Cas. 763.

6. [S. 461] (1) A next friend or guardian for the suit shall not, without the leave of the Court, receive any money or other movable property on behalf of a minor either—

(a) by way of compromise before decree or order, or

(b) under a decree or order in favour of the minor.

(2) Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other movable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

*N. B.*—For local amendment in Madras.—*Vide infra.*

**Scope.**—Appointed guardian failing to furnish security cannot act for minor unless appointed guardian *ad litem*. 54 Ind. Cas. 368 Court has to see that next friends act *bona fide* for interest of minor and not for their personal benefit. 65 M. L. J. 630=A. I. R. 1933 Mad. 890 (F. B.) Section 194 of the Succession Act is not controlled by Order 32, rule 6. 36 C. W. N. 871=A. I. R. 1933 Cal. 17; but see A. I. R. 1927 Sind 187. *Karta* not acting as next friend cannot receive decretal amount without Court's leave. 47 M. L. J. 491=82 Ind. Cas. 588; 1930 M. W. N. 1240. But where *Karta* is not acting as guardian of the minor leave of Court is not necessary. A. I. R. 1927 Pat. 329=8 Pat. L. T. 708=103 Ind. Cas. 75. Next friend cannot draw money from Bank without leave of the Court. A. I. R. 1930 Lah. 496=31 P. L. R. 171=131 Ind. Cas. 282. Payment to next friend without Court's leave being invalid cannot give cause of contribution among judgment-debtors. A. I. R. 1924 Mad. 279=19 L. W. 686=75 Ind. Cas. 905; see also A. I. R. 1924 Lah. 681=78 Ind. Cas. 285. Order XXXII applies to Succession Certificate Act. 101 Ind. Cas. 166=A. I. R. 1927 Sind 187. Provisions of Court Fees Act and Stamp Act apply to security bonds under r. 6. 42 C. L. J. 5=29 C. W. N. 851=53 C. 101 (F. B.). Where a guardian of a minor wants to withdraw money on behalf of the minor, he can be called upon by Court to furnish security. A. I. R. 1937 Sind 173. Refusal on demand by minor creditor without security of valid discharge would not make defendant liable for costs of suit. 64 Ind. Cas. 385; see also 41 M. 40=39 Ind. Cas. 928=1917 M. W. N. 490. A bond carrying a personal liability by the security and given under rule 6, being for the protection of the minor's interest against his guardian is not a bond which is enforceable by execution in the manner provided by s. 145. The bond being given in pursuance of an order made under rule 6, suit is the proper remedy. A. I. R. 1936 Mad. 953=71 M. L. J. 675=44 L. W. 621=1936 M. W. N. 1127. Where the bond is given to the additional Munsiff he is competent to assign it. *Ibid*; see also A. I. R. 1934 Mad. 262=66 M. L. J. 540=57 M. 803=148 Ind. Cas. 846.

7. [S. 462.] (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend

Agreement or compromise by next friend or guardian for the suit.

or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor.

*N. B.*—For insertion of new rule in Madras.—*Vide infra.*

**Scope.**—No next friend or guardian can compromise case for minor without leave of Court expressly recorded. (1917) Pat. 77=35 Ind. Cas. 675; 44 Ind. Cas. 164. Compromise effected after passing decree is governed by rule 7. 31 M. L. J. 207=35 Ind. Cas. 70. Mere recording a compromise and passing a decree accord-

ing to it is no sanction. 39 M. 853=30 M. L. J. 465=32 Ind. Cas. 881; see also A. I. R. 1930 Cal. 539=51 C. L. J. 364; but see 39 Ind. Cas. 53=9 P. L. R. 1917; 71 M. L. J. 388=A. I. R. 1936 Mad. 861. Directions given in rule 7 are not formal but mandatory. A. I. R. 1933 All. 149; A. I. R. 1931 Bom. 500=33 Bom. L. R. 1033. Where sanction to compromise by a guardian is given by Court after considering terms of compromise the decree is binding on minor. A. I. R. 1931 All. 425=1931 A. L. J. 301; see also A. I. R. 1933 Pat. 104=1933 Pat. 109. Where compromise of suit has been entered by member of a joint Hindu family on behalf of his minor wards and himself, without leave of Court, it is not binding on minor nor on him as there was no legal necessity for it. A. I. R. 1931 Mad. 218=59 M. L. J. 139=32 M. L. W. 188. Order allowing compromise and granting decree in terms of it is illegal if Court does not consider whether compromise would benefit or prejudice. A. I. R. 1932 Lah. 521=33 P. L. R. 551. Order 32, rule 7 applies to execution proceedings. A. I. R. 1933 Mad. 456 (F. B.)=56 M. 430=64 M. L. J. 437; 78 Ind. Cas. 291; 62 Ind. Cas. 234=5 P. L. T. 379. Reference to arbitration by guardian without leave does not make decree based on award voidable at the instance of parties other than minor. 35 C. W. N. 238=58 C. 628=52 C. L. J. 298=A. I. R. 1931 Cal. 211; see also A. I. R. 1931 All. 307=53 A. 428=1931 A. L. J. 170; A. I. R. 1931 Cal. 211=35 C. W. N. 238=58 C. 628; 52 Ind. Cas. 752; A. I. R. 1930 Oudh 432=7 O. W. N. 815. Compromise without leave is voidable. Burden of proof of absence of benefit is on minor. A. I. R. 1927 Lah. 687=10 Lah. L. J. 23; A. I. R. 1925 Nag. 325=21 N. L. R. 43=86 Ind. Cas. 375; 29 C. W. N. 597=41 C. L. J. 213=88 Ind. Cas. 369; 90 Ind. Cas. 1049=49 M. L. J. 443; 72 Ind. Cas. 1049=4 P. L. T. 311; 65 Ind. Cas. 50=15 S. L. R. 165; 62 Ind. Cas. 794=79 P. L. R. 1922; 61 Ind. Cas. 118=14 S. L. R. 245; 58 Ind. Cas. 178; 56 Ind. Cas. 878=1 Lah. 341; 50 Ind. Cas. 752=17 A. L. J. 789. Where minor seeks to avoid decree he can avoid it in  *toto*  and not in part. 39 M. 853=32 Ind. Cas. 881. The powers of a next friend acting for a minor in the course of a suit are not wider after the decree than before it. This rule or at any rate the principle embodied in it, is applicable to agreement in execution proceedings. 17 Pat. L. T. 743=A. I. R. 1936 Pat. 506=165 Ind. Cas. 857. If the parties come to an agreement to settle an appeal on certain terms which puts an end to it, such a settlement, if it affects the interests of a minor, must under this rule, but subject to the leave of the Court. 161 Ind. Cas. 751=1936 M. W. N. 123=A. I. R. 1936 Mad. 494. The provisions of rules 6 and 7 of Order 32, C. P. Code, do not restrict in any way the powers of a father or manager of a joint Hindu family to receive the amount of a decree in favour of the family and to give a valid discharge so as to bind a minor member of his family also, who is a party to the suit, without obtaining the leave of the Court in cases where such father or managing member is not the next friend of the said minor. 161 Ind. Cas. 959=1936 M. W. N. 158=43 L. W. 390=A. I. R. 1936 Mad. 434=70 M. L. J. 700. A compromise arrived at by guardian *ad litem* without obtaining the leave of the Court under this rule is voidable against all persons who are majors and not void; but it does not bind the minor in any way. 1936 A. L. J. 1366=A. I. R. 1936 All. 811. If the next friend of a minor expresses his willingness to relinquish the claim of the minor, should the opposite party take a certain oath, it is only a special method of proof adopted by the next friend and is not at all a compromise, and if the interests of the next friend are identical with the minor then sanction under this rule is not necessary for adopting special oath as a form of proof. A. I. R. 1936 Lah. 235=38 P. L. R. 629=162 Ind. Cas. 921. The disability imposed by Order 32, rule 7, will apply only to a father who is also the guardian *ad litem* for his minor son in a suit. Where the minor defendant is represented not by the father but by a Court guardian and where no attempt has been made to show that the compromise entered into by the father on behalf of the minor is improper or prejudicial to his interest, the Court is not justified to his interest, and Court is not justified in extending the provisions of Order 32, rule 7, either by analogy or on considerations of policy. A. I. R. 1937 Mad. 446. Paragraph 1, Schedule II and Order 32, rule 7, should be read together and each governs the other. The only distinction is, where the guardian of a minor has agreed to join in the reference to arbitration, the requirements of para 1, Schedule II, are complied with, but unless and until the leave of the Court has been obtained and expressly recorded in the proceedings, the requirements of Order 32, rule 7 are not fulfilled. A. I. R. 1937 All. 65 (F. B.); see also A. I. R. 1936 Lah. 665; A. I. R. 1931 Cal. 211; A. I. R. 1935 Sind 235; A. I. R. 1935 Mad. 523.



Where a petition for leave is filed under Order 32, rule 7, the Court should consider whether the compromise is or is not in the interest of the minors. A. I. R. 1934 Rang. 168. A compromise of suit made on behalf of a minor without strict compliance with the provisions of this rule, though not enforceable against minor is enforceable against adult co-obligees. 39 M. 409=43 I. A. 99=14 A. L. J. 534=18 Bom. L. R. 432=24 C. L. J. 74=34 Ind. Cas. 213 (P.C.). Court of Wards can compromise without Court's leave. 44 C. 829=37 Ind. Cas. 971; 123 Ind. Cas. 693=A. I. R. 1930 Sind 217. Guardian cannot agree to vary terms of decree without Court's leave. 40 Ind. Cas. 820=1917 M. W. N. 327. A minor is not bound where the next friend withdraws suit without any reason and without leave of the Court. 59 P. R. 1919=47 Ind. Cas. 508. Natural guardian on behalf of minor can enter into arbitration so as to be binding on minor if it is proper, reasonable and for benefit of minor. 44 B. 202=22 Bom. L. R. 266=56 Ind. Cas. 399; see also 43 B. 258=48 Ind. Cas. 238 (F. B.). In a suit against firm though one member is minor, sanction of Court is not necessary. 68 Ind. Cas. 750. Reference on minor's behalf without Court's leave is no ground of appeal. A. I. R. 1931 Cal. 211=35 C. W. N. 238=58 C. 628. Compromise against recorded custom by which property belonging to minor is given to widow is not for benefit of minor. A. I. R. 1933 Lah. 468=34 P. L. R. 409. An attorney's authority to act ends even when guardian *ad litem* informs the Court that the suit has been settled out of Court. A. I. R. 1932 Bom. 401=34 Bom. L. R. 614. Where application is made to Court that Court should decide case as arbitrator signed by pleader duly authorized and stating that some defendants were minors, sanction of Court is presumed from adopting application. A. I. R. 1934 Lah. 176. There is a heavy duty cast upon the counsel appearing for a minor to satisfy himself that the compromise is for the benefit of the minor, and a similar duty is cast upon the Court to scrutinize the compromise and satisfy itself before sanctioning it. A. I. R. 1935 Sind 95.

Guardian's offer to abide by special oath without leave not being compromise binds minor if not tainted with fraud or negligence. A. I. R. 1930 Cal. 463=34 C. W. N. 310=129 Ind. Cas. 408; see A. I. R. 1934 Mad. 260; but see 44A. 117=64 Ind. Cas. 646. All facts necessitating compromise must be placed before Court for obtaining leave either in evidence or by affidavit. A. I. R. 1930 Cal. 539=51 C. L. J. 364=127 Ind. Cas. 785. No particular formula is necessary to be used by the Court in order to grant the leave and when it is shown that an application was made by the guardian to the Court asking for leave to enter into the compromise and the Court makes a note of that application and passes a decree in terms of the compromise, it must be held that the leave of the Court was expressly recorded. 72 Ind. Cas. 1049=4 P. L. T. 311=1 P. L. R. 217; (1931) A. L. J. 76=125 Ind. Cas. 587; A. I. R. 1928 Pat. 40=104 Ind. Cas. 753; A. I. R. 1928 All. 534; A. I. R. 1927 Cal. 796=46 C. L. J. 441; A. I. R. 1927 Lah. 320=28 P. L. R. 184=9 Lah. L. J. 141; A. I. R. 1926 Bom. 291=28 P. L. R. 362=94 Ind. Cas. 101; A. I. R. 1926 Sind 128=20 S. L. R. 116=98 Ind. Cas. 559; but see 60 Ind. Cas. 980=2 P. L. T. 325. Next friend giving up claim against one of the defendants, sanction is necessary. A. I. R. 1926 Mad. 119=22 L. W. 629=91 Ind. Cas. 727. Agreement to file award requires sanction. 83 Ind. Cas. 913=17 S. L. R. 211. Valid compromise under rule 7 cannot be set aside under s. 29, Guardian and Wards Act. A. I. R. 1930 Lah. 250=31 P. L. R. 131=122 Ind. Cas. 103. Compromise by leave of Court should not be set aside unless fraud or misrepresentation is proved. A. I. R. 1930 Lah. 250=31 P. L. R. 131; A. I. R. 1927 Bom. 11=50 B. 716; A. I. R. 1927 Cal. 796. Leave granted under misapprehension does not validate compromise. A. I. R. 1929 Lah. 279=30 P. L. R. 116=11 Lah. L. J. 14. Fair compromise with leave honestly obtained cannot be set aside only because if turned out to be against minor's interest. 51 C. L. J. 364=A. I. R. 1930 Cal. 539. Compromise by guardian after defendant attains majority is not binding though with sanction. A. I. R. 1928 Mad. 294=51 M. 763=55 M. L. J. 374=118 Ind. Cas. 294. Absence of sanction does not of itself invalidate a compromise between parties who are majors. A. I. R. 1925 Cal. 866=29 C. W. N. 597=40 C. L. J. 213=88 Ind. Cas. 369; see also A. I. R. 1927 Cal. 870=55 C. 210. Concealment of material facts by guardian vitiates Court's sanction. 12 O. L. J. 366=88 Ind. Cas. 804. Assignment of decree in minor's favour requires sanction. A. I. R. 1925 Mad. 1287=49 M. L. J. 443=99 Ind. Cas. 1049; see also 63 Ind. Cas. 285=41 M. L. J. 75; but see 62 Ind. Cas. 255. Agreement by guardian to be bound by the statement of certain witnesses is not compromise as such requires no sanction. A. I. R. 1927 All. 584=49 A. 842=25 A. L. J. 729. Agreement to refer to arbitration requires

sanction. A. I. R. 1926 Lah. 665=27 P. L. R. 729=96 Ind. Cas. 748. Assignment of minor's rights under preliminary decree without Court's sanction is not void but voidable by minor. A. I. R. 1927 Mad. 560=38 M. L. T. 148. Compromise can be set aside when it was obtained by misrepresentation. A. I. R. 1929 Mad. 96=1928 M. W. N. 654. Arbitration on behalf of the minors without sanction of the Court is void against the minors. 59 C. L. J. 521=A. I. R. 1934 Cal. 845. A Court of appeal will not set aside a decree passed by the lower Court, on a compromise entered into by the next friend of a minor without the leave of the Court, if on such appeal the minor is represented by the next friend who acted as such in the lower Courts as well. 60 C. L. J. 173. Leave should be expressly recorded under this rule. 152 Ind. Cas. 718=36 Bom. L. R. 738.

Permission to withdraw from compromise should not be granted if there is no misrepresentation and the compromise is in the interest of minors. A. I. R. 1928 Cal. 247; see also 91 Ind. Cas. 521. But where guardian changes mind before grant of leave, and does not want compromise, compromise cannot be forced on minor. 47 A. 782=23 A. L. J. 523=88 Ind. Cas. 429; see also 76 Ind. Cas. 682=27 C. W. N. 792; 35 Ind. Cas. 675. Leave to negotiate compromise need not be expressly recorded. It is enough if Court sanctions terms of proposed compromise. 76 Ind. Cas. 368=A. I. R. 1924 Nag. 180; see also 78 Ind. Cas. 335=A. I. R. 1925 Cal. 475. Where appeal is pending before Privy Council application for approval of compromise on behalf of persons under disability should be moved before the High Court in the first instance. 26 C. W. N. 105=48 C. 931=66 Ind. Cas. 154 (P. C.). After appointment of guardian *ad litem*, the natural guardian's powers are suspended. 44 B. 574=22 Bom. L. R. 725=57 Ind. Cas. 417; see also 56 Ind. Cas. 313=7 O. L. J. 219. Where guardian of minor party to a suit wishes to refer to arbitration, Court ought to consider circumstances of the case and see if the reference would be for minor's benefit. 59 Ind. Cas. 31=5 P. W. R. 1921; A. I. R. 1923 Bom. 402=25 Bom. L. R. 443=47 B. 721=73 Ind. Cas. 464; 55 Ind. Cas. 218. Compromise was allowed where counsel certified that it was for minor's benefit. 55 Ind. Cas. 943; see also 47 I. A. 88=38 M. L. J. 431=22 Bom. L. R. 552=18 A. L. J. 489 (P. C.)=55 Ind. Cas. 943. Where a trustee who was a guardian *ad litem* compromised a suit without Court's sanction and in pursuance thereof effected a mortgage, the mortgage is invalid. 23 C. L. J. 337=18 Bom. L. R. 360=14 A. L. J. 153 (P. C.)=32 Ind. Cas. 258.

8. [S. 447.] (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already incurred.

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor.

**Scope.**—Once a guardian *ad litem* is appointed, the appointment continues for whole *lis*. 45 A. 623=21 A. L. J. 691=75 Ind. Cas. 898; see also A. I. R. 1931 Lah. 635=32 P. L. R. 460. Such guardian cannot retire at his own sweet will. It is in Court's discretion to allow him to withdraw. A. I. R. 1932 All. 130=1931 A. L. J. 1102.

9. [S. 446.] (1) Where the interest of the next friend of a minor is adverse to that of the minor or where he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him, or where he does not do his duty or during the pendency of the suit, ceases to reside within British India or for any other sufficient cause, application may be made on behalf of the minor or by a defendant for his removal; and the Court, if satisfied of the sufficiency of the cause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as it thinks fit.

(2) Where the next friend is not a guardian appointed or declared by an authority competent in this behalf, and an application is made by a guardian

so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit.

**Scope.**—Next friend's failure to ascertain whether minor desired to continue proceedings amounts to failure of duty and Court can remove next friend on that ground. A. I. R. 1928 Nag. 166=107 Ind. Cas. 668. If Court finds that next friend's interest is adverse to minor plaintiff it should proceed under this rule. 6. P. L. J. 317=63 Ind. Cas. 736 ; see also 87 Ind. Cas. 42=41 M. L. J. 417.

**10. [Ss. 448, 449.]** (1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

Stay of proceeding on removal, etc., of next friend.

(2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit.

**Notes.**—*Vide* A. I. R. 1928 Pat. 168=9 Pat. L. T. 547 ; A. I. R. 1933 Cal. 508=37 C. W. N. 184 ; 17 Pat. L. T. 86.

**11. [Ss. 458, 459.]** (1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit.

Retirement, removal or death of guardian for the suit.

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

**Scope.**—Guardian appointed by Court cannot retire without Court's permission. A. I. R. 1926 All. 437=94 Ind. Cas. 340 ; see also A. I. R. 1928 Mad. 980 ; A. I. R. 1927 Mad. 538=50 M. 357=38 M. L. J. 197 ; A. I. R. 1926 Nag. 40=88 Ind. Cas. 235. The power of Court under rule 11 to remove guardian for the suit of a minor defendant and appoint a new guardian instead may be exercised at any time. 27 M. L. T. 171=55 Ind. Cas. 945 ; 27 C. W. N. 792=75 Ind. Cas. 682 ; 87 Ind. Cas. 117=21 L. W. 325. Where guardian for suit dies Court shall appoint new one in his place. 88 Ind. Cas. 235=A. I. R. 1926 Nag. 40. It is not necessary for Court to give notice to minor before making order under rule 11. A. I. R. 1923 Pat. 385=2 Pat. 273=4 P. L. T. 329=71 Ind. Cas. 341. Sale held in execution of decree after death of guardian *ad litem* of judgment-debtor without appointing fresh guardian is not a nullity. A. I. R. 1927 Nag. 198=10 N. L. J. 27=23 N. L. R. 146. Order XXXII, r. 11, cannot be said to restrict provisions of s. 35 so far as they relate to parties on record. A. I. R. 1928 Mad. 590=1928 M. W. N. 318. After Court decides the case it cannot remove guardian originally appointed by itself. 22 Ind. Cas. 445. Where appointed guardian does not appear before the Appellate Court, Appellate Court can appoint fresh guardian in his place by recording the removal of the former guardian. 37 C. W. N. 921=A. I. R. 1933 Cal. 794. Where during the pendency of the appeal, the guardian for the minor respondent dies and no effort is made by the Court, under Order 32, rule 11 to appoint a guardian *ad litem* for him, the appeal does not abate, but the decree passed must be set aside as made during the absence of a guardian *ad litem* and the suit must be remanded to the same lower Appellate Court. A. I. R. 1936 Pat. 670 ; see also A. I. R. 1936 Lah. 86.

**12. [Ss. 450, 453.]** (1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

Course to be followed by minor plaintiff or applicant on attaining majority.

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus :—

“A. B., late a minor, by C. D. his next friend, but now having attained majority.

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this rule may be made *ex parte* ; but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend.

**Scope.**—Where a minor defendant attains majority during proceedings, a duty lies on him to discharge his guardian *ad litem* and appear himself. A. I. R. 1926 Cal. 1053=46 C. L. J. 606=97 Ind. Las. 209. Defendant attaining majority during pendency of suit but not electing to conduct suit himself is bound by decree passed in suit. A. I. R. 1928 Mad. 294=27 L. W. 455=51 M. 763=55 M. L. J. 374 ; see also 88 Ind. Cas. 235 ; A. I. R. 1929 Lah. 555=30 P. L. R. 273 ; A. I. R. 1930 Lah. 603. Minor is not to be deemed to be instituting fresh suit where he elects to continue suit conducted by next friend. A. I. R. 1925 Sind 330=88 Ind. Cas. 116. Rules 12 and 13 lay down the course that a plaintiff may follow on attaining majority, but there is no corresponding rule relating to a defendant who should become major during the pendency of the suit. He has notice of the case already and so no further notice of it need be given to him. If he should fail to take any action on attaining majority the presumption is that he chose to allow the case to be conducted by his quondam guardian or by the counsel engaged by his guardian. It cannot in these circumstances be said that the Court has no jurisdiction to proceed with the case or that the decree passed by it is a nullity. A. I. R. 1928 Lah. 371. Minor electing on attaining majority to abandon suit filed by next friend should pay full costs incurred by next friend, unless he shows that suit was unreasonable or improperly instituted. A. I. R. 1934 Mad. 73.

13. [S. 454.] (1) Where a minor co-plain'iff on attaining majority desires

Where minor co-plaintiff attaining majority desires to repudiate the suit. he shall apply to have his name struck out as co-plaintiff ; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be paid by such persons as the Court directs.

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant.

14. [S. 455.] (1) A minor on attaining majority may, if a sole plaintiff,

Unreasonable or improper suit. apply that a suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper.

(2) Notice of the application shall be served on all the parties concerned ; and the Court, upon being satisfied of such unreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as it thinks fit.

*N. B.*—For additional rule in C. P. and Madras.—*Vide infra.*

**Scope.**—Application by minor on becoming major stating his desire to continue suit as major and requesting opportunity to give evidence in support of his objection

should be granted. A. I. R. 1928 Nag. 166=107 Ind. Cas. 668. In pauper suit Court can order next friend to pay Court-fee. A. I. R. 1931 Mad. 249=58 M. L. J. 623=53 M. 716.

15. [S. 463.] The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind and to persons who though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.

**Scope.**—This rule applies to lunatics whether adjudged or not under the Lunacy Act. 34 Ind. Cas. 551=4 L. W. 228; see also 34 Ind. Cas. 428=3 L. W. 301. In order that a suit by a lunatic can be instituted in his name by his next friend the lunatic must be a person who has been adjudged to be of unsound mind or a person who, though not so adjudged, is found by the Court on enquiry by reason of unsoundness of mind or mental infirmity to be incapable of protecting his interest when suing. A. I. R. 1936 Rang. 121=161 Ind. Cas. 665. When in appeal he is not represented by next friend, prejudice to his interest must be proved to have the decree set aside. 38 P. L. R. 320=161 Ind. Cas. 987; see also A. I. R. 1936 All. 806=1936 A. L. J. 964=165 Ind. Cas. 645. A next friend or a guardian *ad litem* is to be appointed in case of a lunatic only when a party has been adjudged a lunatic in an inquisition under the Lunacy Act or when the Court itself on inquiry has found that the party is of unsound mind. 38 C. W. N. 900=A. I. R. 1934 Cal. 833; see also 38 C. W. N. 1081; A. I. R. 1936 All. 806=1936 A. L. J. 964. Rule 15 applies only to cases of persons adjudged to be of unsound mind and to others who are found by the Court on inquiry to be incapable of protecting their interests. 1935 O. W. N. 1071=158 Ind. Cas. 338. The provisions of this rule do not apply in terms to the proceedings before their Lordships of the Privy Council, though their Lordships would ordinarily require an insane person to be adequately represented before them so that his interests might be protected. 158 Ind. Cas. 338=1935 O. W. N. 1071. Persons absolutely deaf and dumb and unable to communicate with others are covered by this rule. A. I. R. 1930 All. 425. Even person of weak mind can sue through next friend. A. I. R. 1925 Nag. 245=83 Ind. Cas. 253; see also 31 C.W.N. 1087=A. I. R. 1927 P. C. 123. Where it is alleged that defendant is of unsound mind but plaintiff denies that he is so it is desirable that there should be a judicial inquiry in the matter. 70 Ind. Cas. 307=A. I. R. 1922 Cal. 86; see also 62 Ind. Cas. 770; 45 Ind. Cas. 219; 17 A. L. J. 257=50 Ind. Cas. 109; A. I. R. 1933 All. 149. Where application for enquiry under rule 15 is dismissed without holding enquiry required by law, High Court can interfere under s. 151. A. I. R. 1928 All. 108=50 A. 335=25 A. L. J. 1082=108 Ind. Cas. 141. Where a suit is decreed *ex parte* against a lunatic defendant and the lunatic subsequently dies application for restitution of suit and allowing summons to legal representative to, set aside decree was held maintainable. 34 C. W. N. 989=A. I. R. 1931 Cal. 168. Where next friend dies pending suit his estate cannot be made liable for costs. 5 O. L. J. 106=20 O. C. 300=43 Ind. Cas. 257.

16. [S. 464.] Nothing in this Order shall apply to a Sovereign Prince or Ruling Chief suing or being sued in the name of his State, or being sued by direction of "the Central Government, or the Crown Representative or a Provincial Government"\* in the name of an agent or in any other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against lunatics or other persons of unsound mind.

*N. B.*—For additional rule in Madras.—*Vide infra*.

**Scope.**—Where Prince attains majority according to his personal law guardian is unnecessary. A. I. R. 1925 Cal. 513=29 C. W. N. 287=80 Ind. Cas. 100.

\* The words within quotations have been substituted for the words "the Governor-General in Council or a Local Government" by G. I. Order of 1937. In Burma for the words under quotations read "Governor."—*Vide* G. B. Order of 1937.

## ORDER XXXIII.

*Suits by Pauper.*

Suits may be instituted in *forma pauperis*.

1. [S. 401.] Subject to the following provisions, any suit may be instituted by a pauper.

*Explanation.*—A person is a “pauper” when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject-matter of the suit.

*N. B.*—For local amendment in Bombay.—*Vide infra*.

Order 33—Time for redrafting Order 33 is long overdue. A. I. R. 1932 Rang. 195=10 Rang. 475.

**Scope.**—The word “person” in this rule including companies or firm. 41 M. 624 = 34 M. L. J. 421 ; A. I. R. 1930 Rang. 272. A minor without sufficient means with the definition of pauperism for the purpose of Order XXXIII, should be allowed to sue in *forma pauperis* by a next friend although the next friend is not a pauper. 37 C. L. J. 394=70 Ind. Cas. 919 ; see also 80 Ind. Cas. 748=26 Bom. L. R. 380 ; 11 B. L. R. 373. Where pauper plaintiff himself dies during the pendency of a suit, his legal representative can continue the suit. A. I. R. 1928 Mad. 66=109 Ind. Cas. 258 ; see also A. I. R. 1928 Mad. 278=51 M. 697 ; but see 88 Ind. Cas. 91. The word “person” means a natural person and not a judicial person such as a Receiver. A. I. R. 1930 Rang. 259=126 Ind. Cas. 650 ; but see A. I. R. 1937 Mad. 549 (F. B.). There is a difference between Indian and English law. According to Indian law, *i. e.*, according to this rule, where no fees are prescribed pauper must show that he was not possessed of property worth more than Rs. 100. 77 Ind. Cas. 611=4 P. L. T. 538=2 Pat. 879. When pauper application is dismissed, time for payment of Court-fees can be extended. 33 M. L. T. 18=46 M. L. J. 254=76 Ind. Cas. 767. Especially in respect of partition suits it is common knowledge that there is considerable divergence of judicial opinions as to the Court-fee payable. If later on the Court considers an additional fee necessary, and if in truth and fact the plaintiffs are not possessed of means to pay additional fee, there is nothing inconsistent with the scheme of the Code, suing plaintiffs the benefit of the provisions of Order 33. A. I. R. 1936 Mad. 158=43 L. W. 380=161 Ind. Cas. 359. Immunity from Court-fees to a pauper continues during the whole course of proceeding. If however applicant afterwards becomes possessed of sufficient means, the question of pauperism should be re-considered. 25 Bom. L. R. 199=47 B. 523=72 Ind. Cas. 224 ; see also 61 Ind. Cas. 958=13 L. W. 76 ; but see 36 C. W. N. 567=A. I. R. 1932 Cal. 685. Woman allowed to sue as pauper cannot be ordered to furnish security for costs. 10 Bur. L. T. 105=36 Ind. Cas. 820. Where plaintiff who has been permitted to sue as a pauper but his pauperism is challenged, dies during the pendency of a suit, his legal representatives brought on record must along with the deceased plaintiff be found to be paupers. A. I. R. 1927 Lah. 665=104 Ind. Cas. 347 ; see also A. I. R. 1933 Nag. 334. Estate is not pauper, yet person representing such estate may file suit as pauper. A. I. R. 1933 Mad. 883. Suit filed on payment of Court-fee can be continued as pauper. A. I. R. 1933 Mad. 496=64 M. L. J. 728. Past carelessness is irrelevant for considering present poverty. A. I. R. 1934 Nag. 104. Application should not be dismissed on the mere probability that he might have means. A. I. R. 1934 Nag. 104. Two clauses in explanation are disjunctive. A. I. R. 1934 All. 323. Court has no power to grant leave to apply for review in *forma pauperis*. A. I. R. 1930 Rang. 280=8 Rang. 423. Costs can be made condition precedent for allowing plaintiff an adjournment even though he was allowed to sue as pauper. A. I. R. 1928 Rang. 306=3 Rang. 561. Burden of proving that property does not exceed Court-fees is on petitioner. A. I. R. 1929 Lah. 821=31 P. L. R. 432. Order directing pauper to pay costs of amendment in cash and dismissing suit on failure to pay is not proper order. 24 Bom. L. R. 924=47 B. 104=69 Ind. Cas. 207. Application for bringing legal representative of deceased opponent in application for permission to sue in *forma pauperis* is not governed by Art. 177. A. I. R. 1929 Sind 136. On the death of the applicant his legal representative has a right to continue the proceedings by substitution on payment of Court-fee or else by filing a fresh application for leave to sue as pauper. A. I. R. 1936 Pat. 591=15 Pat. 738.

**Sufficient means.**—The word “means” includes all form of realisable assets which are capable of being converted into cash and as such capable of conducting litigation. A. I. R. 1928 Lah. 271=10 Lah. L. J. 159. One who is entitled to property does not mean that one is possessed of means to the value of that property. A. I. R. 1929 Nag. 319. Words possessed of sufficient means are not to be qualified by words “other than the subject-matter of the suit”. A. I. R. 1929 Nag. 319=119 Ind. Cas. 697. Mortgage in favour of petitioner is means. A. I. R. 1929 Lah. 821=31 P. L. R. 432. Cash in actual possession of the petitioner cannot be taken into account. A. I. R. 1930 Cal. 147=34 C. W. N. 188=57 C. 980. Ornaments of women which are of daily use are not to be taken into account. A. I. R. 1927 Cal. 304=45 C. L. J. 68. Minor’s share in the joint Hindu family property should be taken into account. 23 A. L. J. 512=88 Ind. Cas. 420. That the applicant’s husband has property is no ground for rejection of an application to sue as a pauper by wife. 3 P. L. J. 178=44 Ind. Cas. 723; see also A. I. R. 1930 Rang. 324. While considering question of pauperism circumstances as they are at the date when the application was made should be considered. A. I. R. 1930 Cal. 147=34 C. W. N. 188=57 C. 980; see also A. I. R. 1928 Nag. 24=10 N. L. J. 177; A. I. R. 1927 Lah. 665; 95 Ind. Cas. 949=21 N. L. R. 98. The burden of proving pauperism lies on the applicant. A. I. R. 1927 Nag. 340=104 Ind. Cas. 198. Debt which is due to the applicant from the third person is to be excluded while calculating the means of the applicant. A. I. R. 1927 Cal. 309=45 C. L. J. 68. Amount deposited in Court to the pauper’s credit or appellant’s credit should be taken into consideration while allowing the appellant to sue as pauper. A. I. R. 1926 Mad. 567=50 M. L. J. 114=23 L. W. 427. Occupancy holding is not property. A. I. R. 1925 Nag. 438=21 N. L. R. 98=90 Ind. Cas. 949. The words “other than his necessary wearing apparel and the subject-matter of the suit” have an application only where no specific Court-fee is prescribed. A. I. R. 1926 Nag. 273=92 Ind. Cas. 785. Rich relation capable of paying Court-fee is immaterial. A. I. R. 1933 All. 556. Equity of redemption is not assets when money cannot be raised on it. A. I. R. 1933 Lah. 528. But where an applicant is shown to own considerable properties, but all of them are necessarily mortgaged, evidence has to be taken to enable the Court to judge whether any money can be raised on the properties. 152 Ind. Cas. 260=1934 M. W. N. 1031=A. I. R. 1934 Mad. 562. Property forming part of subject-matter of suit in applicant’s possession can be considered to decide question of sufficient means. A. I. R. 1933 Pat. 203. When equity of redemption is subject-matter of suit, it should be excluded in determining whether plaintiff is pauper. A. I. R. 1933 Mad. 679=63 M. L. J. 277=1933 M. W. N. 967. Where suit is filed on insufficient stamp, the Court can allow plaintiff to continue suit as pauper. 36 C. W. N. 1035=56 C. L. J. 148=A. I. R. 1933 Cal. 238; see also 1933 M. W. N. 468=69 M. L. J. 728=A. I. R. 1933 Mad. 498; A. I. R. 1934 Cal. 25. Share in joint family property may amount to means. A. I. R. 1934 All. 396. It cannot be laid down as an abstract proposition that in every case when the plaintiff has got a mortgage or similar claim, he cannot be regarded as a pauper. A. I. R. 1934 Mad. 561=1934 M. W. N. 1054=152 Ind. Cas. 938. In considering whether a person is a pauper the subject-matter of the suit should be excluded. 152 Ind. Cas. 135=40 L. W. 783=1934 M. W. N. 1087=A. I. R. 1934 Mad. 653=67 M. L. J. 581. Where the *shebait* is suing in respect of *debutter* properties the question that requires consideration is whether the trust property vesting in the idol is sufficient to pay the Court-fees or not. 152 Ind. Cas. 241=A. I. R. 1934 Pat. 531; see also A. I. R. 1935 Nag. 209=31 N. L. R. 413. From an order allowing a pauper application the defendant can have no possible grievance, assuming the order was wrong. The only person really affected is the Crown. The High Court can interfere in a proper case, but it would be slow to move at the instance of the opposite party. 151 Ind. Cas. 316=A. I. R. 1934 Lah. 295. In considering an application for permission to sue in *forma pauperis*, the earnings of a brother in service cannot be regarded as property belonging to the plaintiff. A. I. R. 1935 Lah. 965. Once the application to sue as pauper is admitted the plaintiff can only be dispaupered under rule 9 on the grounds mentioned therein. A. I. R. 1935 Pat. 449=157 Ind. Cas. 520.

**Explanation.**—Where Court-fee is prescribed for the plaint in the suit, the case falls within the first part of the Explanation appended to rule 1 of Order 33 and the question which requires decision is whether the applicant for permission to sue in *forma pauperis* is possessed of sufficient property to enable him to pay the Court-fee. Provision is made in the second part of the Explanation for a case in which no

Court-fee is prescribed. As finding of the Court that the assets of the applicant are worth more than Rs. 100 is therefore, beside the point in a case covered by the first part of the Explanation. 1936 O. W. N. 237. The word "person" in Order 33, rule 1, has reference to all those who have a right to institute a suit under the Code of Civil Procedure. This rule applies to all prospective plaintiffs or persons in whom any right to relief exists within the meaning of Order 1, rule 1 of the Code. 31 N. L. R. 413=18 N. L. J. 347=158 Ind. Cas. 660=A. I. R. 1935 Nag. 209. An idol is a person who comes within the meaning of this rule. *Ibid*.

**Appeal or Revision.**—Interlocutory decision rejecting an application for leave to sue as pauper can be appealed against. A. I. R. 1928 Nag. 24=10 N. L. J. 117; see also A. I. R. 1927 Nag. 340; A. I. R. 1925 Nag. 343=88 Ind. Cas. 157. Order either granting or rejecting application for leave to sue in *forma pauperis* amounts to "case" decided. A. I. R. 1931 Rang. 318=135 Ind. Cas. 331. Order rejecting application to sue as pauper is subject to revision. A. I. R. 1927 Lah. 56=98 Ind. Cas. 879; see also 75 Ind. Cas. 993=19 N. L. R. 165; but see A. I. R. 1926 All. 449.

2. [S. 408.] Every application for permission to sue as a pauper shall contain the particulars required in regard to Contents of applications. plaintiffs in suits: a schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof shall be annexed thereto, and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

**Scope.**—This rule deals rather with form of application and not with the truth of its contents. Hence an omission of one item of property is not non-compliance with this rule. A. I. R. 1928 Pat. 28=8 P. L. T. 794. But where there is an entire omission of immovable property, the application should be dismissed. 74 Ind. Cas. 344; 9 O. L. J. 610; see also A. I. R. 1930 Pat. 368=11 P. L. T. 567. Where application to sue as pauper was presented in time, it is not time-barred merely on the ground that it was signed and verified out of time. A. I. R. 1931 Bom. 47=32 Bom. L. R. 1343. Joint family property even of minor must be mentioned. A. I. R. 1934 All. 396. "It" refers to application and not to scheduled property. A. I. R. 1932 Lah. 548=33 P. L. R. 733. Rule 2 should not be meticulously interpreted. A. I. R. 1932 Lah. 328=138 Ind. Cas. 335. In an application for leave to sue as a pauper in respect of a claim under the Fatal Accidents Act, the failure to give particulars of all the beneficiaries is a defect in form but where the plaint includes a claim for loss of petitioners personal effects as well and the Court-fee on that portion of the claim alone exceeds the value of the petitioner's belongings, the plaint cannot be rejected and the whole claim should be considered on its merits. 59 C. L. J. 391=A. I. R. 1934 Cal. 632=38 C. W. N. 551; 59 C. L. J. 394=A. I. R. 1934 Cal. 712. Under rule 2 the application should contain all particulars required in a plaint of a suit. The rule 5 of the same provides for circumstances under which a Court is entitled to reject an application to sue in *forma pauperis*. But from neither of these rules can it be said that for all purposes such an application is a plaint. Under Order 8 when once the application is granted the particulars which have already been given are treated as those of a plaint; but under rule 15 of the same order, if application is rejected, the plaintiff then has to proceed in the ordinary way. A. I. R. 1935 Pat. 193=156 Ind. Cas. 402.

3. [S. 404.] Notwithstanding anything contained in these rules, the application shall be presented to the Court by Presentation of application. the applicant in person, unless he is exempted from appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application, and who may be examined in the same manner as the party represented by him might have been examined had such party attended in person.

**Scope.**—Where a petition was given to the officer of the Court and petitioner was present when the officer presented the petition to the Judge, petition should be regarded as presented to the Judge himself. 58 Ind. Cas. 961=17 N. L. R. 22; see also 47 M. L. J. 522=84 Ind. Cas. 968. Husband of *pardanashin* lady can present the application of his wife for leave to sue as a pauper and no authority in writing is necessary. A. I. R. 1929 Pat. 27=10 P. L. T. 46=114 Ind. Cas. 210. This rule applies to presentation of application to appeal as a pauper and not to



Memorandum of Appeal itself. A. I. R. 1926 Oudh 13=90 Ind. Cas. 371. Where plaint was returned for presentation to proper Court and the memorandum submitted by parties for continuation of suit, objection that plaint should have been presented in person in order to entitle him to sue as a pauper cannot be maintained. A. I. R. 1931 Mad. 418=1930 M. W. N. 582. Court can reject application where the claim is doubtful. 75 Ind. Cas. 744. Where original application is filed by the applicant, the amended application can be filed by pleader. A. I. R. 1933 Rang. 410=11 Rang. 414.

4. [S. 406.] (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant.

(2) Where the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

**Scope.**—Court can examine applicant on merits of claim before and after issue of notice to opponent and may avail of help from latter though latter cannot examine applicant. A. I. R. 1928 Sind 118=22 S. L. R. 441=108 Ind. Cas. 657; 50 Ind. Cas. 676. Evidence except of applicant himself cannot be taken on merits of claim in enquiry under Order 33. 46 C. 651=52 Ind. Cas. 610; see also A. I. R. 1929 Rang. 273=7 Rang. 361. Court should not embark upon consideration of doubtful questions of law and fact in order to see whether the allegation shows cause of action. A. I. R. 1934 Lah. 231. Capacity of plaintiff himself to pay the Court-fee and not that of his next friend or relations is to be considered in pauper applications. A. I. R. 1929 Lah. 746=121 Ind. Cas. 381. Opposite party can cross-examine applicant who is examined under rule 4 to test statements made in application. 60 Ind. Cas. 738.

Rejection of application.

5. [Ss. 4, 5, 407.] The Court shall reject an application for permission to sue as a pauper,—

- (a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or
- (b) where the applicant is not a pauper, or
- (c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or
- (d) where his allegations do not show a cause of action, or
- (e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

*N. B.*—For local amendment in Allahabad.—*Vide infra.*

**Scope.**—Statute must be strictly applied to *bona fide* litigants in whose aid it is designed. A. I. R. 1927 Pat. 352=8 P. L. T. 810. Court must first see whether cause of action is disclosed and then determine whether applicant is really pauper. A. I. R. 1933 All. 779=1933 A. L. J. 757. Application cannot be rejected for omission of goods of small value from the list of properties. A. I. R. 1932 Pat. 308=13 P. L. T. 538. Judge not confining to plaint acts with material irregularity. A. I. R. 1932 Pat. 284=14 P. L. T. 338. In considering whether case falls under rule 5 (d) Court cannot use matters of which it has no notice *aliunde*. A. I. R. 1932 Rang. 107 (F. B.). Government Advocate or opposite party is not competent to adduce evidence to show that applicant has not complied with rule 5 (d), A. I. R. 1930 Rang. 107 (F. B.)=10 Rang. 357. It is customary to allow some time to pay Court-fees when pauper application is dismissed. A. I. R. 1933 Mad. 883. As regards where subsequent application is not barred, *vide* 37 C. W. N. 309=60 C. 630; A. I. R. 1932 Lah. 328; A. I. R. 1934 Lah. 231; A. I. R. 1933 Oudh 534. But dismissal of application under rule 7 (3) for not complying with provisions of rule 5 (a) is a

bar to fresh application. A. I. R. 1932 Rang. 195=10 Rang. 475. When after rejection of pauper application, Court-fee is paid, limitation will count from presentation of pauper application. A. I. R. 1933 Mad. 883; but see A. I. R. 1933 Nag. 237; A. I. R. 1930 All. 758. Rules 5 and 7 are not applicable to pauper appeals. A. I. R. 1932 Mad. 523=63 M. L. J. 28. In considering applications by Hindu widow, the Court should consider the fact that she will be neither able to borrow money nor to sell her property. A. I. R. 1933 Mad. 883. General power of allowing amendment may be applied to application to sue in *forma pauperis*. A. I. R. 1934 Lah. 231. If the Court rejects the pauper petition *ex parte* on any of the grounds laid down in rule 5, a second application is competent; but if the Court proceeds to issue notice to the respondent and takes evidence and finally refuses to allow the petition on merits, no second application is competent. A. I. R. 1937 Pesh. 85. The omission to include one solitary item of property in the Schedule of properties attached to an application for leave to sue as a pauper is not such a defect in the form or frame of the application as to call for rejection under clause (a) where the application is otherwise regular. A. I. R. 1934 Cal. 640=38 C. W. N. 548=151 Ind. Cas. 635. In case of rejection Court should give time for payment of Court-fee. 38 P. L. R. 429; 38 P. L. R. 79.

**Clause (a).**—Order rejecting petition under rule 5 (a) does not bar a second petition if there has been no enquiry under rule 6 and consequent order under rule 7. A. I. R. 1926 Mad. 875=26 L. W. 546=50 M. 63=51 M. L. J. 79=96 Ind. Cas. 952. Application must be rejected if Court-fee value is not calculated in accordance with s. 7 (v) (b), Court Fees Act. A. I. R. 1929 Rang. 128=7 Rang. 359. Where application to sue as pauper is not properly verified, Court should offer chance to applicant to correct defect. A. I. R. 1933 All. 295=55 A. 216; see also A. I. R. 1932 Lah. 548=33 P. L. R. 733. Failure to name all persons in possession of property is no ground to reject application to sue as pauper. A. I. R. 1932 Lah. 328=138 Ind. Cas. 335. Where the verification in an application for leave to appeal in *forma pauperis* is not in the manner prescribed by the Code, the Court instead of rejecting it should allow the applicant a chance to correct the defect in the verification. A. I. R. 1937 Nag. 108.

**Clause (b).**—To allow or not to allow an application for leave to sue as a pauper is within the discretion of the Court. 37 Ind. Cas. 172. Court should restrict itself to question of pauperism in enquiry on pauper application. 37 M. L. J. 309=53 Ind. Cas. 239. Evidence should be limited on question of pauperism. 54 Ind. Cas. 452=10 L. W. 589; see also 23 C. W. N. 955; A. I. R. 1926 Lah. 642. Means of next friend cannot be considered. A. I. R. 1923 Sind 82.

**Clause (c).**—*Vide* A. I. R. 1934 Lah. 681=148 Ind. Cas. 527.

**Clause (d).**—Cause of action means subsisting cause of action which can be enforced. 33 M. L. J. 577=42 Ind. Cas. 519; see also A. I. R. 1932 All. 543=54 A. 525; A. I. R. 1932 All. 487; A. I. R. 1934 Rang. 111=12 Rang. 124=151 Ind. Cas. 826; A. I. R. 1936 Rang. 388=164 Ind. Cas. 556. Right to sue in rule 15, is equivalent to cause of action. 31 C. L. J. 351=57 Ind. Cas. 9. *Prima facie* non-existence of cause of action alone would justify rejection of application. A. I. R. 1927 Mad. 441=52 M. L. J. 330=101 Ind. Cas. 18; see also A. I. R. 1931 Rang. 79=131 Ind. Cas. 64; A. I. R. 1933 Pat. 284; A. I. R. 1930 All. 758=1930 A. L. J. 901; A. I. R. 1929 Rang. 209; A. I. R. 1932 Rang. 167 (F. B.); 1929 A. L. J. 1059=118 Ind. Cas. 669. Court should not ordinarily enter into complicated question of limitation. A. I. R. 1929 Lah. 498; A. I. R. 1932 All. 543; see also A. I. R. 1926 Mad. 135=23 L. W. 406; 3 Pat. 275=6 P. L. T. 209=83 Ind. Cas. 871; 41 C. W. N. 1087; A. I. R. 1936 Pat. 2; but see 53 Ind. Cas. 441. There is no cause of action for maintenance and residence where there is allegation that applicant was turned out by her husband. A. I. R. 1927 Lah. 56=98 Ind. Cas. 879. In pauper application elaborate enquiry on merits of case is not permissible. A. I. R. 1926 Mad. 1160=97 Ind. Cas. 349; see also 87 Ind. Cas. 737; 41 M. 620=45 I. C. 95; 76 Ind. Cas. 40; 73 Ind. Cas. 946; A. I. R. 1932 Rang. 107 (F. B.); A. I. R. 1933 All. 779; but see 11 O. L. J. 568=79 Ind. Cas. 922. If no cause of action is disclosed pauper application should be dismissed without enquiry into poverty of applicant. 9 Bur. L. T. 228=38 Ind. Cas. 566; A. I. R. 1936 Sind 130=30 S. L. R. 314. Where the allegations in the plaint show a cause of action an application should not be rejected *in limini* even though it may be that on the merits, the plaintiff has no claim. A. I. R. 1935 Lah. 124; see also A. I. R. 1935 Lah. 961; 1935 M. W. N. 1270=69 M. L. J. 816; An

application should be rejected if it is found to be barred by the rule of *res judicata*. A. I. R. 1936 Pesh. 39. Order rejecting petition on ground that subject-matter is *res judicata* is illegal and open to revision. A. I. R. 1925 All. 275=23 A. L. J. 200=86 Ind. Cas. 781. Undischarged bankrupt cannot sue for debt due since adjudication order. 5 P. L. T. 606=79 Ind. Cas. 56 ; see also 87 Ind. Cas. 720=48 M. L. J. 491. For the purpose of deciding whether the allegations of the application show a cause of action under rule 5 (d), the Court must take into consideration the averments in the application and any statement, by the applicant regarding the merits of the claim made in the course of the application under rule 4, but the Court is not entitled to take into account any other evidence, oral or documentary, in considering whether the allegations disclose a cause of action. A. I. R. 1934 Rang. 124=151 Ind. Cas. 429.

**Clause (e).**—Agreement in order to bar an application under Order 33, rule 5(e), must be one with reference to the subject-matter of the suit instituted and must be champertous. 37 Ind. Cas. 172 ; see also A. I. R. 1926 Lah. 642 ; see also 43 L. W. 717=A. I. R. 1936 Mad. 665. *Benamidar* cannot be allowed to sue as pauper as it would give non-pauper a right to evade fiscal land and infringe provisions of r. 5(e) by setting up pauper nominees. 50 Ind. Cas. 520. Statement by pauper "I have not yet paid any fees to pleader" but I have undertaken to pay him fees when I obtain decree for my share" is not sufficient to dismiss application. A. I. R. 1931 Rang. 68=138 Ind. Cas. 831. Matters in clauses (c) and (e) relate to pauperism on which evidence can be adduced under rule 6. 10 Rang. 357=A. I. R. 1932 Rang. 107 (F. B.). This rule has been enacted to prevent payment of Court-fee being evaded and it matters little with what purpose the agreement has been entered into, whether it is an honest or *bona fide* one or of an improper character is an irrelevant factor quite outside the scope of the enquiry. The principle underlying the provision is that a person ought not to be allowed to sue in *forma pauperis* after transferring his interest to a third party, no matter for what reason the transfer has been made. The question is whether at the date of institution of the suit there was a subsisting agreement falling within the provision. For a plaintiff to be dispaupered all that need be shown is, that he has entered into an agreement of the character described in respect of the subject-matter of the suit and there was no warrant for assuming that the agreement should be one made with reference to or in view of the intended suit or appeal. A. I. R. 1937 Mad. 161. In case of advance of money out of piety and without agreement securing repayment, mere hope of repayment does not make the understanding illegal. A. I. R. 1934 Rang. 214=151 Ind. Cas. 429. The agreement referred to in clause (e) which authorises a Court to reject an application for permission to sue as pauper is one which is champertous. 38 C. W. N. 1069=A. I. R. 1934 Cal. 740. Such agreement must also be an agreement which is subsisting and effective on the date of the application for leave to sue as pauper. 11 O. W. N. 1356=152 Ind. Cas. 417.

**Revision, etc.**—Order rejecting petition for permission to sue as pauper is open to revision. 52 M. L. J. 330=A. I. R. 1927 Mad. 441 ; A. I. R. 1933 Sind 82 ; I. R. 1934 Lah. 231 ; but see 20 A. L. J. 55=44 A. 248=65 Ind. Cas. 255. Order rejecting pauper application is not appealable but does not bar suit in any ordinary way. 39 Ind. Cas. 942 ; A. I. R. 1931 Rang. 129. Court rejecting pauper application can also review its own order. 20 C. W. N. 669=33 Ind. Cas. 812.

**6. [S. 408.]** Where the Court sees no reason to reject the application

on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof.

**Scope.**—Under rules 6 and 7, Court adduces evidence in any matters referred to the rule 5 and gives a decision thereon. 50 Ind. Cas. 520. But rule 6 does not empower the Court to adduce evidence as to plaintiff's title. 45 A. 548=21 A. L. J. 441=73 Ind. Cas. 538. Disposal of pauper application without notice to the opposite party and the Government pleader and without evidence adduced in disproof of pauperism is acting without jurisdiction. 100 Ind. Cas. 726=A. I. R.

1927 Cal. 464. But ultimate question of the suit should not be tried in an application under Order 33. A. I. R. 1927 Rang. 72=5 Bur. L. J. 174.

7. [S. 409.] (1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper.

Notes.—Defendant must be allowed to disprove pauperism inspite of Government Pleader's report to the contrary. 48 M. 700=47 M. L. J. 932=85 Ind. Cas. 20. Only such defects of form as unfavourably reflect on the merits of the application must be regarded as justifying an order refusing to allow the applicant to sue as pauper. 31 N. L. R. 386=157 Ind. Cas. 294=A. I. R. 1935 Nag. 168.

8. [S. 410.] Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit, shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plaintiff shall not be liable to pay any Court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit.

Scope.—Plaintiff or appellant whose application to sue in *forma pauperis* has been granted has not to pay the Court fees at all. A. I. R. 1930 Rang. 342. Until the application to sue as a pauper is granted, there is no suit as such. 21 C. W. N. 870=38 Ind. Cas. 600; see also 52 Ind. Cas. 688; 65 Ind. Cas. 506=18 N. L. R. 44. Suit in case of pauper application should be regarded as instituted on the date on which the pauper application is made and the Court-fee is payable from that date. A. I. R. 1926 Mad. 159=49 M. L. J. 538; see also A. I. R. 1928 Nag. 296; A. I. R. 1929 Mad. 828=53 M. 43. The application to sue in *forma pauperis* is a potential plaint. If it is rejected under rule 5 or rule 7 it never ripens into a plaint. If the application ripens into a plaint, then the date of institution of the suit shall relate back to the date of filing of the application to sue in *forma pauperis*. If, on the other hand, such an application is rejected, it cannot be deemed to be a plaint, and the payment of the Court-fee after the application to sue in *forma pauperis* has been rejected cannot revive a potential plaint which ceased to exist when the application for leave to sue in *forma pauperis* was rejected. So where an application for permission to sue in *forma pauperis* is rejected and a full Court-fee is paid for a suit for the same relief, the suit must be considered for the purpose of limitation to have been instituted only after the payment of the Court-fee and not at the date of the presentation of the petition to sue as pauper. A. I. R. 1937 Lah. 151. An application for review of judgment passed in a suit or appeal in *forma pauperis* must, under the law, be considered to be one in continuation of the suit or appeal as the case may be, which is *forma pauperis*. 40 C. W. N. 1407=A. I. R. 1936 Cal. 752.

9. [S. 411.] The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order of the plaintiff to be dispaupered—

(a) if he is guilty of vexatious or improper conduct in the course of the suit;

(b) if it appears that his means are such that he ought not to continue to sue as a pauper; or

(c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter.

**Scope**—Heirs of papuer plaintiff, brought on record can be dispaupered. A. I. R. 1931 Mad. 324=1931 M. W. N. 199. Executor can sue as pauper. A. I. R. 1930 Lah. 735. Pauper application can be dismissed for the laches of the applicant in not bringing the representatives of the opposite party on record within reasonable time. A. I. R. 1929 Mad. 136=116 Ind. Cas. 111. Legal representatives cannot be dispaupered for possessing sufficient means. 48 M. L. J. 397=87 Ind. Cas. 372. Dispaupering has no retrospective effect. 48 M. L. J. 390=87 Ind. Cas. 372. Omission to state in the list of assets an insurance policy of small value is only an improper conduct. 24 Bom. L. R. 734=45 B. 1017=70 Ind. Cas. 954. Engaging an eminent pleader is no cause of dispaupering. 77 Ind. Cas. 611=4 Pat. L. T. 538. When a plaintiff has been declared a pauper, *res judicata* does not prevent the question from being reopened. The question can be reopened on any one of three grounds mentioned in rule 9. 149 Ind. Cas. 1004=A. I. R. 1934 All. 323. The case falls under clause (c) where there was an agreement by pauper to advance to his advocate sum of Rs. 3500 in case of success. A. I. R. 1927 Rang. 283=6 Bur. L. J. 152. Order declaring plaintiff or pauper is not *res judicata*. A. I. R. 1934 All. 323. Clause (c) contemplates an agreement in and by which an interest is transferred or created in the subject-matter of the suit in favour of a person who is not entitled to it, and would not cover a case where by virtue of a family settlement between the parties there is recognition of an antecedent title in one of the parties to the suit. A. I. R. 1935 Mad. 576. Rule 9 (c) must be construed as meaning that a person cannot sue as a pauper if at the time of the petition some other person has under an agreement an interest in the subject-matter of the suit. 59 M. 901=1936 M. W. N. 785=71 M. L. J. 355. For an added defendant there is nothing in Order 33, which contemplates a fresh inquiry into papuperism merely from the fact that other defendants are subsequently added to the suit. But an added defendant can apply under rule 9, for dispaupering the plaintiffs for one of the reasons given in Order 9. A. I. R. 1936 Pesh. 51=161 Ind. Cas. 51. The mere fact that the issue will be decided agreed in the suit is no reason why it should not be decided in proceeding for dispaupering. A. I. R. 1931 All. 323.

10. [S. 411.] Where the plaintiff succeeds in the suit, the Court shall

**Costs where pauper succeeds.** calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper; such amount shall be recoverable by the "Provincial Government"\* from any party ordered by the decree to pay the same, and shall be a first charge on the subject-matter of the suit.

**Scope and object**—Object of rule 10 is clearly to facilitate the recovery by Government of Court-fee, where a pauper plaintiff has realised something from his litigation and to make Government as the first creditor of a successful pauper plaintiff. 42 M. L. J. 191=14 L. W. 529=69 Ind. Cas. 743. Under this rule two distinct rights in Crown are created, one right against the property recovered in the suit, other right against the pauper ordered to pay the decree. 50 Ind. Cas. 315=4 Pat. L. J. 166. Rules 10 and 11 are not *ultra vires* of the Indian legislature. A. I. R. 1928 Mad. 385=54 M. L. J. 263. These rules are applicable to suits in the original side of the High Court. *Ibid.* Court-fee payable under rule 10 is what is payable on the date of the plaint. A. I. R. 1926 Mad. 474=50 M. L. J. 280; 27 S. L. R. 240=A. I. R. 1933 Sind 354. Defendant can be ordered to pay Court-fee only to the extent to which the claim of the plaintiff is allowed, plaintiff being liable for the balance where plaintiff succeeds in part only. A. I. R. 1930 Mad. 1000=32 L. W. 172=53 M. 780; A. I. R. 1928 Mad. 216=54 M. L. J. 530=28 L. W. 328; 14 A. L. J. 657=38 A. 469=35 Ind. Cas. 46. It is within the discretion of the Court as to who should pay the costs and the Court-fees. A. I. R. 1928 Cal. 196=55 C. 488=32 C. W. N. 48; A. I. R. 1930 Pat. 353=11 P. L. T. 257=122 Ind. Cas. 152. Appellate Court direct the plaintiff to pay the difference of Court-fee when the suit is decreed in part only. A. I. R. 1926 Mad. 474=50 M. L. J. 280. Where pauper plaintiff succeeds in a suit for future maintenance the proper method to recover Court-fee is by appointing a Receiver to collect maintenance. A. I. R. 1926 Mad. 565=49 M. 567=50 M. L. J. 279; see also A. I. R. 1926 Cal. 859; A. I. R. 1933 Bom.

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350=57 B. 507=35 Bom. L. R. 615. Pauper plaintiff cannot be ordered to pay the costs of amendment of plaintiff then and there and the suit cannot be dismissed on default of such payment. A. I. R. 1922 Bom. 335=24 Bom. L. R. 924=47 B. 104=75 Ind. Cas. 128. Where a suit in *forma pauperis* was decreed in terms of a compromise whereby the defendant was to pay the plaintiff a part of his claims and the decree made the plaintiff liable for the whole Court-fees and also made it a charge on the subject-matter of the compromise, but the money being paid out to the plaintiff out of Court before the decree was drawn up, satisfaction of the same was entered and subsequently the Government started an execution case against the defendant for realising the Court-fees: *Held* that the application in execution was misconceived and in circumstances the defendant was not liable to pay the Court-fees. 39 C. W. N. 1274. Purchaser of decree from pauper decree-holder takes it subject to charge of Court-fee. A. I. R. 1934 All. 438. Where an appeal in *forma pauperis* is partially accepted, the Government is entitled under Order 33, rule 10, C. P. Code to the full amount of the Court-fee which was payable on the Memorandum of Appeal, if the appellant had not been allowed to appeal in *forma pauperis*. 36 P. L. R. 22. Property on which future maintenance is charged cannot be sold by Government for realising Court-fees. A. I. R. 1935 Sind 21=154 Ind. Cas. 580.

11. [S. 412.] Where the plaintiff fails in the suit or is dispaupered, Procedure where pauper fails. or where the suit is withdrawn or dismissed,—

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the Court-fee or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing, the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper.

**Scope.**—Next friend can be ordered to pay costs in place of minor. Payment of Court-fee by plaintiff is included in the costs of the suit. A. I. R. 1931 Mad. 249=58 M. L. J. 623=53 M. 716. Dispaupering order operates retrospectively in respect of Court-fee. A. I. R. 1934 All. 323. An order dispaupering the plaintiff operates retrospectively in respect of payment of Court-fees. A. I. R. 1934 All. 323=149 Ind. Cas. 1004.

12. [*New.*] The "Provincial Government"\* shall have the right at any time to apply to the Court to make an order Government may apply for for the payment of Court-fees under rule 10 payment of Court-fees. or rule 11.

**Notes.**—It is not competent if it thought there was a better prospect of recovering the Court-fee from the next friend who might be a person of property than from the pauper plaintiff, to apply under rule 12 for an order making the next friend pay the Court-fee. A. I. R. 1937 Mad. 145. The Court cannot deprive the Government of the right which, is expressly given by rules 11 and 12 to pass an order that the plaintiff, shall pay the Court-fee when a pauper suit fails. *Ibid.* It is not the function of a Court of appeal to give effect to the right of the Government conferred by rule 12. It must on admission of the appeal dispose of it in the manner laid down by Order 41. Order 33, rule 13, makes it clear that the Government should proceed in the trial Court for recovery of the Court-fee to which its right has been declared by rule 12. The appellate Court cannot enforce the right of Government in the matter of Court-fees either by issuing a process or by directing the pauper appellant to pay the Court-fee and costs awarded to Government on face of his properly stamped appeal being dismissed. A. I. R. 1937 All. 280.

\* In British India the words "Provincial Government" have been substituted for the word "Government" by G. I. Order of 1937. But read "Government" for "Provincial Government" so substituted in British Burma.

13. [New] All matters arising between the "Provincial Government"\* and any party to the suit under rule 10, rule 11 or rule 12 shall be deemed to be questions arising between the parties to the suit within Government to be deemed a party.

the meaning of section 47.

14. [New.] Where an order is made under rule 10, rule 11 or rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector. Copy of decree to be sent to Collector.

Notes.—Where a plaintiff is ordered to pay a certain sum to the Government all that the Code requires is to send a copy of the decree to the Collector. A. I. R. 1930 Rang. 342=8 Rang. 294=127 Ind. Cas. 606.

15. [S. 413.] An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the "Provincial Government"\* and by the opposite party in opposing his application for leave to sue as a pauper.

Scope.—Refusal of pauper application bars a subsequent application but withdrawal does not. A. I. R. 1931 Rang. 79=131 Ind. Cas. 64; see also 40 C. L. J. 188=84 Ind. Cas. 703; 2 Bur. L. J. 217=76 Ind. Cas. 785; 20 C. W. N. 669=33 Ind. Cas. 812; 73 Ind. Cas. 897=A. I. R. 1924 Lah. 312. Rejection of application under rule 5 is no bar to subsequent application under rule 5. 10 O. W. N. 1145=A. I. R. 1933 Oudh 554. Where previous application is withdrawn, subsequent application is not barred. A. I. R. 1931 Rang. 79=131 Ind. Cas. 64. Where first application was dismissed for not being in accordance with rules and the second dismissed for default, third application to sue in respect of the same right in *forma pauperis* is not barred. A. I. R. 1926 Rang. 200=4 Rang. 245=98 Ind. Cas. 26; 85 Ind. Cas. 982. Rules 5, 6, 7 and 15 should be read together. 31 C. L. J. 351=57 Ind. Cas. 9. When first application to sue for maintenance in *forma pauperis* was dismissed on the ground that the plaint did not disclose any cause of action, second application to sue in *forma pauperis* to recover maintenance for a period more than two years subsequent to the date of the previous application is not barred under rule 15. 31 C. L. J. 351=57 Ind. Cas. 9. Omission to insert a schedule of property does not bar a second application to sue in *forma pauperis*. 1 Lah. 151=56 Ind. Cas. 207. Second application to sue in *forma pauperis* is not barred though first was rejected under Order XXXII, rules 2 and 3 even after hearing the other side. 9 L. B. R. 93=42 Ind. Cas. 803. Dismissal of an application to sue in *forma pauperis* does not amount to rejection of plaint, which remains and may be validated by payment of Court-fees within time fixed by the Court. 46 M. L. J. 254=76 Ind. Cas. 767. The words "right to sue" have substantially the same meaning as the words "cause of action". A. I. R. 1936 Nag. 283. Rule 15 must be read in conjunction with rule 7 and not with rule 5. The Court would obviously be transgressing their legitimate province if they attempt to put such a wide construction on the wording of rule 15 as to include an order of rejection. The intention of the legislature must be gathered from the actual words used in rule 15 in describing the order of refusal which constructively put to sub-rule (3) of rule 7. An *ex parte* order passed under rule 15 is not governed by rule 15. 31 N. L. R. 386=157 Ind. Cas. 294=A. I. R. 1935 Nag. 168. Where there is no order for payment of cost a suit can be maintained without payment of cost. A. I. R. 1935 All. 723 (F. B.)=1935 A. L. J. 857. Cost should be paid prior to the institution of the suit. 59. M. L. J. 791.

16. [S. 415.] The costs of an application for permission to sue as a pauper and of an inquiry into pauperism shall be costs in the suit.

• Costs.

\* In British India the words "Provincial Government" have been substituted for the word "Government" by G. I. Order of 1937. But read "Government" for "Provincial Government" so substituted in British Burma.

## ORDER XXXIV.

*Suits relating to Mortgages of Immovable Property.*

1. [T. P. Act, S. 85.] Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage.

*Explanation*—A *puisne* mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit; and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage.

**Scope of Order XXXIV.**—Civil Procedure Code is the guide in mortgage suits in India not English practice. 91 Ind. Cas. 258=2 O. W. N. 826. Order 34 has no application to compromise decrees. 14 Pat. 488=155 Ind. Cas. 976=16 Pat. L. T. 311=A. I. R. 1935 Pat. 385. This order is not applicable to decrees on the arbitrator's award. A. I. R. 1930 Lah. 166; A. I. R. 1933 Lah. 179; A. I. R. 1933 Lah. 48. Proceedings taken under Order 34, are execution proceedings and hence Order XLI, rule 6, is applicable. A. I. R. 1929 Lah. 552=30 P. L. R. 371. Court cannot appoint Receiver of the mortgaged property in a suit for its sale under Order XXXIV. A. I. R. 1929 Lah. 730=122 Ind. Cas. 483; see also A. I. R. 1933 Rang. 94. In execution by sale of mortgaged property, Court cannot order the arrest of judgment-debtor. A. I. R. 1930 Lah. 103=31 P. L. R. 143. Rules of Order 34 apply to mortgage suits relating to movables as well. 36 C. W. N. 263=A. I. R. 1932 Cal. 524=59 C. 667. Interest is to be determined according to Order 34 and not according to s. 34. A. I. R. 1933 Oudh 128=8 Luck. 315; see also A. I. R. 1927 P. C. 1=54 C. 161=31 C. W. N. 399=54 I. A. 1 P. C. Interested party if not joined can claim redemption before foreclosure or sale. 47 C. 924=24 C. W. N. 954=56 Ind. Cas. 274 (P. C.). Where mortgagor transfers equity of redemption, decree against him does not bind transferee. 45 Ind. Cas. 606=21 O. C. 70; see also 22 C. W. N. 543=28 C. L. J. 256; 34 Ind. Cas. 367; 36 Ind. Cas. 744.

**Scope.**—Object of rule 1 is that all claims affecting equity of redemption should be disposed of in the same suit. 50 M. 180=A. I. R. 1927 P. C. 32=52 M. L. J. 338=29 Bom. L. R. 805=31 C. W. N. 670 (P. C.). This rule is not intended to punish omission to join parties whose title-deeds or existence is not known to plaintiff. 5. N. L. J. 157 (F. B.)=66 Ind. Cas. 631; see also 61 Ind. Cas. 412=19 A. L. J. 185. *Puisne* mortgagee is not required to implead prior mortgagee as a party in a suit for foreclosure or sale. The principle will be the same when the subsequent mortgagee and the prior mortgagee happen to be one and the same person. 4 P. L. T. 546=74 Ind. Cas. 820; see also 50 A. 742=26 A. L. J. 529=A. I. R. 1928 All. 378; 86 Ind. Cas. 748=12 O. L. J. 127. Where it is possible for Court to do justice between the parties before it, it should do so and should not make rule 1 a ground for dismissing the entire suit. A. I. R. 1929 A. 941=52 A. 134. Non-compliance is not fatal. 35 C. W. N. 1138=60 C. 87; A. I. R. 1936 Pat. 153; A. I. R. 1936 Sind 87=30 S. L. R. 42. Party knowingly omitting to do what is enjoined by law cannot invoke aid of equity. 55 C. L. J. 299=A. I. R. 1932 Cal. 561. All mortgagees or heirs of mortgagees must be parties to the suit. 37 C. W. N. 478=60 C. 777. If a proper party in mortgage suit is omitted, his right to pursue his own remedy is not affected by that suit. A. I. R. 1932 Mad. 115=62 M. L. J. 272. Mortgaged security does not mean the mere lands which the mortgagor professes to mortgage. The mortgaged security means not the physical object but the interest therein which the mortgagor is competent to transfer by way of mortgage at the date of the transaction. A. I. R. 1936 Rang. 198. The holder of a money-decree against the mortgagor who has obtained an order for a Receiver in execution of his decree is not a person having interest in the mortgaged property or in the right of redemption so as to make him a necessary party to a suit on mortgage under this rule. 45 C. W. N. 974. Rule 1 is the rule of procedure and does not purport to deal with substantive rights of parties or the extinguishment of such rights. 30 S. L. R. 42=164 Ind. Cas. 69=A. I. R. 1936 Sind 87. No decree should be passed against third party, who claims an interest in the property not in mortgagor's interest. A. I. R. 1936 Rang. 198=162 Ind. Cas. 731. Rule 1 does not require that in a suit on a mortgage the owner of the equity of redemption must always fill in the role of a defendant. 70 M. L. J. 719=A. I. R. 1936 Mad. 814=43 L. W. 628=1936 M. W. N. 408=59 M.



1042. All parties having beneficial interest in the property at the date of the suit should be made parties. 38 C. W. N. 1045. Non-compliance with the provisions of rule 1 is not necessarily fatal to the suit to enforce a mortgage. A. I. R. 1934 Oudh 220=11 O. W. N. 524=148 Ind. Cas. 524. Rule of joining all persons interested in redemption is rule of procedure. If in a suit for redemption some of the persons interested in redemption are not joined, the Court should decide if it can adjudicate upon the rights of parties actually present. A. I. R. 1937 Pat. 414. Where in a suit for sale of mortgaged property the alienee of the whole interest of the mortgagor in the property, is made a party after expiry of the period of limitation, the suit must wholly fail. 150 Ind. Cas. 597=A. I. R. 1934 Pesh. 38 ; see also 61 C. L. J. 560=A. I. R. 1935 Cal. 667 ; A. I. R. 1935 Sind 131. Order 34, rule 1, is a rule of procedure only and is subject to the provisions of Order 1, r. 9, and there is nothing in the rule which either does or can deprive a first mortgagee of his inherent right to bar the equity of redemption of a second mortgagee. 155 Ind. Cas. 318=A. I. R. 1935 Rang. 139. The rights of a secured creditor over a property are not affected by the mortgagor being adjudicated an insolvent. A. I. R. 1935 Cal. 460=39 C.W.N. 384=62 C. 483=157 Ind. Cas. 140.

**Proper Parties.**—Only a person having interest either in the mortgage security or in the right of redemption can be joined as a party. 33 P. L. R. 240=136 Ind. Cas. 728 ; A. I. R. 1930 Mad. 801 (F. B.). If necessary party is not pleaded within time the whole suit will be dismissed. 36 Ind. Cas. 542=1 Pat. L. J. 468. All the mortgagees are necessary parties and must be impleaded in a suit to enforce the mortgage. But in a case of a deceased mortgagee, if his estate is effectively represented by the persons on the record, the suit is good and not defective. 16 P. L. T. 689 ; see also A. I. R. 1935 Lah. 203. Proper parties are not always necessary parties. A. I. R. 1935 Rang. 315=158 Ind. Cas. 828.

**Prior mortgagee.**—In a suit by *pui*sne mortgagee prior mortgagee is not necessary party. A. I. R. 1931 All. 549=53 A. 531=1931 A.L.J. 398 ; see also A. I. R. 1931 All. 76=1930 A. L. J. 1222. In a suit by *pui*sne mortgagee if prior mortgagee is joined, he can claim subrogation. A. I. R. 1929 Nag. 135=118 Ind. Cas. 54 ; see also A. I. R. 1936 Rang. 340. The mere fact that the prior mortgagee was impleaded by mistake does not affect the nature of the decree which should be passed. A. I. R. 1930 All. 113=(1930) A. L. J. 321=52 A. 426 ; see also A. I. R. 1931 Pat. 33=9 Pat. 816.

**Puisne mortgagee.**—If a subsequent mortgagee is not made a party to the prior mortgagee's suit, the subsequent mortgagee gets the right to redeem the prior mortgagee, and the amount of money to which the prior mortgagee is entitled is the amount of the mortgage loan with interest at the stipulated rate of interest and not the amount of decree passed on the prior mortgagee's suit. A. I. R. 1930 All. 485=1930 A. L. J. 573=52 A. 331 ; see also A. I. R. 1928 Lah. 593 ; A. I. R. 1927 All. 488 ; 6 N. L. J. 237=82 Ind. Cas. 77 ; 94 Ind. Cas. 284=A. I. R. 1926 Pat. 337=5 Pat. 513. Where decree in the suit by the subsequent mortgagee declared his priority, the suit by the prior mortgagee will be barred by *res judicata*, 71 Ind. Cas. 948=2 Pat. 435 ; but see 47 C. 692=38 M. L. J. 424=47 I. A. 11=55 Ind. Cas. 959 P. C. Where in a suit by a prior mortgagee *pui*sne mortgagee is not impleaded his right, is not affected. 33 Ind. Cas. 815=86 P. R. 1916 ; see also 33 Ind. Cas. 243=18 O. C. 347 ; A. I. R. 1928 Lah. 593 ; 38 Ind. Cas. 179 ; A. I. R. 1932 Cal. 561 ; 14 A. L. J. 337=36 Ind. Cas. 703 ; 58 Ind. Cas. 295 ; 42 A. 364=47 I. A. 71=25 C. W. N. 397=55 Ind. Cas. 969 (P. C.) ; 26 C. W. N. 279=42 M. L. J. 15=24 Bom. L. R. 590=48 I. A. 465=43 A. 469 (P. C.) ; 13 Pat. 364=A. I. R. 1934 Pat. 648 ; 38 C. W. N. 1178. Where *pui*sne mortgagee is not made parties, prior mortgagee can after depositing in Court money due on *pui*sne mortgagee, claim to redeem *pui*sne mortgage. 20 A. L. J. 401=44 A. 452=67 Ind. Cas. 841. Prior mortgagee cannot sue subsequent mortgagee for possession after limitation on prior mortgagee nor compel him to redeem his mortgage. A. I. R. 1926 All. 480=24 A. L. J. 661. Question of contribution between several subsequent mortgagees is foreign to mortgage suit. A. I. R. 1923 Pat. 199=4 P. L. T. 91=71 Ind. Cas. 942. First mortgagee in possession under prior sale may always shield himself under his mortgage and purchase, though his right to possession is defective. A. I. R. 1923 Rang. 107=1 Bur. L. J. 217=74 Ind. Cas. 151. Not impleading subsequent mortgagee or other person interested in mortgaged property does not make whole proceeding null and void. A. I. R. 1931 All. 466 (F. B.)=1931 A. L. J. 729=53 A. 1023.

**Sub-mortgagee.**—In redemption suit relief against sub-mortgagee can be given. A. I. R. 1927 Mad. 703=101 Ind. Cas. 728. First mortgagor is not necessary party in redemption suit by mortgagee to redeem his sub-mortgage. 24 Bom. L. R. 911=68 Ind. Cas. 741; see also 3 Lah. L. J. 373=67 Ind. Cas. 421. Mortgagor without notice of sub-mortgage paying off mortgagee in redemption suit is not bound by sub-mortgage. 30 M. L. T. 21=63 Ind. Cas. 192.

**Paramount title.**—Question of paramount title should not ordinarily be decided in mortgage suit. 59 C. 548=1932 Cal. 512; see also 10 Pat. 234=A. I. R. 1931 Pat. 64; 18 N. L. J. 291. Person who claims title paramount to mortgagor and mortgagee is not a necessary party. 80 Ind. Cas. 753=2 Rang. 106; see also 73 Ind. Cas. 428=10 O. L. J. 263; 20 C. W. N. 1079=35 Ind. Cas. 959=14 A. L. J. 1002 (P. C.); 47 Ind. Cas. 179; 44 C. 425=21 C. W. N. 127; 54 Ind. Cas. 806; 63 Ind. Cas. 92=25 C. W. N. 192. Paramount title is one which originates independently of the parties to the mortgage and it can be investigated in mortgage suit, if it is necessary to give complete relief. A. I. R. 1931 Nag. 20=26 N. L. R. 359. In a mortgage suit a stranger setting up an adverse claim of title cannot be made a party for the purpose of litigating that in the mortgage suit. A. I. R. 1929 Cal. 672=33 C. W. N. 659; see also A. I. R. 1930 Nag. 89=13 N. L. J. 1. The mortgagee plaintiff should not be allowed in his suit on mortgage to raise a controversy as regards the title of a third person claiming a paramount title. A. I. R. 1930 Oudh 97=7 O. W. N. 25=121 Ind. Cas. 277. In a suit to enforce mortgage, a person claiming paramount title is not necessary or proper party. 100 Ind. Cas. 195=A. I. R. 1927 Sind 265; see also A. I. R. 1927 Mad. 301=52 M. L. J. 52; 1927 Oudh 607; A. I. R. 1927 Pat. 45=7 P. L. T. 737; A. I. R. 1928 Mad. 764; but see A. I. R. 1928 Mad. 2=53 M. L. J. 647; A. I. R. 1935 All. 205=1934 A. L. J. 1177. But he can be made a party where it is just and convenient to decide such title in that suit. A. I. R. 1935 Nag. 68. Mortgagee can implead persons who as prior transferees claim paramount title to mortgaged property. A. I. R. 1937 All. 251. Rule as to non-joining person claiming adverse title is not inflexible. A. I. R. 1928 Mad. 2=53 M. L. J. 647.

**Official Receiver.**—The Official Receiver is not a necessary party in a suit by the mortgagee of an insolvent mortgagor to enforce the mortgage. A. I. R. 1930 Lah. 791=31 P. L. R. 506=126 Ind. Cas. 174; see also A. I. R. 1925 Cal. 785=29 C. W. N. 771=86 Ind. Cas. 1042; A. I. R. 1927 Mad. 609.

**Attaching creditor.**—Attaching creditor has no right to be made party in mortgage suit. A. I. R. 1929 All. 861=122 Ind. Cas. 766; 89 Ind. Cas. 446; 62 Ind. Cas. 121=44 M. 232=40 M. L. J. 65; 1936 A. L. J. 708=A. I. R. 1936 All. 512; A. I. R. 1936 Nag. 209; 1934 A. L. J. 1085=A. I. R. 1934 All. 1027. An attaching creditor under a money-decree against mortgagor is entitled to redeem the mortgage. 73 Ind. Cas. 8.

**Co-Mortgagee.**—Failure to join co-mortgagee's heirs vitiates suit by other mortgagee. A. I. R. 1926 Cal. 416=89 Ind. Cas. 121.

**Co-heirs.**—Where some heirs of mortgagor are not parties, plaintiff can get decree for proportional amount of mortgage money. 25 C. W. N. 594=66 Ind. Cas. 312; see also 51 C. 223=43 B. 575. Suit by only one co-heir of mortgagee cannot be maintained. 36 Ind. Cas. 77.

**Co-mortgagors.**—Where all persons interested in the equity of redemption are not on record, only the interest of the defendants joined in the suit can be sold. 72 Ind. Cas. 458; see also 82 Ind. Cas. 638=29 C. W. N. 51. In a redemption suit a co-mortgagor who is not suing for redemption is a necessary party. A. I. R. 1929 All. 814=119 Ind. Cas. 97; see also A. I. R. 1926 All. 46=48 A. 171=24 A. L. J. 83. Where against dismissal of redemption suit only one mortgagor appealed, others are not necessary parties to appeal. A. I. R. 1927 Cal. 479=100 Ind. Cas. 521. The liability of mortgagor *inter se* can only be determined in separate suit. A. I. R. 1927 Pat. 117=8 P. L. T. 255.

**Joint Hindu family.**—Where manager of joint Hindu family representing the family is alone sued to enforce mortgage, rule 1 is complied with. A. I. R. 1927 Oudh 27=3 O. W. N. 954; see also A. I. R. 1926 Pat. 207=4 Pat. 723; 80 Ind. Cas. 34=3 Pat. 329; 71 Ind. Cas. 948=2 Pat. 455. *Karta* of joint Hindu family represents the whole family. 63 Ind. Cas. 564=2 P. L. T. 553=(1921) Pat. 289; 39 Ind. Cas. 779=(1917) Pat. 137; 45 Ind. Cas. 76; 46 Ind. Cas. 727; 58 Ind. Cas. 489=1 P. L. T. 582; 53 Ind. Cas. 411=125 P. R. 1919; A. I. R. 1930 Pat. 293; 50 Ind. Cas. 243;

40 Ind. Cas. 525 ; 37 Ind. Cas. 833 ; 36 Ind. Cas. 64. Where minor co-parcener is not joined the suit is not bad, but minor will not be bound. A. I. R. 1925 All. 335=47 A. 427=23 A. L. J. 246=87 Ind. Cas. 700.

**Landlord.**—Landlord is not necessary party in a suit to enforce mortgage of non-transferable occupancy holding. 22 C.W. N. 662. But if he is made a party the rights of the parties should be determined in the same suit. 8 Pat. 439=A. I. R. 1929 Pat. 222.

**Lessee.**—*Vide* A. I. R. 1927 Pat. 411=8 P. L. T. 229 ; A. I. R. 1926 Nag. 496=23 N. L. R. 128 ; A. I. R. 1923 Nag. 273=65 Ind. Cas. 503.

**Mortgagee.**—Original mortgagee is not a necessary party in redemption suit against mortgagee's assignee. 20 S. L. R. 277=91 Ind. Cas. 87.

**Tenant.**—In a suit for redemption alleged tenants of mortgagee setting up paramount title are proper parties. A. I. R. 1926 Bom. 522=28 Bom. L. R. 848 ; see also 78 Ind. Cas. 885=3 Pat. 244.

**Legal representatives.**—When the defendant dies after preliminary decree, some of his legal representatives who are already in record, can represent the estate. A. I. R. 1930 Mad. 69=57 M. L. J. 712 ; see also A. I. R. 1927 Mad. 1071. Legal representatives of mortgagor can raise only those objections as the original mortgagor can. A. I. R. 1930 Lah. 1068=31 P. L. R. 998. Heirs of intestate *Parsi* who intermeddle with his estate, are his legal representatives. A. I. R. 1927 Bom. 474=51 B. 771. Right *inter se* between the legal representatives of a deceased plaintiff mortgagee need not be decided. A. I. R. 1927 Mad. 1071.

**Non-joinder.**—The failure to bring on record one having equity of redemption does not necessarily entail dismissal of suit. A. I. R. 1931 Pat. 164=12 P. L. T. 28. Non-joinder of necessary parties is not fatal. 83 Ind. Cas. 262 ; but see A. I. R. 1927 All. 290 ; but see 33 C. W. N. 100 ; 66 Ind. Cas. 945. Where purchaser of equity of redemption is not made a party he is not bound by the mortgage decree. 49 C. 1048=28 C. W. N. 92 ; 24 Bom. L. R. 741=69 Ind. Cas. 165 ; 25 C. W. N. 253. Non-joinder of other co-mortgagees does not vitiate suit where mortgage bonds were in favour of one who sufficiently represents other. 40 C. L. J. 67=84 Ind. Cas. 124. Suit for sale should not be dismissed though *puisne* mortgagee was not joined in it. 21 A. L. J. 701=74 Ind. Cas. 943. It is doubtful if mortgagee can sue purchaser of equity of redemption. 25 C. W. N. 253. A subsequent mortgagee is not bound by a decree obtained on the foot of a prior mortgage when he is not made a party thereto. A. I. R. 1929 Pat. 94=11 P. L. T. 41.

Preliminary decree in foreclosure suit. "2. (1) In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(a) ordering that an account be taken of what was due to the plaintiff at the date of such decree for—

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date in respect of his mortgage security, together with interest thereon ; or

(b) declaring the amount so due at that date ; and

(c) directing—

(i) that, if the defendant pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the plaintiff shall deliver up to the defendant, or to such person as the defendant appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the

property to the defendant at his cost free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the defendant fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the plaintiff shall be entitled to apply for a final decree debarring the defendant from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court, from time to time, at any time before a final decree is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) Where, in a suit for foreclosure, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9 or Form No. 10, as the case may be, of Appendix D with such variations as the circumstances of the case may require.

*N. B.*—For local amendments in Bombay and Rangoon.—*Vide infra.*

**Notes.**—Rules 2 to 8 have been added by Act 21 of 1929. The reason of the amendment has been thus stated by the Special Committee :—

This order relates to mortgage suits and its provisions were originally in the Transfer of Property Act (section 85 to 99), but were transferred to the Code of Civil Procedure in 1908. The amendment of the Transfer of Property Act particularly the provisions relating to mortgages, necessitates the amendment of rules 2 to 8, 10, 11 and 15 of the Order.

We propose to make the following amendments in this rule, *viz* :—

(1) It should be expressly stated that the decree passed under this rule is "preliminary."

(2) In clause (a) of the present rule, the Court is merely directly directed to take an account of what would be due to the plaintiff on account of (a) principal and interest on the mortgage and (b) the costs of the suit. Under sections 72 and 76 of the Transfer of Property Act, a mortgagee is authorised to spend money for certain necessary purposes in connection with the mortgage security. Under section 63 A of the Transfer of Property Act, as proposed to be added, a mortgagee is allowed to spend money for improvements in certain circumstances. The above provisions also provide that the money so spent by a mortgagee should be added to the principal money. Clause (a) is therefore, amended to make it clear that in taking an account sums spent by a mortgagee for necessary costs, charges and expenses in respect of the mortgage-security, together with interest thereon, must be taken into account.

(3) Clause (a) of the present rule 2 provides that the account of the sum due to the plaintiff will be taken up to the date fixed for payment in the preliminary decree. The date so fixed is to be within six months from the date of the decree. Clause (b) however, which relates to the declaration by a Court of the amount due to a mortgagee, merely provides that the amount due at the date of the decree is to be declared. Although clause (c) provides that the Court has to fix a date for the payment of the amount so declared within six months, no provision is made for awarding costs, charges and expenses incurred by a mortgagee in respect of the mortgage-security subsequent to the date of the declaration or the decree. This seems anomalous. There is no reason why a mortgagee should lose subsequent costs, charges and expenses where the Court declares the amount. The scheme of Order XXXIV of the Code of Civil Procedure, 1908, is to draw a clear distinction between a preliminary and a final decree; rule 2 is amended to make it clear that

the amount to be declared or found due on taking accounts should be up to the date of the preliminary decree. The defendant will then be in a position to know what sum he has to pay in order to claim redemption. Care is taken to provide in clause (e) of sub-rule (1) of the amended rule that after tendering the amount so declared or found to be due, the defendant has to pay the amount which the Court may adjudge for subsequent interest and subsequent costs, charges and expenses. Rules 10 and 11 have been amended to empower a Court to adjudge the amount due in respect of such interest and costs.

(4) Although clause (a) of this rule refers to the date fixed for payment of the amount found to be due on taking accounts, clause (c) refers the date within six months from the date of the declaration of the amount due by the Court under clause (b). This appears to be an error. The date fixed for payment must be within six months from the date when the Court declares the amount due or, where it directs an account is to be taken from the date when such account is confirmed by the Court. Our amendment makes this clear.

(5) As the mortgagor or any other person seeking redemption has to bear all costs and expenses of the redemption, in clause (c) of sub-rule (1) it is made clear that the costs of re-conveyance or re-transfer by the mortgagee on payment of the amount due by the mortgagor shall be borne by the mortgagor or such other person.

(6) The proviso to sub-rule 2 to rule 3 provides for the extension of the time fixed for payment in the final decree. The power of the Court to extend the time fixed for payment is well recognised and is exercised at any time before a final decree for foreclosure is passed. The proper place for this provision is in the rule relating to the preliminary decree. The proviso is, therefore, placed in rule 2 as sub-rule (2). The expression "postpone the day" in this proviso has been replaced by the words "extend the time" to make it clear that the time can be extended even after the expiry of the period once fixed. Sub-rule (2) also makes it clear that the extension of the time fixed for payment must be subject to such terms as the Court may fix. It is not fair that after the plaintiff has obtained a decree for payment of the amount due on the mortgage and when the payment has been already postponed for six months, the plaintiff should be made to wait for payment for a further period without getting compensation. A defendant who applies for an extension of time must be put on terms before his application is granted.

(7) As clauses (a) and (b) of sub-rule (1) will provide for the adjudication of the amount due to a mortgagee till the date of the preliminary decree, in sub-rule (1) clause (c) it is made clear that after the payment of that amount the defendant is bound to pay subsequent costs and subsequent interest due to the plaintiff till the date of actual payment, which may be on or before date fixed in the preliminary decree or such other date to which the time for payment may have been extended under sub-rule (2). It has been well established that the mortgagee can add to mortgage-money the amount spent by him between the passing of the preliminary decree and the final decree. (I. L. R. 44 Cal. 448).

(8) It has been held that the right of a mortgagor to redeem the mortgaged property subsists till a final decree for foreclosure is passed (I. L. R. 27 Cal. 705). Default in payment on the day originally fixed in the preliminary decree for payment or on the day to which the time for payment may have been extended by the Court does not *ipso facto* extinguish the mortgagor's right of redemption. It is open to a mortgagor to apply for extension of time till a final decree for foreclosure has been passed, and he can do so even after the expiry of the period once fixed (I. L. R. 39 Mad. 882 ; 28 Bom. 102). Clause (d) of rule 2, as at present worded, is not consistent with the above rulings. It provides that if payment, as provided in the rule, is not made, the defendant will be debarred from all right to redeem the property. In sub-rule (2) of the amended rule, therefore, it is made clear that on non-payment of the amount due, the plaintiff will have only a right to apply for a decree for foreclosure. We propose to make it clear that the right of the plaintiff to file an application arises not only when the amount adjudged due in the preliminary decree is not paid in full, but also if any portion of the sums for subsequent costs and subsequent interest remains to be paid.

(9) Rules 2-8 of Order XXXIV do not specifically provide for decrees in suits for foreclosure or sale in which, besides the mortgagor other persons who are entitled to redeem, such as subsequent mortgagees or persons subrogated to their rights, are joined as parties. This omission was sought to be remedied by providing forms for

decrees in such suits—Forms Nos. 9 to 11 in Appendix D to the Code. Under Order XLVIII, rule 1 of the Code of Civil Procedure, 1908, forms are not binding and can be varied by the Courts. An express provisions in Order XXXIV itself is necessary to give full statutory force to the forms. As such cases will be of varied type and cannot all be anticipated, it will suffice to enact in Order XXXIV that in such cases the rights of the parties will be regulated in accordance with the forms given in the Appendix, with such variations as the circumstances of the case may require. Provisions to that effect are embodied in sub-rule (3) of rule 2 and sub-rule 3 of rule 4. In a redemption suit by a mortgagor such difficulties will not arise. Consequential amendments have been made in rules 7 and 8.

We propose to amend this rule in accordance with the alterations made in rule 2. It is expressly stated that the decree made under this rule is final. For the reasons stated in paragraph (5) above, it is made clear in this rule that the payment by the mortgagor can be made at any time till the final decree for foreclosure is actually passed. It is also made clear that on payment of the amount declared or found to be due in the preliminary decree, together with the amount due for the subsequent costs and subsequent interest, the mortgagee can on the application of the mortgagor, be ordered to re-convey or re-transfer the mortgaged property. The provisions regarding the application by the mortgagor has been added to avoid difficulties which arise in such cases as *I. L. R. 50 Bom. 730*. Owing to the absence of words to that effect in the original rule 8, the Court found it difficult to hold what article of limitation applied to a final decree on payment by the mortgagor. In sub-rule (3) of the proposed rule, it is provided that on foreclosure the liability of the defendant, not only in respect of the mortgage but for the costs of the suit also is discharged and extinguished. The effect of a final decree for foreclosure is to vest the mortgaged property absolutely in the mortgagee, and to extinguish not only the debt due on the mortgage but all liability arising in respect of the suit brought to enforce it. It is desirable that foreclosure, which is an exceptional remedy, should extinguish *in toto* the whole of the liability of the mortgagor.

We propose to amend this rule, which relates to a preliminary decree for sale, on the lines of rule 2. As by the amendment in the Transfer of Property Act it is proposed to allow the remedy of foreclosure only in the case of a mortgage by conditional sale and an anomalous mortgage providing the remedy of foreclosure, the power of the Court to grant the alternative relief of sale can only be exercised in the case of such an anomalous mortgage. By the very nature of the mortgage by conditional sale the Court cannot order a sale of the property. We propose to amend clause (2) by stating clearly that it applies only to an anomalous mortgage which provides for foreclosure. Sub-rule (3) is added to rule 4 on the same lines as rule 2 (3). It provides for a case where, besides the mortgagor, there are other parties in a suit for sale.

It should, however, be noted that in the case of a decree for sale there is no reason why the Court should extend the time for payment. Even after the sale is held, there is an opportunity to a mortgagor to redeem before the confirmation of the sale. No necessity, therefore exists for empowering Courts to enlarge the time before passing a final decree for sale (*I. L. R. 20 All. 354*).

Section 89 of the Transfer of Property Act, which was replaced by rule 5 of Order XXXIV, Code of Civil Procedure, 1908, contained at the end the words "and thereupon the defendant's right to redeem and the security shall both be extinguished". These words gave rise to the view that an order absolute under the section had the effect of extinguishing the rights arising out of the mortgage and substituting for them rights under the decree and the mortgagor could not redeem after the order absolute was made (*Hel Ram v. Shadi Ram*, 45 I. A. 130; *Matru Mal v. Durga Kunwar*, 47 I. A. 71). To avoid this result the words quoted above which occurred in section 89 were omitted in the corresponding rule 5 of Order XXXIV. No doubt is therefore, left that the right of a mortgagor to redeem is not extinguished by the mere passing of a final decree (42 All. 517, see also *Sukhi v. Gulam Safdar*, 48 I. A. 465 at p. 472). We propose to lay it down definitely that the right of a mortgagor to redeem subsists till the confirmation of the sale held in execution of the decree passed against him under rule 4 or rule 7. We have, however, made a provision for compensating the purchaser when a mortgagor seeks to redeem after the sale has taken place but before it is confirmed.

The words 'any such sale' in rule 6 and its position after rules 3 to 5 led to the view being taken that the personal decree for the balance of the amount due to a mortgagor after the sale can only be passed in a suit by a mortgagee far sale, and not in a redemption suit by a mortgagor, although in a redemption decree in default of payment by the mortgagor a sale of the mortgaged property can be ordered. In I. L. R. 42 Cal. 294. It is held that as this rule does not require an application by a mortgagee for the passing of a personal decree for the balance of the mortgage-money, no period of limitation applies for claiming such relief. This is not followed by other Courts (I. L. R. 40 All. 551). This point is made clear by introducing the words "on application by the plaintiff" in rule 6, and the words 'on application by the defendant' in rule 8A.—*Report of the Special Committee.*

**Report of the Select Committee.**—"We are not convinced by the reasons given by the Special Committee for deciding not to insert a provision giving the Court power to extend the time for the payment of the amount due from a mortgagor after a preliminary decree for the sale of the mortgaged property has been passed. We think this is a power which the Court may well be trusted to exercise in proper cases and on proper terms. We have, therefore, inserted a new sub-rule as sub-rule (2) in this rule on the line of sub-clause (ii) of clause (c) in sub-rule (1) of rule 2. Sub-rules (2) and (3) of the present rule have therefore been renumbered as sub-rules (3) and (4). Abuse of such a provision is prevented by providing that the extension of time cannot be granted after the final decree for sale has been actually passed."

**Rule 5.**—We have added the words "if a decree has been passed an order" after the words "pass a final decree" in sub-rule (1). As the sub-rule stands at present it contemplates the passing of another final decree in favour of a mortgagor who makes payment after a final decree for sale has been passed at the instance of the mortgagee, but before the confirmation of the sale of the mortgaged property. The passing of two final decrees would lead to confusion, besides being obviously an anomaly. In the case where a mortgagor gets a sale set aside before it is confirmed by making the required payment under Order XXXI, rule 89 of the Code of Civil Procedure, 1908, the directions given by the Court ordering the mortgagee to deliver the documents or to re-transfer the mortgaged property are orders in execution and there is no necessity for the Court to pass another decree.—*Report of the Select Committee.*

**Rule (2).**—Rules framed under s. 43 of the Co-operative Societies Act depriving right of six months under Order 34, rule 2, are not *ultra vires*. A. I. R. 1933 Nag. 211=142 Ind. Cas. 487. Interest *pendente lite* in mortgage suit is governed by rules 2, 4 and 11 and not under s. 34. 14 N. L. J. 109=A. I. R. 1931 Nag. 161. Mortgagee paying Government revenue is entitled to recover from mortgagor. A. I. R. 1933 Nag. 112=144 Ind. Cas. 392. Future interest is within the discretion of trial Court. A. I. R. 1932 Oudh 255=9 O. W. N. 253. Co-mortgagee defendant's costs should be provided for out of mortgage-security. 33 C. W. N. 657. In a suit on mortgage, the mortgagee claimed a decree for Rs. 32,000 against the mortgaged property and person of the mortgagor. The Court passed a decree, making the decretal amount payable in eight annual instalments and entitling the mortgagee to possession under Order 34, rule 2, C. P. Code, in case the mortgagor failed to pay three instalments regularly. Mortgagee appealed from it claiming decree under Order 34, rule 4: Held that the order directing mortgagee to possession on default of three successive instalments was erroneous as Order 34, rule 2, applied to foreclosure and the mortgagee was entitled to decree under Order 34, rule 4. The stage at which the mortgagor should ask the Court for fixing instalments would be reached, when the decree-holder applied under Order 34, rule 6 to the Court to proceed against the person of the mortgagor. A. I. R. 1927 Pesh. 31.

**3. (1)** Where, before a final decree debarring the defendant from all right to redeem the mortgaged property has been passed, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 2, the Court shall, on application made by the defendant in this behalf, pass a final decree—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and, if necessary,—

(b) ordering him to re-transfer at the cost of the defendant the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree declaring that the defendant and all persons claiming through or under him are debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property.

(3) On the passing of a final decree under sub-rule (2), all liabilities to which the defendant is subject in respect of the mortgage or on account of the suit shall be deemed to have been discharged.

*N. B.*—For local amendment in Rangoon.—*Vide infra.*

**Notes**—No discretion to Court to accept money after final decree. 37 Ind. Cas. 779. Final decree cannot be passed without application. 1 Pat. L. J. 364=38 Ind. Cas. 385. Final decree extinguishes property and also right of redemption. 23 O. C. 334=60 Ind. Cas. 213. Defendant is entitled to make payment before final decree is passed. A. I. R. 1931 Oudh. 121=8 O. W. N. 142=131 Ind. Cas. 435. Interest stops from the date of deposit and not from withdrawal. A. I. R. 1933 Lah. 126. It is well settled that the Court in preparing the final decree cannot go behind the preliminary decree. But it is open to the Court to interpret the preliminary decree and also to correct any accidental mistakes which may have crept into it. A. I. R. 1934 Oudh 45=11 O. W. N. 35=147 Ind. Cas. 788.

4. (1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree in suit for sale. preliminary decree to the effect mentioned in clauses (a), (b) and (c) (1) of sub-rule (1) of rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court from time to time, at any time before a final decree for sale is passed, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

(3) In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the Court may, at the instance of any party to the suit or of any other person interested in the mortgage security or the right of redemption, pass a like decree (in lieu of a decree for foreclosure) on such terms as it thinks fit, including the deposit in Court of a reasonable sum fixed by the Court to meet the expenses of the sale and to secure the performance of the terms.

(4) Where, in a suit for sale or a suit for foreclosure in which sale is ordered, subsequent mortgagees or persons deriving title from, or subrogated to the rights of, any such mortgagees are joined as parties, the preliminary decree referred to in sub-rule (1) shall provide for the adjudication of the respective rights and liabilities of the parties to the suit in the manner and form set forth in Form No. 9, Form No. 10 or Form No. 11, as the case may



be, of Appendix D with such variations as the circumstances of the case may require.

*N. B.*—For local amendments in Allahabad, Bombay, Calcutta, Oudh, Rangoon, —*Vide infra*.

**Notes.**—Court may direct in what order property may be sold. A. I. R. 1931 Nag. 91=13 N. L. J. 213. According to the provisions of Order 34, rule 4, relating to preliminary decree in a suit for sale the costs of the suit, if any, awarded to the mortgagee are to be included in the decree for sale. A. I. R. 1935 Oudh 452=1935 O. W. N. 926. Where a payment was actually made in Court by a judgment-debtor to the attaching creditor of the plaintiff, and it was noted to have been made in the presence of the presiding Judge, there is very little distinction between such payment "in" Court and a payment made "into" Court. 158 Ind. Cas. 419=1935 O. W. N. 1087. Where a plaintiff in a mortgage suit has no right in a personal decree he cannot apply for enforcement of personal remedies. 150 Ind. Cas. 1035=1934 A. L. J. 561=A. I. R. 1934 All. 772. The "subsequent interest" which rule 4 (1) of Order 34, C. P. Code, before its amendment in 1929, provided for payment out of the sale-proceeds could only be the interest on the decretal amount awarded under s. 34, C. P. Code. 63 I. A. 114=15 Pat. 210=38 Bom. L. R. 349=1936 O. W. N. 283=70 M. L. J. 355 (P. C.)=A. I. R. 1936 P. C. 89=63 C. L. J. 154=1936 A. L. J. 108=40 C. W. N. 328. Where the words in a mortgage-deed with regard to redemption after the period of three years has elapsed clearly indicate that the redemption was considered to be designed at the end of the stipulated period and that it was not intended that the mortgagee should continue to occupy the land afterwards, it will be inequitable to refuse the relief to recover the mortgaged money by sale of the property as plaintiff is entitled to a decree for the sale, as contemplated by Order 34, C. P. Code. A. I. R. 1936 Pesh. 43=160 Ind. Cas. 986. Subsequent mortgagees, who are joined as parties in a suit on a mortgage by a prior mortgagee, cannot be deprived of the right of putting the property to sale in all circumstances. A. I. R. 1936 Oudh 183=1936 O. W. N. 139=160 Ind. Cas. 165. Under sub-clause (4) subsequent mortgagee cannot request a particular order of sale of properties of other person than his mortgagor. A. I. R. 1930 Mad. 178=1929 M. W. N. 629. Specific mention of interest in final decree is not necessary to be made payable until realisation when there is a direction in the preliminary decree. A. I. R. 1931 Oudh 47=7 O. W. N. 1205. Where a mortgagee brings a suit for sale on a hypothecation bond, the Court should pass a decree awarding him the contractual rate of interest up to the date fixed for payment by the defendant. A. I. R. 1935 All. 1003=1935 A. L. J. 1161=158 Ind. Cas. 233. When appellate Court only extended time trial Court's direction to pay interest at bond rate for time fixed for payment applies also to this extension as it is time of grace. A. I. R. 1930 Pat. 380=121 Ind. Cas. 906. In granting time interests of mortgagee should also be considered. A. I. R. 1933 Rang. 323.

5. (1) Where on or before the day fixed or at any time before the confirmation of sale made in pursuance of a final decree

Final decree in suit for sale. passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order—

(a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree,

and if necessary,—

(b) ordering him to transfer the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the

purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4.

*N. B.*—For local amendments in Bombay and Rangoon.—*Vide infra.*

**Notes.**—Preparation of final decree is continuation of proceedings after preliminary decree. A. I. R. 1931 All. 386 (F. B.)=53 A. 283. The Court should pass a final decree even where an application for preliminary decree is out of time. A. I. R. 1934 Oudh 209=11 O. W. N. 475=151 Ind. Cas. 145. Court has discretion to fix order in which properties should be put up for sale. A. I. R. 1932 All. 85=53 A. 391. Amendment by Act 21 of 1929 has no retrospective effect. 36 C. W. N. 955=59 C. 1454. Right of redemption is extinguished after confirmation of sale. 35 C. W. N. 877. Rights of *paisne* mortgagee purchaser are not regulated by T. P. Act, s. 74. *Ibid.* It is not obligatory on Court to grant interest for period between date fixed for repayment and until realization of money by sale. A. I. R. 1932 Cal. 689=59 C. 722. Decree for cost cannot be executed separately as personal one. A. I. R. 1931 All. 124. Where decree-holder asks for sale of only one item of property, this can be refused if Court thinks this as improper. A. I. R. 1932 All. 85=53 A. 391. Even compromise decree under rule 4 cannot be executed without a final decree. A. I. R. 1929 All. 881. A final decree in a suit on a mortgage passed during the pendency of an appeal from the preliminary decree which is eventually affirmed by a Court of appeal is valid and binding on the parties and capable of execution. The mortgagee decree-holder can apply for execution of the final decree already passed and it is not necessary for him to apply for a fresh final decree. A. I. R. 1937 Mad. 421. Proceedings to obtain a final decree are not proceedings in execution. 14 Pat. 488=16 Pat. L. T. 311=A. I. R. 1935 Pat. 385. A compromise decree in a mortgage suit, expressly called a preliminary mortgage-decree, and providing for payments in instalments and also providing that it is not to be made final until a specified date over twelve years' later, does not come under rule 4 or rule 5 and is not accordingly applicable to the case. 14 Pat. 488=155 Ind. Cas. 976=16 Pat. L. T. 311=A. I. R. 1935 Pat. 385; see also A. I. R. 1934 Oudh 44=11 O. W. N. 92; A. I. R. 1934 Cal. 735. While on the one hand, Order 34, rule 5, contemplates a payment into Court on the other hand under Order 23, rule 3, the payment has to be recognized even though it has been made out of Court. If before a final decree is passed a payment is made out of Court and the payment is admitted by the plaintiff, it would be in the highest decree unreasonable to ignore that payment because of its not being made in Court as required by Order 34, rule 5. In such cases if the payment is admitted by both parties the satisfaction based on such payment ought to be recorded under Order 23, rule 3, in spite of its not being made into Court. On the other hand if the alleged payment out of Court is disputed, the payment having been much in clear disregard of the mandatory provisions of Order 34, rule 5, the Court is not bound to embark upon an enquiry into the question whether the alleged payment was in fact made or not. A. I. R. 1935 Oudh. 313=1935 O. W. N. 541=155 Ind. Cas. 231; see also A. I. R. 1935 Lah. 168=158 Ind. Cas. 83. The right to redeem is available to the judgment-debtor till the date of the confirmation of the sale. A. I. R. 1936 Lah. 552=164 Ind. Cas. 53=38 P. L. R. 259; 38 C. W. N. 924=A. I. R. 1934 Cal. 822. It is clear from this rule that the property which can be sold in execution of mortgage-decree is the mortgaged property only and no other property. A. I. R. 1936 Rang. 127=162 Ind. Cas. 383. An order directing the drawing up of a final decree is not a decree nor an appealable order within the meaning of Order 43. 57 M. 437=1934 M. W. N. 520=148 Ind. Cas. 134=A. I. R. 1934 Mad. 198=66 M. L. J. 178. In proceedings under this rule the auction purchaser is not a necessary party. 38 P. L. R. 259=A. I. R. 1936 Lah. 562=164 Ind. Cas. 53. Where a compromise decree makes provisions for obtaining a final decree and application for the same should not be rejected. A. I. R. 1936 Oudh 173=1936 O. W. N. 59. The passing of a final decree cannot be stayed as

a matter of course in every case where an appeal has been preferred against the preliminary decree. A. I. R. 1934 Pat. 225=15 P. L. T. 205=13 Pat. 379. A decree-holder who attaches in execution of his decree a preliminary mortgage decree obtained by his judgment-debtor in a certain suit, has no *locus standi* to apply under sub-rule (2) for the preparation of a final decree. 1936 A. L. J. 1154=A. I. R. 1936 All. 857.

6. Where the net proceeds of any sale held under the last preceding rule are found insufficient to pay the amount due Recovery of balance due on mortgage in suit for sale. to the plaintiff, the Court, on application by him may, if the balance is legally recoverable from the defendant otherwise than out of the property sold, pass a decree for such balance.

**Scope.**—Application under rule 6 for decree for balance due is governed by Art. 181 and time begins to run only from date when sale becomes absolute under Order XXI, rule 92. A. I. R. 1931 Cal. 166=52 C. L. J. 531=35 C. W. N.; 231=58 C. 741. This rule applies only to personal covenant arising from mortgage and consequently existence of charge on mortgaged property at some other place does not give jurisdiction to Court of that place. A. I. R. 1931 All. 192. An application for personal decree under this rule, is not maintainable unless a sale in pursuance of the preceding rule has as a matter of fact taken place. A. I. R. 1930 Oudh 377 (F. B.); see also 8 Rang. 316=A. I. R. 1930 Rang. 25; A. I. R. 1930 All. 69=52 A. 363; 33 C. W. N. 500; A. I. R. 1934 Cal. 426. Personal remedy can be enforced on the basis of registered deed within six years under Art. 116. A. I. R. 1930 All. 69 (F. B.)=52 A. 363=1929 A. L. J. 1294; 36 C. W. N. 117. In rule 6 the expression "amount due" means the amount, to recover which a decree for sale has been previously passed. 26 A. L. J. 1374=A. I. R. 1929 All. 15. Personal remedy can be enforced only when all remedies against the security are exhausted. 36 C. W. N. 109 P. C. see also 1932 A. L. J. 317=A. I. R. 1932 All. 358; A. I. R. 1933 Lah. 792; 14 P. L. T. 189=A. I. R. 1933 Pat. 210. Rule 6 is not limited by Form No. 8 in Sch. 1, Appendix D. A. I. R. 1933 Cal. 251=60 C. 19. Mortgagee is not entitled to a personal decree against the mortgagor in the absence of a stipulation to that effect. A. I. R. 1933 Lah. 32=34 P. L. R. 171. Mortgagee is not bound to ask in mortgage suit itself, relief under Order 34, rule 6, nor is the Court bound to adjudicate upon it, even if such relief is asked for. Such question can be considered when contingency arises. A. I. R. 1933 Oudh. 520. Court can under Order 34, rule 6, pass decree against surety on sale proceeds proving insufficient for satisfaction of mortgage decree. 1931 A. L. J. 559=53 A. 695=A. I. R. 1931 All. 631. Composite decree combining decree for sale and personal decree is valid. A. I. R. 1933 Oudh 466; see also 10 O. W. N. 1087=A. I. R. 1933 Oudh 529; A. I. R. 1933 Mad. 63=56 M. 339; A. I. R. 1933 Lah. 329; 39 C. W. N. 1229; 1935 O. W. N. 1103. It is open to Court on motion in a consent decree to give a personal judgment against the mortgagor. 36 C. W. N. 109; see also A. I. R. 1933 Oudh 520=10 O. W. N. 1097; A. I. R. 1933 Oudh 214=10 O. W. N. 223. Application under rule 6 is a proceeding in mortgage suit. A. I. R. 1932 All. 466=1932 A. L. J. 308. Where mortgaged property is not available owing to claim of third party, personal decree can be passed. A. I. R. 1934 Lah. 174. For a right to a personal decree independent of the provisions of rule 6, there must have been made a provision for such a right in the mortgage-deed itself and in the absence of any such provision the mortgagee is entitled to a personal decree independently of this rule. A. I. R. 1937 Oudh 252. An application for a personal decree under this rule is not maintainable unless a sale in pursuance of the pleading has, as a matter of fact, taken place. In other words, before the plaintiff can invoke the aid of the provision of this rule, he must establish that the mortgaged properties have been sold as contemplated by sub-rule of rule 5. A. I. R. 1935 Oudh 252; see also A. I. R. 1935 Lah. 536; A. I. R. 1935 Mad. 640=42 L. W. 518=1935 M. W. N. 594=157 Ind. Cas. 942; 161 Ind. Cas. 633=A. I. R. 1936 Pesh. 71; A. I. R. 1936 Nag. 34=160 Ind. Cas. 196=31 N. L. R. (Supp) 124; 164 Ind. Cas. 817=1936 O. W. N. 732; but see 38 C. W. N. 850=60 C. L. J. 22=A. I. R. 1934 Cal. 764=152 Ind. Cas. 770. Where *Jack and Khund Kar* // has held that under Order 34, rule 6, it is not a condition precedent to the making of a personal decree that the mortgaged property should have been already sold and proceeds found insufficient. Nor is a separate application necessary for a personal decree. A composite decree *i. e.*, a decree for sale in which there is also a direction that if the decretal amount is not realised by

the sale of the property mortgaged, the decree-holder will be entitled to realise the balance by personal decree is not on that account invalid, though improper. 152 Ind. Cas. 770=60 C. L. J. 22=38 C. W. N. 850=A. I. R. 1934 Cal. 764 ; see also A. I. R. 1936 All. 408=1936 A. L. J. 314. There is nothing in Order 34, which debars a Court from determining the personal liability of the mortgagor defendant at the time of passing the preliminary decree. 15 Pat. 345=A. I. R. 1936 Pat. 568. There can be a personal decree against the mortgagor for the amount of costs incurred in the mortgage suit, even though his personal liability for the principal amount and interest is barred by time. 38 P. L. R. 74=A. I. R. 1936 Lah. 387 ; but see 14 Rang. 538. Where the claim for personal liability for the principal amount is barred by time the claim to recover interest for six years immediately proceeding the institution of the suit is also barred. A. I. R. 1936 Lah. 387=38 P. L. R. 74=163 Ind. Cas. 100. Where the mortgage-decree is in terms of compromise which expressly authorises the decree-holder to apply for a personal decree, the decree-holder is entitled to a personal decree for the balance. A. I. R. 1936 Oudh 259=1936 O. W. N. 476=162 Ind. Cas. 536. Where claim for personal decree in the original suit is rejected on merits, subsequent application for a personal decree is barred by the doctrine of *res judicata*. 1936 A. L. J. 1228. An unpaid vendor who has a statutory charge on the property sold by him, has all the right of a simple mortgagee. 1935 A. L. J. 279=A. I. R. 1935 All. 411. A mortgagee has a right to personal decree, where mortgaged property is not available for sale owing to prior mortgagees' claim. A. I. R. 1935 All. 850=37 P. L. R. 285.

Preliminary decree in re-  
demption suit. 7. (1) In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree—

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for—

(i) principal and interest on the mortgage,  
(ii) the cost of suit, if any, awarded to him, and  
(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage security, together with interest thereon ; or

(b) declaring the amount so due at that date ; and

(c) directing—

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, where, the defendant claims by derived title, by those under whom he claims, and shall also if necessary, put the plaintiff in possession of the property ; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the defendant shall be entitled to apply for a final decree—

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for foreclosure only and not for sale, that the mortgaged property be sold,

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid, that the plaintiff be debarred from all right to redeem the property.

(2) The Court may, on good cause shown and upon terms to be fixed by the Court from time to time, at any time before the passing of a final decree for foreclosure or sale, as the case may be, extend the time fixed for the payment of the amount found or declared due under sub-rule (1) or of the amount adjudged due in respect of subsequent costs, charges, expenses and interest.

*N. B.*—For local amendments in Bombay and Rangoon.—*Vide infra*.

**Notes.**—Decree for redemption cannot be passed unless all particulars are in plaint. A. I. R. 1931 Oudh 378=8 O. W. N. 732=7 Luck. 94. Rule 7 is mandatory and directs mortgagor on redemption to pay interest upto date of redemption. A. I. R. 1928 Lah. 96. Where the mortgagor covenants in the deed of mortgage to pay the rent of mortgaged property to the *Zaminder* but fails to pay the same, and the mortgagee in consequence pays the rent, the latter can ask for the amount paid by him to be added to the mortgage-money in a suit for redemption for the mortgagor. It is not necessary that the mortgagee should file a separate suit for recovery of the amount. 150 Ind. Cas. 879=1934 A. L. J. 637=A. I. R. 1934 All. 888. S. 13 of the Dekhan Agriculturists' Relief Act provides for an account to be taken to the date of suit but not thereafter. In a suit on a mortgage executed by an agriculturist, accounts can be taken only upto the date of the suit. From the date of the suit an account should be taken in terms of Order 34, rule 7, C. P. Code. 154 Ind. Cas. 770=37 Bom. L. R. 76=A. I. R. 1935 Bom. 122; see also 36 Bom. L. R. 1242. There is no provision in rules 7, 8, 10 of Order 34 for taking into consideration any *mesne* profits by the failure of the defendant to deliver possession to plaintiff after the final decree. 152 Ind. Cas. 921=1935 A. L. J. 115=A. I. R. 1934 All. 96.

8. (1) Where, before a final decree debarring the plaintiff from all right

Final decree in redemption to redeem the mortgaged property has been  
suit. passed or before the confirmation of a sale held  
in pursuance of a final decree passed under  
sub-rule (3) of this rule, the plaintiff makes payment into Court of all amounts  
due from him under sub-rule (1) of rule 7, the Court shall, on application  
made by the plaintiff in this behalf, pass a final decree or, if such decree has  
been passed, an order—

(a) ordering the defendant to deliver up the documents referred to in  
the preliminary decree,  
and if necessary,—

(b) ordering him to re-transfer at the cost of the plaintiff the mortgaged  
property as directed in the said decree,  
and, also, if necessary,—

(c) ordering him to put the plaintiff in possession of the property.

(2) Where the mortgaged property or a part thereof has been sold in  
pursuance of a decree passed under sub-rule (3) of this rule, the Court shall  
not pass an order under sub-rule (1) of this rule, unless the plaintiff, in addi-  
tion to the amount mentioned in sub-rule (1), deposits in Court for payment  
to the purchaser a sum equal to five per cent. of the amount of the purchase-  
money paid into Court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an  
order for repayment of the amount of the purchase-money paid into Court by  
him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made,  
the Court shall, on application made by the defendant in this behalf,—

(a) in the case of a mortgage by conditional sale or of such an  
anomalous mortgage as is hereinbefore referred to in rule 7, pass a  
final decree declaring that the plaintiff and all persons claiming  
under him are debarred from all right to redeem the mortgaged property and,  
also, if necessary, ordering the plaintiff to put the defendant in possession of  
the mortgaged property; or

(b) in the case of any other mortgage, not being a usufructuary mortgage, pass a final decree that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and the balance, if any, be paid to the plaintiff or other persons entitled to receive the same.

*N. B.*—For local amendment in Rangoon.—*Vide infra*.

**Notes.**—Adjustment out of Court cannot be pleaded in passing final decree. 54 M. 708=A. I. R. 1931 Mad. 592. In redemption suit mortgagee is decree-holder and can transfer his decree. *Ibid*. Application for final decree made within three years after second appeal against preliminary decree is within time. A. I. R. 1930 Mad. 353=58 M. L. J. 207.

**8A.** Where the net proceeds of any sale held under the last preceding rule are found insufficient, to pay the amount due to the defendant, the Court, on application by him, may, if the balance is legally recoverable from the plaintiff otherwise than out of the property sold, pass a decree for such balance.

**Notes.**—Order 34, rule 8A, does not apply to usufructuary mortgages. A. I. R. 1933 Oudh 40=9 O. W. N. 1059.

**9.** [*New.*] Notwithstanding anything hereinbefore contained if it appears, upon taking the account referred to in rule 7, that nothing is due to the defendant or that he has been overpaid, the Court shall pass a decree directing the defendant, if so required, to re-transfer the property and to pay to the plaintiff the amount which may be found due to him; and the plaintiff shall, if necessary, be put in possession of the mortgaged property.

**Notes.**—Suit for redemption is also suit for surplus profit due to mortgagor. 60 M. L. J. 698=A. I. R. 1931 Mad. 479; see also A. I. R. 1929 Bom. 337=31 Bom. L. R. 476.

**10.** In finally adjusting the amount to be paid to a mortgagee in case of a foreclosure, sale or redemption, the Court shall, unless in the case of costs of the suit, the conduct of the mortgagee has been such as to disentitle him thereto, and to the mortgage money such costs of the suit and other costs, charges and expenses as have been properly incurred by him since the date of the preliminary decree for foreclosure, sale or redemption up to the time of actual payment.

**Scope.**—Rule 10 in effect makes a mortgaged property liable for amount of costs in the first instance. 93 Ind. Cas. 224=A. I. R. 1926 All. 343. Rule 10 relates to costs that have been incurred by mortgagee since the passing of the preliminary decree and before the final decree passed in the case. A. I. R. 1926 All. 722=48 A. 682=96 Ind. Cas. 542; A. I. R. 1930 Oudh 328=7 O. W. N. 398. Where mortgagee raises question of involving denial of mortgagor's right to redeem it, it is subject to Court's discretion whether to award costs or not. A. I. R. 1926 Mad. 405. Costs which should have been included in final decree are not claimable in execution. A. I. R. 1922 All. 27=44 A. 350=20 A. L. J. 170=65 Ind. Cas. 799. Costs including costs of appeal, form part of the decretal amount and are realisable in the first instance by the sale of mortgaged property. 48 Ind. Cas. 329.

**11.** In any decree passed in a suit for foreclosure, sale or redemption, where interest is legally recoverable, the Court may order payment of interest to the mortgagee as follows, namely :—

**Payment of interest.**

(a) interest upto the date on or before which payment of the amount found or declared due is under the preliminary decree to be made by the mortgagor or other person redeeming the mortgage—

(i) on the principal amount found or declared due on the mortgage,—at the rate payable on the principal, or where no such rate is fixed, at such rate as the Court deems reasonable,

(ii) on the amount of the costs of the suit awarded to the mortgagee,—at such rate as the Court deems reasonable from the date of preliminary decree, and

(iii) on the amount adjudged due to the mortgagee for costs, charges and expenses properly incurred by the mortgagee in respect of the mortgage-security upto the date of the preliminary decree and added to the mortgage-money— at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principal, or failing both such rates, at nine per cent. per annum ; and

(b) subsequent interest upto the date of realization or actual payment at such rate as the Court deems reasonable—

(i) on the aggregate of the principal sums specified in clause (a) and of the interest thereon as calculated in accordance with that clause ; and

(ii) on the amount adjudged due to the mortgagee in respect of such further costs, charges and expenses as may be payable under rule 10.

**Scope.**—Bond rate of interest till expiry of grace period cannot be claimed as of right. A. I. R. 1932 Pat. 232=13 P. L. T. 545. "Principal amount found due or declared due on the mortgage" was only principal amount on mortgage without any interest. Mortgagee is entitled to contract rate till date fixed for payment. A. I. R. 1933 Oudh 128=10 O. W. N. 173. Having regard to Order 34 of the Code of Civil Procedure, the lower Court was perfectly right in allowing interest at the contract rate on the principal amount only from the date of the suit to the date fixed for the payment. *Ibid.* Interest ceases from the date of deposition money in Court and not from the date of its removal by the decree-holder. A. I. R. 1933 Lah. 126. The presumption is that where a mortgage-deed is executed the parties contemplate the possibility that payment may not be made at the time when the entire amount becomes due. If the deed contains stipulations regarding payment of interest before the date, the presumption arises that the parties intended that interest should be fixed after that date. Stipulators may be such as to justify the inference that interest on the due date is to be paid at a particular rate ; but where no inference regarding the rate can be drawn, the presumption is that what it was intended to pay interest at a reasonable rate. 28 N. L. R. 1=A. I. R. 1932 Nag. 39. Order 34, r. 11 (b), which specifically allows "subsequent interest" upto the date of realisation only gives effect to the previous judicial decisions. 63 I. A. 114=70 M. L. J. 355 (P. C.)=A. I. R. 1936 P. C. 63=17 Pat. L. T. 89=1936 A. L. J. 108=63 C. L. J. 154=40 C. W. N. 328=15 Pat. 210=38 Bom. L. R. 349. As regards the period subsequent to the date fixed for payment the award of interest even at the Court rate is not obligatory. Though ordinarily the Court will award interest for that period at the Court rate, it has in proper cases, a discretion to refuse interest altogether *i. e.*, even at the Court rate. 59 C. 722=A. I. R. 1932 Cal 689. The words "on the principal amount found or declared due" in clause (a) sub-clause (i) of rule 11 refer not only to the principal sum secured by the mortgage-deed but also to the amount due on account of interest which has become a part of principal in accordance with the terms of the deed on the date when the preliminary decree was prepared. The mortgagee is therefore entitled to interest on the principal sum and on the interest due, which has become part of the principal at the contract rate, from the date of the suit till the date fixed for payment, if the mortgage-deed provides it. A. I. R. 1937 All. 442. Order 34, rule 11, embodies the principle that interest after it becomes due shall be added to the principal money and the aggregate amount so found due shall be decreed to the mortgagee. A. I. R. 1934 Oudh 473=11 O. W. N. 1141=151 Ind. Cas. 856. The words "principal amount" as used in sub-clause means the principal money secured by the deed of mortgage and interest which has accrued due before the suit cannot be regarded as part of the principal money. A. I. R. 1935 Oudh 263=154 Ind. Cas. 46 ; see also A. I. R. 1933 Oudh 128=8 Luck. 315. Interest on the amount of costs of the suit can be awarded only from the date of the prelimi-

nary decree, and not during the pendency of the suit. *Ibid.* The usual rate of future interest after date fixed for payment is 6 per cent. per annum. *Ibid.* Order 34, rules 2 and 4, deals respectively with a decree in a mortgage suit for foreclosure and for sale, and the words used in the rules seem to infer that the question of interest upto the date of the decree is one which is not within the discretion of the Court. But Order 34, rule 11, dealing with interest after the decree is clearly a matter within the discretion of the Court, as the word used there is "may." A. I. R. 1935 Pat. 98=14 Pat. 400=156 Ind. Cas. 290=16 Pat. L. T. 579. Words "on the principal amount found or declared due" in Order 34, rule 11 (a) (i), refer not only to principal sum but also the amount due on interest which has become part of principal. A. I. R. 1937 All. 442.

**12. [T. P. Act, S. 96.]** Where any property, the sale of which is directed under this Order is subject to a prior mortgage, the Court may, with the consent of the prior mortgagee, direct that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold.

**Scope.**—Without the consent of the prior mortgagee the property cannot be sold free from the prior encumbrance. 47 C. 662 (P. C.)=25 C. W. N. 417; see also A. I. R. 1930 Lah. 1053=130 Ind. Cas. 49; A. I. R. 1934 All. 73. Where subsequent mortgagee impleads prior mortgagee but does not challenge prior mortgage prior mortgagee's failure to plead his own mortgage as defence does not bar suit to enforce his mortgage against subsequent mortgagee. 55 Ind. Cas. 956. This rule does not contemplate fuller inquiry but merely incidental inquiry. A. I. R. 1937 Mad. 554. This rule merely confers upon the Court the power of directing a sale free from the prior mortgage subject to the conditions prescribed in that rule *viz.*, that the property must be one of which the sale is directed under Order 34, and there must be the consent of the prior mortgagee. When these conditions are fulfilled, the Court has full power in its discretion to direct the sale free from the prior mortgage. This does not require that the consent of the plaintiff is necessary or of any other person besides the prior mortgagee. A. I. R. 1935 Mad. 453=1935 M. W. N. 389. But a prior mortgagee can himself make no application under this rule. It is only the decree-holder in the suit who alone can make an application. Where the prior mortgagee agrees, a provision is to be made that the amount of his priority shall be paid off first from the sale proceeds. But that does not constitute him an alternative plaintiff in the suit or entitle him to execute the decree or to have the mortgaged property sold. A. I. R. 1935 Mad. 660=68 M. L. J. 738=1935 M. W. N. 306=41 L. W. 565.

**13. [T. P. Act, S. 97.]** (1) Such proceeds shall be brought into Court and applied as follows:—

first, in payment of all expenses incident to the sale or properly incurred in any attempted sale;

secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly incurred in connection therewith;

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made;

fourthly, in payment of the principal money due on account of that mortgage; and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according to their respective interests therein or upon their joint receipt.

(2) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 1882.\*



**Scope.**—Surplus assets after an auction sale should not be paid out to a subsequent incumbrancer otherwise than with mortgagor's consent. A. I. R. 1927 All. 467=25 A. L. J. 390=49 A. 636. Mortgagee is not entitled to share in surplus sale proceeds if his final decree of sale is barred by time. 22 A. L. J. 825=83 Ind. Cas. 1033. This rule does not apply to the case of a surety who is made liable for interest under the mortgage decree. This rule is meant to regulate the position, as between the mortgagor and mortgagee and to protect the position of the mortgagee. A. I. R. 1935 Lah. 334.

**14. [T. P. Act, S. 99.]** (1) Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale

Suit for sale necessary for bringing mortgaged property to sale.

in enforcement of the mortgage, and he may institute such suit notwithstanding anything contained in Order II, rule 2.

(2), Nothing in sub-rule (1) shall apply to any territories to which the Transfer of Property Act, 1882,\* has not been extended.

**Scope.**—Rule 14 does not apply where charge is created by decree itself. A. I. R. 1934 Nag. 147; see also A. I. R. 1934 Cal. 327. The opening words of rule 14 only mean that the decree should relate to the payment of the money in satisfaction of a claim arising under the mortgage, i. e., a mortgage independent of the decree. A. I. R. 1934 Nag. 147=30 N. L. R. 325=150 Ind. Cas. 492. Where a money decree is ordered to be paid in instalments on the judgment-debtor executing a security bond hypothecating immovable property for the satisfaction of the decree and default is committed in the payment of instalments, the hypothecated property can be sold in execution of the decree and a fresh suit is not necessary. A. I. R. 1936 Pat. 289=17 Pat. L. T. 434=15 Pat. 545. Where a usufructuary mortgagee, who has leased the property to the mortgagor obtains a decree against the mortgagor for arrears of rent, the arrears of rent in respect of which the decree is passed present in substance the usufruct of the mortgaged property and the decree is a decree which the mortgagee has obtained for payment of money in satisfaction of a claim arising under the mortgage. That being so, he cannot by reason of provisions of Order 34, rule 14, attach the property and put the same up for sale. A. I. R. 1936 All. 708=1936 A. L. J. 708=162 Ind. Cas. 402. This rule does not apply to consent decrees, because the mortgagor can waive the benefit of the rule. A. I. R. 1935 Nag. 129=157 Ind. Cas. 292. This rule is really intended to create a prohibition to the mortgagee securing the sale of the mortgaged property without first bringing a suit for the sale thereof. A. I. R. 1935 Lah. 672 (F. B.)=37 P. L. R. 816=16 Lah. 640. But when a suit is brought on a mortgage on joint-family property executed by the father and the mortgagee is bound to be not for legal necessity to a certain extent and the mortgage is declared invalid but a simple money decree for such amount is passed against the father, the decree-holder can, in execution of the decree so obtained, attach and sell the property covered by the mortgage and Order 34, rule 14, is no bar to his so doing. A. I. R. 1935 All. 507=157 Ind. Cas. 1010. A mortgagee can bring to sale the equity of redemption of the mortgaged property in execution of a simple money decree obtained by him on account of land revenue which he has had to pay to save the property. A. I. R. 1935 Rang. 438. A mere averment in the plaint that the mortgagee has surrendered the mortgage security does not extinguish the mortgagee's rights, and as such he is debarred from executing a money-decree against the mortgaged property. A. I. R. 1935 Rang. 132=13 Rang. 292. Where a charge is created in the decree on specified properties for payment of decretal amount, the decree can be executed and the property charged sold and so separate suit is necessary. A. I. R. 1935 Nag. 129=157 Ind. Cas. 292. Money decree-holder may bring to sale property comprised in security bond without bringing suit on basis of security bond. A. I. R. 1934 All. 524. Maintenance decree creating charge does not come within rule 14. A. I. R. 1934 Nag. 83. Award by Registrar Co-operative Societies, directing sale of mortgaged property does not militate against rule 14. A. I. R. 1933 Nag. 211. Where compromise is silent as to how hypothecated property is to be sold, rule 14 applies. 54 A. 763=1932 A. L.

J. 486=A. I. R. 1932 All. 439. It is clear from language of rule 14 that the rule does not apply unless the decree falls within decree for payment of money in satisfaction of claim under mortgage or charge. The mortgage or charge in this rule must be a mortgage or charge existing prior to date of decree and not one created by decree. It is not necessary for a person to sue to enforce a charge on immovable property created by a consent decree. 64 Ind. Cas. 852=35 C. L. J. 61; see also 43 A. 677=19 A. L. J. 728=63 Ind. Cas. 445. Rule 14 applies only to claims under mortgage and not where sale takes place in execution of decree upon claim not arising under mortgage. 27 C. W. N. 38=37 C. L. J. 265. So a mortgagee is entitled to have the equity of redemption sold in satisfaction of any debt which he might have against the mortgagor unconnected with the mortgage. 33 Ind. Cas. 802=18 P. R. 1916; see also 38 A. 327=33 Ind. Cas. 982. Rule 14 is confined to cases where a mortgagee has obtained a personal decree against a mortgagor on a mortgage debt. Rules 14 and 15 read with s. 100, Transfer of Property Act, means that where immovable property has been made security for the payment of the money and the beneficiary has obtained a decree for the payment of money so secured, he cannot bring the property to sale only by a suit for sale. The decree referred to in rule 14 must be a decree subsequent to the creation of the security. 3 Pat. L. W. 202=38 Ind. Cas. 791; see also 63 Ind. Cas. 303. Rules 14 and 15 do not apply unless the charge was created before obtaining decree. 46 Ind. Cas. 169. "Mortgagee" in rule 14 means the holder of a subsisting and effective mortgage. 39 A. 86=14 A. L. J. 992=36 Ind. Cas. 907; see also A. I. R. 1929 All. 589; 115 Ind. Cas. 829; 41 M. L. J. 160=62 Ind. Cas. 756; A. I. R. 1930 Mad. 138; 42 A. 566. Rule 14 means that the decree should relate to payment of money in satisfaction of a claim arising under the mortgage *i. e.*, mortgage independent of the decree. 43 B. 631=51 Ind. Cas. 920.

Where there are simultaneous and different mortgages which could reasonably be treated as constituting one transaction Court would be slow to allow plaintiffs to resort to a device which would enable them to do something which it is the object of rule to prevent. 49 B. 208=27 Bom. L. R. 202=86 Ind. Cas. 870. A sale in contravention of the rule is not void but voidable at the instance of the mortgagor and to avoid it, it is sufficient for the mortgagor to show that the sale contravenes r. 14. 45 B. 174=58 Ind. Cas. 231; see also A. I. R. 1927 Mad. 1135; A. I. R. 1926 Lah. 490=27 P. L. R. 494; 2 Pat. L. J. 587=41 Ind. Cas. 533; 39 Ind. Cas. 3=41 B. 357=19 Bom. L. R. 75. Mortgagee obtaining only simple money decree cannot straightway ask to sell property in execution of that money decree. A. I. R. 1930 Mad. 138=53 M. 670. Rule 14 has no application to cases where charge is created by decree and did not exist prior to it. A. I. R. 1929 Pat. 439. Where the mortgagee brings a suit on a mortgage stating in the plaint that he has given up his mortgage right and is merely suing on the mortgage as a simple money bond he can still sue for sale under Order 34, rule 14, Civil Pro. Code, notwithstanding his statement in the plaint. A. I. R. 1937 Mad. 501.

15. All the provisions contained in this Order which apply to a simple mortgage shall, so far as may be, apply to a mortgage by deposit of title-deeds and charges, meaning of section 58, and to a charge within the meaning of section 100 of the Transfer of Property Act, 1882.

*N. B.*—For local amendment in Oudh.—*Vide infra.*

**Notes.**—"Section 96 which it is proposed to introduce in the Transfer of Property Act, 1882, applies the provisions relating to simple mortgages to mortgages by deposit of title-deeds. Our amendment to this rules makes the necessary corresponding provisions in Order XXXIV of the Code of Civil Procedure, 1908,"—*Report of the Select Committee.* Where in a suit for recovery of money, the defendants accept a personal decree against themselves and submit to a declaration in the decree that a portion of their immovable property should be charged for payment of the decretal amount, the decree is nothing but a personal decree, and although it also creates a charge, it cannot be regarded as a decree under Order 34. A. I. R. 1934 Nag. 140=150 Ind. Cas. 95.

## ORDER XXXV.

*Interpleader.*

1. [S. 471.] In every suit of interpleader the plaintiff shall, in addition to the other statements necessary for complaints, state—

(a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs ;

(b) the claims made by the defendants severally,

(c) that there is no collusion between the plaintiff and any of the defendants.

**Notes.**—Where the preliminary decree is passed in an interpleader suit it becomes to all intents and purposes a partition suit. A. I. R. 1930 Mad. 988=60 M. L. J. 79.

2. [S. 472.] Where the thing claimed is capable of being paid into Court or placed in the custody of the Court, the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit.

3. [S. 476.] Where any of the defendants in an interpleader suit is actually suing, the plaintiff in respect of the subject-matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed, by the Court in which the interpleader suit has been instituted, stay the proceedings as against him ; and his costs in the suit so stayed may be provided for in such suit ; but if, and in so far as, they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit.

4. [S. 473, R. S. C. O. 57, r. 7.] (1) At the first hearing the Court may—

(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit ; or

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—

(a) that an issue or issues between the parties be framed and tried, and

(b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner.

**Notes.**—*Vide* 21 Bom. L. R. 918=53 Ind. Cas. 365.

5. [S. 474.] Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

*Illustrations.*

(a) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A and claims them from B. B cannot institute an interpleader suit against A and C.

(b) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A after-

wards alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute an interpleader suit against A and C.

**Notes.**—A tenant cannot bring an interpleader suit to determine which of the two defendants both of whom claim rent from him is his landlord. 48 Ind. Cas. 733.

6. [S. 475.] Where the suit is properly instituted the Court may provide Charge for plaintiff's costs. him a charge on the thing claimed or in some other effectual way.

## ORDER XXXVI.

### *Special Case.*

1. [S. 527.] (1) Parties claiming to be interested in the decision of any question of fact or law may enter into an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

(a) a sum of money fixed by the parties or to be determined by the Court shall be paid by one of the parties to the other of them ; or

(b) some property, movable or immovable, specified in the agreement, shall be delivered by one of the parties to the other of them ; or

(c) one or more of the parties shall do, or refrain from doing some other particular act specified in the agreement.

(2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concisely state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby.

**Notes.**—A special case stated by consent can only be re-opened by mutual consent. 43 B. 281=20 Bom. L. R. 839=47 Ind. Cas. 642. Rule 1 obliges the parties to enter into an agreement in writing stating the question in the form of a case for the opinion of the Court, and providing that upon the finding of the Court with respect to such questions the parties shall do or refrain from doing some other particular act specified in the agreement. A. I. R. 1930 Bom. 232=32 Bom. L. R. 416=45 B. 825=125 Ind. Cas. 897.

2. [S. 528.] Where the agreement is for the delivery of any property, or for the doing, or the refraining from doing any particular act, the estimated value of the property to be delivered, or to which the act specified has reference shall be stated in the agreement.

3. [S. 529.] (1) The agreement, if framed in accordance with the rules hereinbefore contained, may be filed in the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others of them as defendant or defendants ; and notice shall be given to all the parties to the agreement, other than the party or parties by whom it was presented.

4. [S. 530.] Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court and shall be bound by the statements contained therein.

5. [S 581.] (1) The case shall be set down for hearing as a suit instituted in the ordinary manner, and the provisions of this Code shall apply to such suit so far as the same are applicable.

(2) Where the Court is satisfied, after examination of the parties, or after taking such evidence as it thinks fit,—

(a) that the agreement was duly executed by them,

(b) that they have a *bona fide* interest in the question stated therein, and

(c) that the same is fit to be decided,

it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow.

Notes.—*Vide* A. I. R. 1930 Bom. 732=32 Bom. L. R. 41=54 B. 825=125 Ind. Cas. 897.

## ORDER XXXVII.

### *Summary Procedure on Negotiable Instruments.*

Application of Order. 1. [S. 538.] This Order shall apply only to—

(a) The High Courts of Judicature at Fort William, Madras and Bombay ;\*

(c) the Court of the Judicial Commissioner of Sind ; and

(d)† any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1852, ‡ have been already applied.

**Amendment in Burma.**—In British Burma for clauses (a), (b) and (c) substitute the following clause “(a) the High Court and.”—*Vide* G. B. Order of 1937.

*N. B.*—For local amendment in Lahore.—*Vide infra*.

Notes.—A presiding officer of an ordinary Civil Court exercising Small Causes court's powers has no authority to act under Order XXXVII. A. I. R. 1928 Mad. 517=51 M. 491=55 M. L. J. 114. The addition of cl. (e) to this rule by the Lahore High Court in the exercise of the powers conferred by s. 122, C.P. Code, is not *ultra vires*. The rule merely empowers them to follow a certain definite procedure for the expeditious disposal of suits. A. I. R. 1927 Lah. 174=8 Lah. 156=28 P. L. R. 539.

2. [S. 532.] (1) All suits upon bills of exchange, hundies or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed ; but the summons shall be in Form No. 4 in Appendix B or in such other form as may be from time to time prescribed.

(2) In any case in which the plaint and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend ; and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree.

“(a) for the principal sum due on the instrument and for the interest calculated in accordance with the provisions of section 79 or section 80, as the case may be, of the Negotiable Instruments Act, 1831, upto the date of the institution of the suit, or for the sum mentioned in the summons, whichever is less, and for interest upto the date of the decree at the same rate or at such other rate as the Court thinks fit ; and

\* Clause (b) has been omitted in British India by G. I. Order of 1937.

† See Notifications under s. 538 of Act XIV of 1882 in the various Lists of Local Rules and Orders.

‡ XIV of 1882.

(b) for such subsequent interest, if any, as the Court may order under section 34 of this Code ; and

(c) for such sum for costs as may be prescribed :

Provided that, if the plaintiff claims more than such fixed sum for costs, the costs shall be ascertained in the ordinary way.

(3) A decree passed under this rule may be executed forthwith.\*

*N. B.*—For local amendments in Bombay and Rangoon.—*Vide infra*

**Notes.**—Order by Chamber Judge in summary suit refusing leave to defend is appealable. A. I. R. 1932 Bom. 163=56 B. 268=34 Bom. L. R. 252. Where there is no agreement to pay interest in the document (*hundis*) statutory interest should be allowed. A. I. R. 1933 Mad. 299=56 M. 398=64 M. L. J. 117.

3. [S. 533.] (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit, upon Defendant showing defence affidavits which disclose such facts as would on merits to have leave to appear. make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit.

*N. B.*—For local amendment in Bombay.—*Vide infra*.

**Notes.**—Where defendant fails to show that *hundis* were without consideration, leave to defend should not be granted. A. I. R. 1933 Lah. 440. The question under rule 3 is whether or not a triable issue is disclosed on affidavit or otherwise. A triable issue means a plea which is at least plausible. 98 Ind. Cas. 72 ; see also A. I. R. 1928 Cal. 123=32 C. W. N. 125 ; A. I. R. 1929 Mad. 841 ; 82 Ind. Cas. 1028 ; 78 Ind. Cas. 505=45 M. L. J. 255. Where defendant has not obtained leave, he cannot apply for payment of decretal amount by instalments. A. I. R. 1926 Bom. 250=50 B. 262 ; but see A. I. R. 1933 Rang. 245. If there is a triable issue in the case, the Court ought to grant leave to defend without requiring the defendant either to pay the amount claimed or to furnish security therefor. A. I. R. 1935 Mad. 302=41 L. W. 573=1935 M. W. N. 280=157 Ind. Cas. 591. In a suit on a promissory-note the plaintiff referred to the pledges in respect of the jewellery for payment of money due in respect of the promissory-note but asked leave under Order 2, rule 2, to reserve his right as such pledge. The defendant applied for leave to defend on the ground that since the execution of the promissory-note various amounts had been paid in satisfaction and that upon proper account being taken it would be found that the amount claimed was in excess of the amount due : *Held* that leave to defend be granted on the defendant giving securities for costs only. A. I. R. 1936 Cal. 476. Where in a suit on a promissory-note instituted under this Order 37, the defendant applies for leave to appear and defend, but the Court is not satisfied with the *bona fides* of the defendant and vague and indefinite assertion has been made by him to gain time, it is open to the Court to grant leave to defend only conditionally *i. e.* on the defendant paying in Court the amount claimed. A. I. R. 1936 Lah. 534=165 Ind. Cas. 166. It will certainly not be a reasonable interpretation of Clause 2, rule 3, Order 37 of the Code to say that it contemplates only two courses either a grant of leave unconditionally or a refusal of leave. At the time when the question of granting leave comes up, the Court has not before it the full materials on which it can come to the satisfactory conclusion on the merits of the proposed defence ; and if it thinks that there is something to be said in defence, it may grant leave but only on condition of security. A. I. R. 1936 Mad. 246=70 M. L. J. 241=1936 M. W. N. 175=43 L. W. 298=161 Ind. Cas. 182. The question to be considered on an application under this rule is whether or not triable issue is disclosed by the defendants on affidavit or otherwise ; a triable issue meaning a plea which is at least plausible. Once the Court comes to the conclusion that there is a triable issue in the case, it must grant leave to defend without requiring the defendant either to pay the amount claimed in Court or to furnish

\* Substituted by Act XXX of 1926.

security therefor; such a condition must be imposed only in exceptional cases, where, for instance, there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put only in order to obtain further time. A. I. R. 1934 Sind 191; see also 40 L. W. 650=152 Ind. Cas. 687.

4. [S. 534.] After decree, the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

Notes.—*Vide* 32 M. L. J. 503=38 Ind. Cas. 481.

5. [535.] In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all the proceedings shall be stayed until the plaintiff given security for the costs thereof.

6. [S. 536.] The holder of every dishonoured bill of exchange or promissory-note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note.

7. [S. 537.] Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.

## ORDER XXXVIII.

### *Arrest and Attachment before Judgment.*

#### *Arrest before Judgment.*

1. [Ss. 477, 478.] Where at any stage of a suit, other than a suit of the nature referred to in section 16, clauses (a) to (d), the Court is satisfied, by affidavit or otherwise,—

Where defendant may be called upon to furnish security for appearance.

(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,—

(i) has absconded or left the local limits of the jurisdiction of the Court; or

(ii) is about to abscond or leave the local limits of the jurisdiction of the Court; or

(iii) has disposed of or removed from the local limits of the jurisdiction of the Court his property or any part thereof, or

(b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the Court may issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not furnish security for his appearance:

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant

as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court.

**Scope.**—Where warrant has been taken under rule 1, amount of security to be furnished is the amount mentioned in the warrant. A. I. R. 1929 Cal. 732=56 C. 700. Court should exercise powers under Order 38, after satisfying that plaintiff's case is *prima facie* an unimpeachable subject to his proving plain allegations and there must be reason to believe that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court. A. I. R. 1926 Mad. 884=50 Mad. 27; see also 4 Lah. L. J. 423. Sale must be in fraud of creditors. 36 C. W. N. 46=A. I. R. 1932 Cal. 790. Provincial Small Cause Court has no power to attach immovable property before judgment. 28 C. W. N. 16. The power of Court to issue simultaneous execution for arrest and attachment is entirely discretionary. 84 Ind. Cas. 270. Attachment before judgment does not rank in the same position as an attachment after judgment. 3 Pat. 250=83 Ind. Cas. 413.

**2. [S. 479.]** (1) Where the defendant fails to show such cause the Court shall order him either to deposit in Court money or other property sufficient to answer the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit.

**Scope.**—Security under rule 2 is for defendant's appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in suit. If decree has been passed, defendant would be bound to appear when called upon between date of decree and satisfaction thereof. 70 Ind. Cas. 129=1 Bur. L. J. 196; see also 115 Ind. Cas. 129; A. I. R. 1931 Mad. 828; A. I. R. 1934 Mad. 24. Where money is deposited, money is subject to the lien of the plaintiff. 41 M. 1053=35 M. L. J. 355=49 Ind. Cas. 20. Claimant whose objection has been disallowed is at liberty to bring a suit under Order 21, rule 63 within period prescribed by Art. 11 of the Limitation Act. 47 Ind. Cas. 1000=35 M. L. J. 231.

**3. [S. 480.]** (1) A surety for the appearance of a defendant may at any time apply to the Court in which he became such surety to be discharged from his obligation.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant for his arrest in the first instance.

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

**Scope.**—A surety in case of arrest before judgment can set a discharge under rule 3. But surety for due performance cannot be granted discharge. A. I. R. 1929 Lah. 435=30 P. L. R. 130; see also A. I. R. 1929 Bom. 190=31 Bom. L. R. 225. A surety is not discharged even the judgment-debtor is adjudged insolvent. A. I. R. 1928 Rang. 124=6 Rang. 241. Obligation of surety continues even though the parties to the suit entered into a compromise on the strength of which a decree is passed. 43 M. 272=53 Ind. Cas. 367; see also A. I. R. 1928 Rang. 184=6 Rang. 241. Order of arrest under rule 3 is illegal. A. I. R. 1929 Lah. 163=30 P. L. R. 147.



4. [S. 481.] Where the defendant fails to comply with any order under rule 2 or rule 3, the Court may commit him to the civil prison until the decision of the suit or where a decree is passed against the defendant, until the decree has been satisfied :

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of the subject-matter of the suit does not exceed fifty rupees :

Provided also that no person shall be detained in prison under this rule after he has complied with such order.

*Attachment before Judgement.*

5. [Ss. 483, 484.] Where, at any stage of the suit, the Court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the Court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The Court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

**Scope.**—Under rule 5 attachment before judgment can be of property within or without the jurisdiction of the Court. A. I. R. 1926 Lah. 330=27 P. L. R. 144 ; A. I. R. 1928 Lah. 376 ; A. I. R. 1926 B. 278 ; A. I. R. 1931 Rang. 279. This rule does not contemplate attachment of property already disposed of. A. I. R. 1928 Lah. 772. The provision of rule 5 can only be invoked if the Court is satisfied that the property is about to be disposed of wholly or partly. A. I. R. 1928 Lah. 808 ; see also A. I. R. 1928 Pat. 172 ; 73 Ind. Cas. 721=5 Pat. L. T. 124. It is essential that the plaintiff must make out a *prima facie* case before any attachment before judgment or an injunction can be granted. The Court must be satisfied that interference is necessary to prevent injury which is irreparable, and that the mischief or inconvenience likely to arise in consequence of refusal will be greater than that from granting it. Neither an attachment nor an injunction should be lightly granted. It would be serious if persons in possession were restrained from making use of their property—merely because a suit has been instituted against them. It is only where it is essential that the property should be kept in its existing condition pending the suit that the Court should interfere under Order 38, rule 5 (1) or under Order 39 rule 1. 38 C. W. N. 771=61 C. 814=A. I. R. 1934 Cal. 694 ; see also A. I. R. 1934 Lah. 594=148 Ind. Cas. 719 ; A. I. R. 1934 Oudh 429=11 O. W. N. 1135=151 Ind. Cas. 283 ; A. I. R. 1934 Nag. 169=17 N. L. J. 5=150 Ind. Cas. 1142 ; 38 P. L. R. 772=A. I. R. 1936 Lah. 33. A plaintiff in a mortgage suit has no right to a personal decree until the mortgaged property is sold in auction sale and from the sale proceeds the mortgage decree is not satisfied. So before auction sale the Court has no jurisdiction to attach mortgagor's other properties under this rule. A. I. R. 1934 All. 772=1934 A. L. J. 561=150 Ind. Cas. 1035. Where security is given to obtain removal of attachment before judgment under Order 38, the liability of the surety is fully incurred as soon as the decree of the Court of first instance is made and subsequent appeal or appeals from the decree do not destroy the liability, although they may have the effect of reducing the quantum of the liability which may even be found to be nothing. 14 Rang. 361=164 Ind. Cas. 455=A. I. R. 1936 Rang. 342. Attachment under Order 38, rule 5, is to be made in accordance with the

manner provided for attachment of properties in execution of a decree and the manner for attachment of property in execution of a decree is laid down in Order 21, rule 54. A. I. R. 1937 Cal. 375. Surety is not discharged from liability though suit is once dismissed for default, but immediately restored and decreed. 89 Ind. Cas. 17 = 12 O. L. J. 521 ; see also A.I.R. 1927 Bom. 84 = 51 B. 31 ; but see 82 Ind. Cas. 451 = 47 M. L. J. 523. A Provincial Small Cause Court has jurisdiction to order an attachment of immovable property before judgment. 52 C. 245 (F. B.) = 82 Ind. Cas. 109 ; see also 87 Ind. Cas. 399 = 48 M. L. J. 406 ; 49 C. 994 = 70 Ind. Cas. 84. Order conditional under rule 5 (3) should be accompanied by an order under rule 5 (1) to furnish security or to show cause why it should not be furnished. 57 Ind. Cas. 907 ; see also 23 C. L. J. 392 = 33 Ind. Cas. 689. Where conditional order of attachment before judgment is made absolute, fresh order of attachment need not be issued. A. I. R. 1934 Cal. 251. Attachment without notice is *ultra vires*. A. I. R. 1934 All. 165. Notice to party should be according to Form No. 5, Appendix F. A. I. R. 1934 All. 456. Security under this rule can be enforced in execution. A. I. R. 1934 Cal. 64. Order for attachment before judgment of property under Court of Wards is not justified. A. I. R. 1934 Nag. 169. If notice to furnish security and order of attachment are not consolidated, warrant is illegal. A. I. R. 1933 All. 759 = 1933 A.L.J. 952. Issue of notice to defendant under Order 38, rule 5 (1), is absolutely necessary before an Order under sub-rule (3) is passed. A. I. R. 1936 Lah. 33 = 38 P.L.R. 772. Possibility of transfer of property is no ground for attachment before judgment. A. I. R. 1933 All. 191 = 1933 A. L. J. 37. Attachment before judgment of property other than mortgaged property is permissible if mortgaged property is insufficient to satisfy decree. A. I. R. 1931 Bom. 32 = 33 Bom. L. R. 514 ; 85 Ind. Cas. 94.

**Appeal.**—An order granting an application for attachment before judgment without issuing notice to defendant under Order 38, rule 5 (1), can be deemed to have been one under Order 38, rule 6, and is therefore appealable under Order 43, rule 1 (q). 38 P. L. R. 772 = A. I. R. 1936 Lah. 33. An appeal lies against a conditional order of attachment. A. I. R. 1934 Lah. 594 = 148 Ind. Cas. 719.

**6. [S. 485.]** (1) Where the defendant fails to show cause why he should

Attachment where cause not shown or security not furnished.

not furnish security, or fails to furnish the security required within the time fixed by the Court, the Court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has been attached, the Court shall order the attachment to be withdrawn, or make such other order as it thinks fit.

**Scope.**—Attachment before judgment of mortgaged property can under proper circumstances be ordered in mortgage suit. 84 Rang. 270 = 2 Rang. 362. Attachment remains in force until termination is ordered. 90 Ind. Cas. 545 = 49 M. L. J. 88. For order under rule 6, disposal of property in the past is not sufficient but there must be present likelihood of disposal with intent to obstruct or delay decree to be passed. A. I. R. 1926 Cal. 855. Attachment cannot be ordered under rule 6 unless there is non-compliance with order under rule 5. A. I. R. 1928 Lah. 445 ; see also 57 Ind. Cas. 907 ; A. I. R. 1927 Cal. 354 = 31 C. W. N. 432 ; A. I. R. 1928 Lah. 445. Order withdrawing attachment on defendant's showing cause is appealable. A. I. R. 1932 All. 269. As regards effect of surety bond on dismissal of a suit and subsequent restoration of the same, *vide* 68 M. L. J. 444 (F.B.) = 58 M. 721 = 157 Ind. Cas. 528 = 41 L. W. 479 = A. I. R. 1935 Mad. 365 = 1935 M. W. N. 205.

**7. [S. 486.]** Save as otherwise expressly provided, the attachment shall

Mode of making attachment.

be made in the manner provided for the attachment of property in execution of a decree.

**Scope.**—This rule applies to making and not cessation of attachment. 22 A.L.J. 823 = 80 Ind. Cas. 105. An order of attachment before judgment, of movable found at a specified place does not authorize the nazir to take away the things from the place. 59 C. L. J. 389 = A. I. R. 1934 Cal. 780.

8. [S. 487.] Where any claim is preferred to property attached before judgment, such claim shall be investigated in the manner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the payment of money.

Investigation of claim to property attached before judgment.

**Scope.**—Attachment before judgment of debt is not injunction nor objection to such attachment that debt did not exist is one under O. 38, rule 8. A. I. R. 1933 All. 481. Court has jurisdiction to go into question of title under peculiar circumstances. A. I. R. 1929 Pat. 747=11 P. L. T. 59; see also A. I. R. 1927 Sind 114. Release of property from attachment under rule 8 does not determine ownership. 41 M. 23=39 Ind. Cas. 863. Although claims to property attached before judgment should be investigated, if made, according to the procedure laid down by Order 21, rule 58, it does not follow that a person who has a claim to such property is bound to make an objection before the decree; and a claim preferred within a reasonable time after the decree and application for execution is not "designedly or unnecessarily delayed" within the meaning of proviso to Order 21, rule 58, Civil Procedure Code. It is not therefore necessary for any person who has a claim to property attached before judgment to prefer a claim, though he may do so if he wishes to do so under the provisions of Order 38, rule 8. 31 N. L. R. 426=158 Ind. Cas. 353=A. I. R. 1935 Nag. 222.

9. [S. 488.] Where an order is made for attachment before judgment, the Court shall order the attachment to be withdrawn when the defendant furnishes the security required, together with security for the costs of the attachment or when the suit is dismissed.

Removal of attachment when security furnished or suit dismissed.

**Notes.**—Attachment ceases on dismissal of suit. A. I. R. 1930 Mad. 514=53 M. 234; see also A. I. R. 1928 Mad. 976; A. I. R. 1929 Rang. 94; 87 Ind. Cas. 756; 46 M. L. J. 415=83 Ind. Cas. 91; 9 Rang. 472=A. I. R. 1931 Rang. 281. Filing appeal does not revive attachment. 45 C. 780=22 C. W. N. 927; see also A. I. R. 1927 Rang. 310=5 Rang. 492. On suit abating for death, attachment before judgment ceases. A. I. R. 1928 Cal. 234=47 C. L. J. 282. Express order of withdrawal on oral or written application is necessary when only attachment ceases otherwise not. A. I. R. 1928 Mad. 940=56 M. L. J. 70.

10. [S. 489.] Attachment before judgment shall not affect the rights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree.

Attachment before judgment not to affect rights of strangers nor bar decree-holder from applying for sale.

**Scope.**—According to rule 10 attachment before judgment does not affect the right existing prior to the attachment of persons not parties to the suit. A. I. R. 1928 Bom. 545=30 Bom. L. R. 1488; see also A. I. R. 1928 Pat. 199=9 P. L. T. 55. Order 38, rule 10, is not confined to rights *in rem* 21 C. W. N. 158=23 C. L. J. 115=34 Ind. Cas. 953. Attachment confers no sort of lien or charge on the attached property. 46 M. 506=72 Ind. Cas. 820=44 M. L. J. 413; see also A. I. R. 1931 Rang. 48=8 Rang. 494. When at the date of attachment a person had no interest nor was possessed of the properties attached, he cannot proceed under rule 10. A. I. R. 1929 Cal. 162=48 C. L. J. 594. Section 64 does not distinguish attachment before and after judgment. A. I. R. 1929 Cal. 494=33 C. W. N. 805=57 C. 274. Where subsequent to attachment before judgment property is sold in execution by another decree-holder sale confers a fully valid title on the purchaser notwithstanding that only symbolical possession is given to him. 61 Ind. Cas. 922=2 P. L. T. 140; see also 59 Ind. Cas. 713=45 Bom. 360; A. I. R. 1925 Rang. 85. An attachment before judgment does not create any title or interest but merely prevents any alienation to the prejudice of the attaching creditor. 151 Ind. Cas. 683=A. I. R. 1934 Pat. 413; see also 59 C. L. J. 18=A. I. R. 1934 Cal. 426.

11. [S. 490.] Where property is under attachment by virtue of the provisions of this order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

**Scope.**—The attachment before judgment is converted after decree into an attachment in execution and the provisions of Order XXI, rule 57, will apply. A. I. R. 1929 Bom. 321=53 B. 545=31 Bom. L. R. 652; see also 62 Ind. Cas. 33=2 Pat. L. T. 719; A. I. R. 1929 Bom. 455=31 Bom. L. R. 1101; A. I. R. 1927 Cal. 240=44 C. L. J. 553; A. I. R. 1929 Cal. 465=56 C. 416; 70 Ind. Cas. 439=41 M. L. J. 252. The attachment before judgment does not merge in the subsequent attachment and becomes subject to all the infirmities of the subsequent attachment. A. I. R. 1929 Cal. 465=56 Cal. 416. A re-attachment in execution does not amount to waiver or abandonment of attachment before judgment. A. I. R. 1929 Cal. 465=56 C. 416. As regards the meaning of the words "Has been attached," *vide* A. I. R. 1931 Bom. 550=33 Bom. L. R. 1130. Appeal from order of attachment before judgment does not become injunctions when decree is passed. 37 C. W. N. 978=58 C. L. J. 289.

12. [*New.*] Nothing in this Order shall be deemed to authorise the plaintiff to apply for the attachment of any agricultural produce not attachable before judgment. agricultural produce in the possession of an agriculturist, or to empower the Court to order the attachment or production of such produce.

13.\* Nothing in this order shall be deemed to empower any Court of Small Causes to make an order for the attachment of immovable property. Small Causes Court not to attach immovable property.

**Notes.**—Act I of 1926 by which rule 13 was added to order 38 is retrospective in effect. A. I. R. 1928 Mad. 1173=55 M. L. J. 382.

## ORDER XXXIX.

### TEMPORARY INJUNCTIONS AND INTERLOCUTORY ORDERS.

#### *Temporary Injunctions.*

1. [S. 492.] Where in any suit it is proved by affidavit or otherwise—  
Cases in which temporary injunction may be granted.

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree, or

(b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit, until the disposal of the suit or until further orders.

*N. B.*—For local amendments in Allahabad, Calcutta, C. P., Oudh and Rangoon.—*Vide infra.*

**Scope of order 39.**—Section 94 is governed by Order XXXIX. A. I. R. 1926 Lah. 258=23 L. W. 85=92 Ind. Cas. 615. Order 39 applies to liquidation proceedings only if subject-matter is in dispute. 93 Ind. Cas. 310=A. I. R. 1925 Lah. 525.

**Principles of granting injunctions.**—Object and effect of injunction is to keep matters in *status quo* till final disposal. Principles on which it is issued are :

\* Inserted by Act I of 1936.

*prima facie* case, (2) irreparable injury if not granted and (3) balance of convenience. A. I. R. 1930 Sind 287=127 Ind. Cas. 690 ; see also A. I. R. 1926 Lah. 589 ; 23 C. W. N. 677=46 C. 1001 ; A. I. R. 1926 Cal. 837=43 C. L. J. 405 ; 88 Ind. Cas. 581 ; A. I. R. 1927 Mad. 188 ; A. I. R. 1929 Sind 182 ; A. I. R. 1928 Sind 82 ; 110 Ind. Cas. 621 (Nag) ; 66 Ind. Cas. 161 ; A. I. R. 1932 Lah. 356 ; 75 Ind. Cas. 859=5 P. L. T. 195 ; A. I. R. 1926 Pat. 318=7 P. L. T. 337 ; 85 Ind. Cas. 88=6 Lah. L. J. 298 ; 81 Ind. Cas. 332=5 Lah. L. J. 262 ; A. I. R. 1926 Lah. 435 ; A. I. R. 1930 Lah. 108 ; 31 P. L. R. 587 ; 89 Ind. Cas. 321=21 S. L. R. 170 ; 70 Ind. Cas. 864 ; A. I. R. 1933 Lah. 621 ; A. I. R. 1933 Lah. 448 ; A. I. R. 1933 Lah. 282 ; A. I. R. 1933 Sind 311.

**Scope.**—When conditions in rule 1 do not exist, injunction has no legal effect. 51 Ind. Cas. 108 ; see also 46 Ind. Cas. 224=(1918) Pat. 303 ; A. I. R. 1925 Cal. 233=81 Ind. Cas. 2. "Property in dispute in suit" means property which is the subject-matter of suit. 89 Ind. Cas. 678. Indian Courts can grant temporary injunctions in a mandatory form. 41 M. 208=6 L. W. 140=33 M. L. J. 448=41 Ind. Cas. 384 ; A. I. R. 1926 Sind 201. In a case under Order 39, rule 1, Court had not order petitioner to furnish security to compensate opposite party. A. I. R. 1934 Lah. 26. Injunction to restrain should not be ordinarily granted. A. I. R. 1933 Mad. 103. Whether injunction has been obtained without reasonable and probable cause is a finding of fact. A. I. R. 1933 Lah. 263=34 P. L. R. 281. In granting injunction balance of convenience should be considered. A. I. R. 1933 Nag. 153. Where discretion has been judicially exercised, order granting *interim* injunction should not be disturbed in appeal. A. I. R. 1933 Nag. 153. In some cases it is difficult for Court to grant temporary injunction without to a certain extent prejudicing case. A. I. R. 1931 Nag. 106. In cases of temporary injunction, conditions applicable to perpetual injunctions, are to be applied. A. I. R. 1933 All. 86=1932 A. L. J. 803. Court has summary power to pass *interim* order in respect of property to which *prima facie* company is entitled. 34 P. L. R. 388=A. I. R. 1932 Lah. 437=14 Lah. 68. High Court has no power to grant injunction under Order 39 in appeal or revision from mofussal Courts. A. I. R. 1933 Mad. 500=56 M. 563=64 M. L. J. 112. Temporary injunction against President, Legislative Assembly, restraining him from proceeding with certain Bill cannot be granted. A. I. R. 1932 Bom. 165=56 Bom. 254=34 Bom. L. R. 231. Calcutta High Court has inherent right to protect suitors resorting to it. 130 Ind. Cas. 252=57 C. 1285=A. I. R. 1931 Cal. 279 ; see also A. I. R. 1928 Mad. 591=27 L. W. 418. Calcutta High Court's powers of issuing injunction on parties in appeal before it are not circumscribed by this rule. 36 C. W. N. 291=54 C. L. J. 317. Order granting injunction is appealable. A. I. R. 1933 Lah. 282. Where demolition of party's wall is likely to endanger plaintiff's building, temporary injunction should be granted. A. I. R. 1930 Sind 244. Where appeal is pending before High Court, High Court can grant injunction. A. I. R. 1931 Lah. 65=31 P. L. R. 550. Temporary injunction if "until disposal" ends with suit, and if "until further orders" on earlier date on which further orders may be passed. A. I. R. 1930 All. 387 ; see also 76 Ind. Cas. 126. Injunction to stop sale by creditors can be granted if claim is *bona-fide*. 127 Ind. Cas. 347. Injunction can be granted only against party to suit. A. I. R. 1926 Lah. 284=27 P. L. R. 11. Injunction is binding on the party to whom it is issued from the time it is communicated. A. I. R. 1926 All. 457=24 A. L. J. 519. Court should issue injunction where breach of plaintiff's right is threatened. A. I. R. 1926 Mad. 166 ; see also A. I. R. 1928 Sind 82. In a suit for permanent injunction, temporary injunction should be issued if its refusal would defeat object of suit. 43 Ind. Cas. 24. Proof of waste is sufficient ground for obtaining injunction and appointing Receiver. 53 Ind. Cas. 760=10 L. W. 551. It is general principle restricting grant of temporary injunctions that equally efficacious relief should not be obtainable by any other usual remedy. A. I. R. 1921 Nag. 90=4 N. L. R. 207. One Subordinate Court has no power to restrain action of another Subordinate Court, co-ordinate to itself. 2 P. L. T. 716=63 Ind. Cas. 465. Order to keep accounts and prepare inventory comes under this rule. A. I. R. 1923 Lah. 48=72 Ind. Cas. 569. Temporary injunction will not be allowed if permanent injunction cannot be granted. 73 Ind. Cas. 294=2 Pat. L. R. 17. Where a person is beyond jurisdiction, injunction can be granted against him if he has submitted to jurisdiction. A. I. R. 1926 Pat. 171=6 Pat. L. T. 540. Sale is not void where there is an injunction against alienation. A. I. R. 1930 Lah. 858 ; see also A. I. R. 1930 All. 387 ; A. I. R. 1929 Oudh 255 ; A. I. R. 1928 Lah. 639.

Order issuing injunction in co-sharer's case must be passed with greater caution than order in case of trespasser. A. I. R. 1928 Cal. 293. Injunction can be granted

In suit for office of *Imam*. But in such injunctions there should be no compulsion to have particular *kazi* at marriages. A. I. R. 1927 Mad. 1070=106 Ind. Cas. 523. Apprehension of breach of peace and collection of rent are not sufficient grounds to issue injunction. A. I. R. 1926 Cal. 604=30 C. W. N. 214=94 Ind. Cas. 871. Where in a declaratory suit, there is no prayer for consequential relief, injunction should not be generally granted. A. I. R. 1926 Lah. 504=8 Lah. L. J. 289=27 P. L. R. 453=96 Ind. Cas. 439. Order of injunction without finding of possession or of danger of waste is unsustainable. A. I. R. 1925 Mad. 896=21 L. W. 698=91 Ind. Cas. 307. Order for injunction differs from order attaching property. *Bona fide* purchaser under injunction without notice is protected. A. I. R. 1925 Lah. 644=6 Lah. 380=90 Ind. Cas. 937. Though relief prayed for in suit may ultimately be refused; temporary injunction can be granted. A. I. R. 1925 Lah. 628=89 Ind. Cas. 678. Court can grant injunction under inherent power to restrain party from proceeding with execution in different suits. A. I. R. 1926 Mad. 1126=24 L. W. 421=97 Ind. Cas. 938. But injunction restraining execution of decree obtained by defendant against plaintiff cannot be granted under Order 39, rules 1 and 2. A. I. R. 1926 Mad. 258=23 L. W. 85=92 Ind. Cas. 615. Though relief prayed for in suit may ultimately be refused, temporary injunction can be granted. 89 Ind. Cas. 678=A. I. R. 1925 Lah. 628.

Proof of waste is sufficient ground for obtaining injunction and appointing Receiver. 10 L. W. 551=53 Ind. Cas. 760. Where person is out of possession, injunction cannot be issued, unless there is fraud or collusion or irreparable injury. A. I. R. 1925 Lah. 167=80 Ind. Cas. 727. Injunction to restrain plaintiff from preventing defendants from entering and worshiping in certain temples does not come under rule 1. 3 Pat. L. W. 98=1 Pat. L. J. 560=38 Ind. Cas. 40. In case of appointment of *co-mutwalli* no injunction is to be issued if there is no danger of waste. 14 A. L. J. 554=35 Ind. Cas. 718. Where Muhammadan woman having exercised option of puberty to be a wife, injunction against some relatives of woman restraining them from giving her away in marriage is not maintainable. 17 A. L. J. 1138=42 A. 134=54 Ind. Cas. 223. Interlocutory injunction should not be issued upon novel consideration interfering with arbitrators. 31 C. L. J. 167=24 C. W. N. 612=55 Ind. Cas. 778=47 C. 611=58 Ind. Cas. 755. In a suit for setting aside fraudulent decree against a minor, injunction to stay sale should not be granted unless there is reasonable prospect of proof of minority and fraud. A. I. R. 1925 Pat. 337=5 P. L. T. 121=1 Pat. L. R. 462=75 Ind. Cas. 381. Injunction should be granted if Court is satisfied about *prima facie* right and its infringement. A. I. R. 1923 Pat. 209=4 Pat. L. T. 48=71 Ind. Cas. 11. Injunction is to be granted only if it does not create totally a new state of things. 67 Ind. Cas. 742. In a suit to set aside compromise decree passed against plaintiffs during minority, injunction to restrain execution cannot be granted. A. I. R. 1922 Pat. 34=4 P. L. T. 10=1 Pat. 356=69 Ind. Cas. 891. No injunction for landlord's restraining tenant from executing his decree for possession against sub-tenant can be granted. A. I. R. 1922 Bom. 385=24 Bom. L. R. 378=46 B. 939=66 Ind. Cas. 768.

Where no *prima facie* case is proved, injunction should not be used. 156 Ind. Cas. 698=A. I. R. 1935 Sind 128; see also 61 C. 814=38 C. W. N. 771=A. I. R. 1934 Cal. 694. An injunction can only be granted under Order 39, rule 1, C. P. Code, on certain grounds specified therein. 59 M. 741=161 Ind. Cas. 721=1936 M. W. N. 51=A. I. R. 1936 Mad. 276=70 M. L. J. 257. The principles governing the issue of temporary injunction are as follows: The applicant must show a fair *prima facie* case in support of the right claimed and an actual or threatened violation of that right, production of irreparable or at least serious damage; his conduct must be such as not to disentitle him to assistance; it should be fair and honest, and in particular there must be no acquiescence or delay. 160 Ind. Cas. 569=A. I. R. 1936 Pesh. 11. An *interim* injunction should not be granted merely because the defendant against whom it is asked for would be no worse off for it. 15 Pat. 404=162 Ind. Cas. 210=17 Pat. L. T. 109=A. I. R. 1936 Pat. 226.

In a case falling under Order 39, rule 1, it is not necessary that the Court should order the petitioner to furnish security to compensate the decree-holder for any loss that may be caused by a temporary injunction against him being granted. A. I. R. 1934 Lah. 26. High Court has an inherent power to grant injunction in suitable cases irrespective of the provisions of Order XXXIX. A. I. R. 1925 Lah. 241=78 Ind. Cas. 802. Injunction by Appellate Court ends with passing of decree by trial Court in declaratory suit. A. I. R. 1921 All. 919=43 A. 383=19 A. L. J. 174=

61 Ind. Cas. 417. Applying to restrain defendant from prosecuting action in foreign Court must be done at very early stage. 24 C. W. N. 735=59 Ind. Cas. 218. Where prohibitory order is made in Court in the presence of parties, no notice of it is necessary. 42 A. 98=17 A. L. J. 1127=58 Ind. Cas. 600.

**Appeal.**—Appeal lies against an order under rule 1. 6 P. L. T. 201=83 Ind. Cas. 48.

2. [S. 493.] (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may by order grant such injunction, on such terms as to the duration of the injunction, keeping an account, giving security, or otherwise as the Court thinks fit.

(3) In case of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

(4) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the Court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

**Soope.**—Temporary mandatory injunctions are not covered by rule 2 but can be issued under s. 151. A. I. R. 1927 Mad. 201=24 L. W. 854. In absence of strong proof injunction will not be issued for stopping share-holder's meeting. A. I. R. 1926 Sind 295. "Injury" in rule 2 means an act which is contrary to law. Court has inherent power to grant temporary injunction. 2 Lah. L. J. 283=55 Ind. Cas. 403. Suit in High Court, original side, can issue injunction against defendant to stay his suit on mofussil Court if it causes embarrassment or delay of trial of suit. 44 B. 283=21 Bom. L. R. 963=53 Ind. Cas. 518. No injunction will be granted where arbitration proceedings sought to be restrained are merely futile and will not result in injury to applicant. But injunction will be issued when arbitrator has misconducted himself. A. I. R. 1927 Sind 182=21 S. L. R. 306=101 Ind. Cas. 160. Order of one Indian Court may be effective against person with jurisdiction of another Indian Court, which like order by English Court would be no use against person in foreign jurisdiction. A. I. R. 1931 Cal. 279=57 C. 1280=130 Ind. Cas. 252. Where remedy under Criminal Procedure Code, s. 488 is open, Civil Court should not grant injunction. A. I. R. 1930 Cal. 753=32 Cr. L. J. 332=129 Ind. Cas. 103. Before an applicant can succeed in obtaining the temporary injunction he must satisfy the Court that the comparative mischief or inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it. 151 Ind. Cas. 862=A. I. R. 1934 Sind 136; A. I. R. 1934 Cal. 621=151 Ind. Cas. 675. If the relief which the plaintiff seeks cannot be granted, no temporary injunction can be issued by the Court. 152 Ind. Cas. 98=A. I. R. 1934 All. 876. It is neither the rule nor the practice of the Court to grant, on an interlocutory application, an injunction which will have the practical effect of granting the entire relief claimed in the suit, in the absence of apparent urgency and injury to the applicant. 40 C. W. N. 1201. Where no *prima facie* case is proved, injunction should not be issued. 156 Ind. Cas. 698=A. I. R. 1935 Sind 128. If a suit is pending in a Civil Court,

the Court has jurisdiction under this rule to issue a temporary injunction if it is satisfied that injury is likely to be caused to the plaintiff. The fact that the Court subsequently discovers that the suit does not lie or that it should fail on some other ground does not oust its jurisdiction formerly exercised. 152 Ind. Cas. 817=A. I. R. 1935 All. 106=1935 A. L. J. 139.

Clause (3) of rule 2 applies to disobedience generally of an injunction granted by the Court. The words "in case of disobedience" are wide enough to cover breaches of injunctions issued under Order 39, rule 1, for which breach no penalty is elsewhere provided and they are not limited to breaches of injunctions issued under rule 2 alone. A. I. R. 1935 Pat. 274=16 Pat. L. T. 309; see also A. I. R. 1936 Pat. 23=15 Pat. 320=17 Pat. L. T. 61. No injunction can be issued in suit for declaration that a candidate is not eligible for election. A. I. R. 1923 Lah. 47=79 Ind. Cas. 233. Under rule 2 Court has power to grant *interim* injunction. A. I. R. 1933 All. 344=55 A. 399=1933 A. L. J. 290. Grant of injunction is dependent upon judicial discretion. 1932 A. L. J. 803=A. I. R. 1933 All. 86; see also A. I. R. 1933 Lah. 1046. Delay is sufficient reason for refusing injunction. 14 Lah. 330=A. I. R. 1933 Lah. 203. Court should not pass order frivolously and vexatiously. *Ibid.* Where breach has already been committed, injunction though cannot be granted under Order 39, rule 2, Court can grant it in its inherent powers. 34 P. L. R. 51=A. I. R. 1933 Lah. 73. Where compensation in damages is possible, injunction should not be granted. *Ibid.*; *interim* order restraining minor's marriage with unsuitable person is competent. A. I. R. 1933 Nag. 62=28 N. L. R. 332. In case of injunction restraining import and sale of goods as infringing trade-mark, fraudulent misrepresentation is not essential. A. I. R. 1932 Sind 84=26 S. L. R. 51. Party not carrying on business in British India should be put to terms in granting injunction. 26 S. L. R. 51. Person disobeying injunction restraining alienation of property pending decision of appeal must be punished. A. I. R. 1931 Lah. 201=12 Lah. L. J. 309. Order refusing or granting a temporary injunction is appealable. A. I. R. 1037 Rang. 150.

Fact that suit would be infructuous if no temporary injunction is issued is not sufficient for issuing injunction. A. I. R. 1933 Lah. 203. Injunction can be passed by consent of parties. But it must be by order of Court. A. I. R. 1934 Cal. 402. Persons should not be allowed to disobey injunction with impunity. A. I. R. 1931 Lah. 201=12 Lah. L. J. 309; see also A. I. R. 1926 Mad. 574=50 M. L. J. 401.

**3. [S. 494.]** The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

Before granting injunction Court to direct notice to opposite party.

**Scope.**—Court should issue injunction without notice if object of injunction is likely to be defeated by delay. 13 Bur. L. T. 227=64 Ind. Cas. 534. Order merely ordering notice is not appealable. A. I. R. 1924 Mad. 857.

**4. [S. 496.]** Any order for an injunction may be discharged, or varied or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Order for injunction may be discharged, varied or set aside.

**Scope.**—Rule 4 is intended to cover two cases *viz.*, (1) order afterwards becoming unnecessary, harsh or unworkable or (2) when urgent order *ex parte* is passed under rule 3. A. I. R. 1929 Mad. 803.

**5. [S. 495.]** An injunction directed to a corporation is binding not only

Injunction to corporation binding on its officers.

on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

**Notes.**—This rule applies to registered or unincorporated bodies or associations. 9 Bur. L. T. 247=38 Ind. Cas. 572.



*Interlocutory Orders.*

6. [S. 498.] The Court may, on the application of any party to a suit, order the sale, by any person named in such Power to order interim sale. order, and in such manner and on such terms as it thinks fit, of any movable property, being the subject-matter of such suit, or attached before judgment in such suit, which is subject to speedy and natural decay, or which for any other just and sufficient cause it may be desirable to have sold at once.

**Scope.**—This rule does not authorise Court to send Commissioner to sell crops. A. I. R. 1930 Mad. 224. Interlocutory order without jurisdiction can be attacked in revision. A. I. R. 1932 Lah. 51.

7. [S. 499.] (1) The Court may, on the Detention, preservation, inspection, etc., of subject-matter of suit. application of any party to a suit, and on such terms as it thinks fit,—

(a) make an order for the detention, preservation or inspection of any property which is the subject-matter of such suit, or as to which any question may arise therein ;

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such suit ; and

(c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence.

(2) The provisions as to execution of process shall apply, *mutatis mutandis*, to persons authorized to enter under this rule.

**Notes.**—Where the question is whether certain structure is old or new, commission must be issued under this rule. 37 C. W. N. 143. Inventory of property can be made. 52 Ind. Cas. 33. As regards order of production *vide*, 30 C. L. J. 64=52 Ind. Cas. 4. An order that a situation should not be altered pending a suit is an order under this rule. 1935 A. M. L. J. 117.

8. [S. 500.] (1) An application by the plaintiff for an order under rule 6 or rule 7 may be made after notice to the Application for such orders to be after notice. defendant at any time after institution of the suit.

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

**Scope.**—Improper delay deprives right of interlocutory injunction A. I. R. 1933 Sind 26=26 S. L. R. 335.

9. [S. 501.] Where land paying revenue to Government, or a tenure liable to sale, is the subject-matter of a suit, When party may be put in immediate possession of land, if the party in possession of such land or the subject-matter of suit. tenure neglects to pay the Government revenue, or the rent due to the proprietor of the tenure, as the case may be, and such land or tenure is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenure ;

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

10. [S. 502.] Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the Court may order the same to be deposited in Court or delivered to such last named party, with or without security, subject to the further direction of the Court.

Notes.—Admission under Order XII, r. 6, if insufficient it is also insufficient under Order 39, rule 10 ; A. I. R. 1927 Sind 25=97 Ind. Cas. 623.

## ORDER XL.

### *Appointment of Receivers.*

1. [S. 503.] (1) Where it appears to the Court to be just and convenient, the Court may by order—

- (a) appoint a receiver of any property, whether before or after decree ;
- (b) remove any person from the possession or custody of the property ;
- (c) commit the same to the possession, custody or management of the receiver ; and
- (d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

**Receiver.**—Receiver is not a judicial officer and cannot act as Judge in Court. A. I. R. 1929 Bom. 478=31 Bom. L. R. 1081. Remedy is derived from English practice. A. I. R. 1927 All. 419. Court can order *suo motu* even in declaratory suit. 67 Ind. Cas. 383. Court has summary power to pass order in respect of property to which *prima facie* company is entitled. A. I. R. 1933 Lah. 437. Receiver is a public officer. 35 C. W. N. 161=58 C. 850 ; 57 C. 1127.

**When can be appointed.**—Receiver can be appointed when it is just and convenient. A. I. R. 1932 Mad. 193=61 M. L. J. 904. There must be danger of waste or destruction of property. A. I. R. 1933 Sind 231 ; see also 34 C. W. N. 440 ; A. I. R. 1929 Lah. 497 ; A. I. R. 1928 Nag. 93 ; 45 Ind. Cas. 224 ; 48 Ind. Cas. 152 ; 44 B. 727=57 Ind. Cas. 553 ; 46 M. L. J. 133=79 Ind. Cas. 561. Where there are rival claimants appointment of Receiver is proper. A. I. R. 1927 Pat. 220=8 P. L. T. 455. Receiver cannot be appointed to ascertain the real income of property. 89 Ind. Cas. 943. Omission by executor to submit inventory and account is good ground for appointing Receiver. A. I. R. 1927 Rang. 135=6 Bur. L. J. 13. Even in simple claim for money Receiver can be appointed. A. I. R. 1929 Mad. 184=52 M. 938. An executing Court can appoint a Receiver for realisation of property outside jurisdiction. 61 Ind. Cas. 753. As regards Court's power to appoint Receiver in other cases, *vide* 55 C. 249=A. I. R. 1928 Cal. 256 ; A. I. R. 1927 Lah. 65 ; 90 Ind. Cas. 611=26 P. L. R. 576 ; 52 C. 513=88 Ind. Cas. 826 ; 30 C. W. N. 818 (P. C.)=47 A. 385=52 I. A. 262 ; 78 Ind. Cas. 84=18 S. L. R. 303 ; 73 Ind. Cas. 600=5 Lah. L. J. 533. Appointment of Receiver for equitable execution by Calcutta High Court is good though colliery was situate outside limits of its jurisdiction. A. I. R. 1930 Cal. 502=57 C. 964=34 C. W. N. 238. Mere apprehension that defendant would wrongfully dispose of property is not enough for appointment of a Receiver. A. I. R. 1936 Lah. 102. The words "just and convenient" in rule 1, do not mean just or convenient to one party or the other but just or convenient according to judicial notions of what is right and just. A. I. R. 1935 Mad. 875=159 Ind. Cas. 93. A Court cannot appoint a Receiver to

take charge of property which is in the possession of third party and when that party claims to be in possession thereof in his own right. A. I. R. 1935 Rang. 398.

**Effect of appointment.**—Where a Receiver is appointed by Court, he takes possession of the property on behalf of Court. 71 Ind. Cas. 293=43 M. L. J. 211. An order appointing a Receiver of the property of the judgment-debtor does not stay execution. 62 Ind. Cas. 469=2 Pat. L. T. 628. Property in possession of a Receiver is in the custody of the law and cannot be seized under a writ of attachment or execution. Court can in its discretion refuse to permit a sale of the property. 68 Ind. Cas. 826=43 M. L. J. 211=47 M. 47; see also A. I. R. 1930 Mad. 4; 79 Ind. Cas. 632; 71 Ind. Cas. 293. Appointment so long lasts, must be respected. A. I. R. 1933 Lah. 671. Stranger cannot question possession of Receiver. A. I. R. 1929 Mad. 184=52 M. 938. Persons with paramount title are not affected by appointment of Receiver. A. I. R. 1927 Pat. 397. The rule that possession of a Receiver may not be disturbed without leave, does not apply to third parties until a Receiver has been actually appointed and is in actual possession. 27 C. W. N. 38=37 C. L. J. 265. Receiver alone and no one else represents the estate. No leave is accordingly necessary for suing him. A. I. R. 1924 All. 40=21 A. L. J. 737=46 A. 16=76 Ind. Cas. 57. Where a person who is to be appointed Receiver is asked to produce security, he is not appointed till he produces security. 71 Ind. Cas. 293.

**Application for appointment.**—Application to be made in open Court. A. I. R. 1927 Bom. 256=29 Bom. L. R. 214. Application should be made promptly. A. I. R. 1926 Cal. 1092. Notice to opposite party is not necessary. The main object is to preserve property and the Court is to see that. 71 Ind. Cas. 743; see also 67 Ind. Cas. 606; 43 C. 986=20 C. W. N. 1009.

**Discretion of Court**—Court has wide discretion but should be cautiously exercised. A. I. R. 1927 Rang. 135=6 Bur. L. J. 13; 26 P. L. R. 228=88 Ind. Cas. 562; 28 C. W. N. 86=77 Ind. Cas. 783; 61 Ind. Cas. 112; 55 Ind. Cas. 50; 76 Ind. Cas. 583; 23 C. L. J. 567=34 Ind. Cas. 693; 36 C. W. N. 882 (P. C.)=A. I. R. 1932 P. C. 191; A. I. R. 1932 Lah. 82; A. I. R. 1933 Rang. 94. Two Receivers by different Courts cannot be appointed for same property. A. I. R. 1933 Lah. 671.

**Interim Receiver.**—Appointment of *interim* Receiver pending final appointment of common manager under s. 95 of the B. T. Act, can be made under special circumstances. 34 Ind. Cas. 83.

**Who can be appointed.**—Party or his agent can be appointed. A. I. R. 1929 Lah. 789. But for such appointment consent of the other party is required. A. I. R. 1926 Cal. 593=53 C. 319; A. I. R. 1926 Sind. 37. A Receiver must be impartial. 53 C. 319=A. I. R. 1926 Cal. 593; 28 C. W. N. 86. A person who is guardian of an incapacitated defendant in a suit is not always disqualified to be a Receiver. 35 Ind. Cas. 939=4 L. W. 285. The appointment of a Receiver lies in the discretion of the Court. 6 Lah. 74=88 Ind. Cas. 562. Creditor's wishes are entitled to great weight in appointing Receiver. A. I. R. 1929 Pat. 114.

**Powers of Receiver.**—Receiver is the representative and officer of Court. He is the hand of Court. A. I. R. 1928 Cal. 402. A Receiver has none but expressly granted powers. Whatever power he exercises are delegated powers of the Court which it expressly gives to him. 82 Ind. Cas. 793; see also 71 Ind. Cas. 650=50 I. A. 77=50 C. 338=28 C. W. N. 1 (P. C.); 29 C. W. N. 413=26 Bom. L. R. 1153 (P. C.). The possession of the Receiver although in a sense the possession of the Court is also the possession of all the parties to the suit according to their title. (1918) M. W. N. 683=49 Ind. Cas. 89. Person appointed as officer of Court cannot pledge credit of individual party. A. I. R. 1929 Cal. 654. Receiver continues till discharge though suit is dismissed in appeal. A. I. R. 1930 Mad. 67=52 M. 967=57 M. L. J. 668. A Receiver can bring a suit for recovery of rent which accrued one prior to his appointment. 69 Ind. Cas. 858; but see 42 Ind. Cas. 785. A private Receiver deriving his power from the appointment of a mortgagee is not known in India. 40 Ind. Cas. 865. Receiver's powers are strictly limited by term of his appointment; subject to any subsequent change by the Court under which he holds the appointment. 30 M. L. J. 456=32 Ind. Cas. 207. A Receiver appointed to collect outstandings has power to file suits though the suit in which he was appointed has terminated in a decree or an appeal is pending from that decree. 33 Ind. Cas. 69.

Special leave of Court is not necessary for giving notice to quit or to sue for compensation for use and occupation when the Receiver is given full powers. 10 Bur. L. T. 244=38 Ind. Cas. 92. Position and duties of common manager of estate appointed by Court and of Receiver of property appointed by Court are analogous. 59 C. 961=A. I. R. 1932 Cal. 275.

**Prima facie case**—Plaintiff must show *prima facie* good title and strong case for appointment of Receiver. A. I. R. 1928 Mad. 813=106 Ind. Cas. 167; A. I. R. 1925 Sind 83; A. I. R. 1926 Sind 37=20 S. L. R. 201=89 Ind. Cas. 104, 3 P. L. T. 466=68 Ind. Cas. 656; 43 Ind. Cas. 550; 69 Ind. Cas. 361. On an application under this rule filed by the plaintiff for the appointment of a Receiver, the plaintiff in order to succeed must show that *prima facie* the defendant has no title to the property and that he has the title. 1936 O. W. N. 466=161 Ind. Cas. 838; see also A. I. R. 1936 Lah. 102; A. I. R. 1936 Mad. 817=44 L. W. 498; A. I. R. 1936 Mad. 966=71 M. L. J. 629.

**Meaning of words.**—Person in clause (b) denotes a person other than a "Receiver." A. I. R. 1924 Mad. 614=46 M. L. J. 196=78 Ind. Cas. 625. Person in sub-section (2) denotes persons intrusted in the property and in possession or custody of it prior to the passing of an order appointing a Receiver. 53 C. 319=A. I. R. 1926 Cal. 593.

**Mortgage-suit.**—Where mortgage is void, Receiver should not be appointed on application by mortgagee. A. I. R. 1930 Rang. 271. Receiver can be appointed in mortgage-suits if found convenient. A. I. R. 1927 Sind 230; see also A. I. R. 1929 Lah. 780; A. I. R. 1929 Mad. 138; A. I. R. 1927 Sind 230; A. I. R. 1926 Cal. 1006; A. I. R. 1926 Cal. 978; 87 Ind. Cas. 375; 85 Ind. Cas. 737; 56 Ind. Cas. 839=47 C. 418; 43 Ind. Cas. 533; 32 Ind. Cas. 691; A. I. R. 1935 Oudh 497=1935 O. W. N. 1118; A. I. R. 1935 Mad. 825=159 Ind. Cas. 93; A. I. R. 1935 Mad. 410=1935 M. W. N. 351; A. I. R. 1935 Rang. 525; A. I. R. 1935 Lah. 17=16 Lah. 366. Receiver can be appointed in suit by simple mortgagee. A. I. R. 1933 Mad. 570 (F. B.)=56 M. L. J. 222; A. I. R. 1933 Mad. 447; but see 13 P. L. T. 525=A. I. R. 1932 Pat. 360. Equitable mortgagee is entitled to appointment of Receiver. A. I. R. 1932 Lah. 82. Receiver in mortgage-suit must make over income of the property towards mortgage due in preference to assignee. 54 M. 555=A. I. R. 1931 Mad. 626. Receiver can be appointed after decree for sale. A. I. R. 1932 Cal. 194. An order appointing a Receiver in execution of a mortgage decree does not bind a person not a party to the suit. 4 P. L. W. 414=45 Ind. Cas. 177. Where a Receiver is asked to be appointed in a mortgage suit the primary consideration is the protection of the mortgagee. 23 C. L. J. 440=34 Ind. Cas. 405. A mortgagee without possession is entitled to move the Court to appoint an *interim* Receiver, and the Court may pass an order if, in the circumstances of the case, it thinks that it is just and convenient to do so. A. I. R. 1934 Lah. 717; see also 12 Rang. 437=A. I. R. 1934 Rang. 321; A. I. R. 1934 All. 772=1934 A. L. J. 561; A. I. R. 1936 Rang. 246=163 Ind. Cas. 166; A. I. R. 1936 Rang. 296 (S. B.)=14 Rang. 308; A. I. R. 1936 Rang. 290=14 Rang. 292=163 Ind. Cas. 850; A. I. R. 1936 Pat. 357=17 Pat. L. T. 671=163 Ind. Cas. 811; but see 1935 A. L. J. 605=A. I. R. 1936 All. 495 (F. B.)=163 Ind. Cas. 481.

**Partition suit.**—The Court can appoint a Receiver in a pending partition suit between co-owners or co-sharers for the protection of the property in suit or the prevention of an injury to such property. A. I. R. 1926 Sind 37=20 S. L. R. 201=89 Ind. Cas. 104. Plaintiff must show *prima facie* care and danger of waste. 72 Ind. Cas. 569. The Court should appoint a Receiver, in a partition suit, between members of a joint-family only by consent and especially where the family property consists of land. 55 Ind. Cas. 827=22 Bom. L. R. 217; see also 85 Ind. Cas. 93=3 Pat. 964.

**Partnership suit.**—A Receiver can be appointed in a suit for dissolution of partnership. 89 Ind. Cas. 593=A. I. R. 1925 Rang. 287=3 Rang. 195; A. I. R. 1934 Cal. 444. No transfer of ownership of the partnership assets from the partner to the Receiver is affected by a Receiver's application to take charge of such property. 91 P. R. 1917=36 Ind. Cas. 980.

**Miscellaneous cases.**—Appointment of Receiver for equitable execution by Calcutta High Court is good though colliery was situate outside the limits of its jurisdiction. A. I. R. 1930 Cal. 502=51 C. L. J. 209=34 C. W. N. 238=57 C. 964=

128 Ind. Cas. 97. In a suit in the lifetime of a Hindu widow to have the alienation declared void, a receiver should not be appointed. A. I. R. 1930 Bom. 545=32 Bom. L. R. 1013=54 B. 1013=54 B. 837. In case of joint ownership appointment of receiver for the whole property is bad. A. I. R. 1927 Rang. 179=101 Ind. Cas. 717. In a mortgage decree appointment of receiver to collect debt is good. A. I. R. 1928 Rang. 176=6 Rang. 261. Where the executor is to act with advice of other heirs and this condition becomes impossible, a receiver can be appointed. A. I. R. 1928 Cal. 256=55 C. 249=109 Ind. Cas. 759. Where there is no personal decree against the person and no reasonable chance of a personal decree being passed against him in the near future, the persons should not be deprived of the possession of the estate which is in any way connected with property in the suit and a Receiver appointed for it. A. I. R. 1926 Mad. 797=23 L. W. 650; see also A. I. R. 1926 Cal. 1092=96 Ind. Cas. 30. No receiver could be appointed where a trustee against whom misconduct was alleged, died. 91 Ind. Cas. 105. Court cannot appoint a Receiver at the instance of a simple contract creditor unless the creditor establishes a special equity in favour of such appointment. 3 P. L. T. 24=6 P. L. J. 366=61 Ind. Cas. 849. Court cannot appoint a Receiver in a case where a Mahammadan widow or her heir is in possession of the estate of her deceased husband for the satisfaction of dower debt. A. I. R. 1923 Nag. 21=68 Ind. Cas. 502. That the person in actual possession as manager is a poor man is not an adequate reason for appointing a Receiver. 43 A. 311=19 A. L. J. 50=60 Ind. Cas. 901. As a trust-property cannot be sold in execution of a decree against the trustees, a Receiver for judgment-debtor's property should be appointed for satisfaction of decree-holder's claim. 30 C. L. J. 231=57 Ind. Cas. 70; see also 37 C. L. J. 417=75 Ind. Cas. 417. (Impartible estate). Under this rule the Court has power to appoint a receiver of an estate and to direct to accept the award of the land acquisition Collector on behalf of the claimants. A. I. R. 1934 Cal. 758=38 C. W. N. 844. Where properties of deceased are in the possession of his widow and she is the executrix under the Will left by the deceased, a mere claim to such property made by an alleged daughter of the deceased is no ground for appointment of a receiver. A. I. R. 1934 Rang. 153. There is a distinction between the practice of appointing a receiver in the case of a general creditor and in the case of a creditor who has a right against a specific fund or estate. A. I. R. 1936 Lah. 102. Section 51, C. P. Code, prescribes the procedure in execution and lays down that the Court may on the application of the decree-holder order execution of the decree by appointing a receiver. A. I. R. 1936 Lah. 239=162 Ind. Cas. 861. Where the judgment-debtors are in possession of the property by virtue of their having furnished the security demanded from them by the Court as a condition of execution being stayed, the decree-holder has not a present right to remove them from possession. A. I. R. 1936 Oudh 370=1936 O. W. N. 595. A receiver appointed in execution is quite as much as a receiver appointed in a suit, an officer of the Court, and holds moneys collected by him subject to the order of the Court. 69 M. L. J. 534=1935 M. W. N. 1078=A. I. R. 1935 Mad. 1046. A receiver can be appointed in a suit on promissory-note. A. I. R. 1935 Rang. 398.

**Trust.**—When a Receiver can be appointed, *vide* 31 C. W. N. 1021 P. C.; A. I. R. 1927 Sind 237; A. I. R. 1926 Cal. 1092; 29 C. W. N. 836; 68 Ind. Cas. 565; A. I. R. 1936 Cudh 337; A. I. R. 1937 B. 124.

**Suit by or against Receiver**—Leave of Court essential for Receiver to sue or be sued. A. I. R. 1928 Rang. 175=6 Rang. 268; see also A. I. R. 1928 Pat. 321; A. I. R. 1927 Pat. 297; 73 Ind. Cas. 456=44 M. L. J. 427; 76 Ind. Cas. 441; 69 Ind. Cas. 393. A receiver's possession is on behalf of the party entitled to it and no action can lie against a receiver without leave of the Court. A Court would refuse to determine the accountability of a Receiver, where it rests on a debatable point. A. I. R. 1926 Cal. 385=52 C. 914=41 C. L. J. 571=90 Ind. Cas. 851. Permission of appointing Court is necessary for injunction against receiver even when it is granted with his consent by another Court. A. I. R. 1928 Pat. 321=7 Pat. 684=9 P. L. T. 279. A third party who may be entitled to possession is not kept out of possession by the appointment of a receiver and the Court will readily give leave to sue its receiver if it is satisfied that there is a case to be tried so that the claim of the third party may be tried in the presence of the receiver. A. I. R. 1924 Pat. 491=3 Pat. 357=5 P. L. T. 243=78 Ind. Cas. 620. Owner of an estate cannot file suit for account against a *tahsilder* appointed by a receiver for his estate. A. I. R. 1921 Cal. 516=26 C. W. N. 992=62 Ind. Cas. 768. A Court grants leave to continue a

suit instituted by or against a receiver of the Court commenced without such leave, provided a proper case is made on the merits. The grant of subsequent leave will cure the defect. 46 C. 352=23 C. W. N. 496=58 Ind. Cas. 486. Permission to institute a suit is implied in permission to conduct a suit. A permission granted by a Court to sue a receiver relates back to the time of the institution of the suit. 63 Ind. Cas. 843. Court's sanction for institution of a suit against the receiver is required merely to enforce due respect towards Courts of Justice and omission to do so does not affect the jurisdiction of the Court. 15 L. W. 289=42 M. L. J. 339=70 Ind. Cas. 759; but see 21 A. L. J. 737=46 A. 16=77 Ind. Cas. 57. Where it has been held that a receiver holds the estate on behalf of the Court. The estate does not vest in him, nor does he in any way represent it. Leave of the Court is required to sue him to find the estate. The omission to get leave of the Court to institute a suit against a receiver can be made good while the proceedings are pending. 61 Ind. Cas. 888; see also 43 M. 793=12 L. W. 331=59 Ind. Cas. 568; 22 Bom. L. R. 319=56 Ind. Cas. 424. A party has to obtain the leave of a Court to sue a receiver not as per provision of any statute but in the exercise of the inherent power which every Court possesses to prevent acts which constitute or are akin to an abuse of its authority. A Court should not refuse to leave to sue ordinarily. 4 P. L. J. 20=(1918) Pat. 337=47 Ind. Cas. 719. Court is empowered to authorise receiver to bring suit in his own name. A. I. R. 1937 Bom. 244.

**Discharge of Receiver.**—His functions continue until discharged. 89 Ind. Cas. 932=6 Lah. 442; see also 61 Ind. Cas. 562=13 L. W. 367. Neither a decree nor the pendency of the appeal against that decree will put an end to the authority of the Receiver appointed to collect rents. 33 Ind. Cas. 69; see also 20 C. W. N. 789; 58 Ind. Cas. 405=5 Pat. L. J. 513; A. I. R. 1929 Bom. 279=31 Bom. L. R. 320. Court appointing a Receiver can also dismiss him. A. I. R. 1931 All. 72; 75 Ind. Cas. 858; but see 31 Ind. Cas. 908. A Receiver should be discharged if he is found to be incapable. A. I. R. 1929 Pat. 114.

**Possession of Receiver**—Receiver is not agent of judgment-creditor. A. I. R. 1930 Mad. 4. The object of appointing a receiver is the safeguarding of property for the benefit of those entitled to it. His possession is on behalf and for the benefit of all the parties to the suit in which he is appointed, and is in possession of all the said parties according to their titles. The property in his hands is in *custodia legis* for the person who can make a title to it. The title of the real owner is in no way affected either in theory or principle by his appointment. He collects and receives the rents, issues and profits not upon his own title but upon the title of some other persons, parties to the action. A Receiver is not the representative or agent of the party or parties but of the Court in the sense that he acts in the interest of neither plaintiff nor defendant but for the common benefit of all parties interested. A. I. R. 1926 Cal. 385=52 C. 914=41 C. L. J. 571=90 Ind. Cas. 851; see also A. I. R. 1924 Cal. 600=39 C. L. J. 40=79 Ind. Cas. 520. The rule that the possession of a receiver may not be disturbed without leave, does not apply, so far as third persons are concerned until a receiver has been actually appointed, and is in possession. 23 C. W. N. 952=29 C. L. J. 424. The only ground upon which Receiver's possession can be resisted is under rule 1 (2). 48 Ind. Cas. 779. The words "any person" in Order XL, r. 1 (2), are not confined to persons who are not parties to the suit. 12 L. W. 254=61 Ind. Cas. 605. The possession of the Court through its Receiver is possession on behalf of the party finally held to be entitled to the properties in dispute and does not suspend the operation of adverse possession of the successful party. 40 Ind. Cas. 53=5 L. W. 690=32 M. L. J. 85.

**Appeal.**—No appeal lies from order removing a Receiver from office. 1931 A. L. J. 13; see also A. I. R. 1933 Pat. 293. Appeal lies against order under this rule as the order is tantamount to judgment. A. I. R. 1927 Rang. 139=5 Rang. 99=101 Ind. Cas. 791; see also A. I. R. 1927 Lah. 920=100 Ind. Cas. 293; A. I. R. 1926 Cal. 1006=95 Ind. Cas. 632; A. I. R. 1936 Oudh 337=1236 O. W. N. 1134=163 Ind. Cas. 204. Order giving Receiver directions to restore property is not appealable. A. I. R. 1933 Lah. 216. Order holding that the case is one in which a Receiver should be appointed is appealable. A. I. R. 1932 Pat. 360. No appeal lies from an order refusing an application for removal of a Receiver. 23 C. L. J. 217=20 C. W. N. 789=34 Ind. Cas. 789. Appeal does lie against an order to appoint a Receiver, but where no Receiver is named. A. I. R. 1927 Sind 202=102 Ind. Cas. 176; see also 40 M. 18=5 L. W. 776=32 M. L. J. 304=40 Ind. Cas. 185. (*Per Spencer J.*); but see *ibid*; (*Per Abder Rahim and Srinivas [yangar J.]*). Although

another Receiver is not appointed an order removing a Receiver is final and appealable. A. I. R. 1926 Cal. 573=53 C. 319=92 Ind. Cas. 940. Where Receiver has been appointed conditional on his furnishing security, the appointment is not complete till furnishing of the security and therefore the order is not appealable before the security is furnished. A. I. R. 1927 Cal. 253=31 C. W. N. 235=45 C. L. J. 63=100 Ind. Cas. 147. Order appointing Receiver even in execution proceeding is under Order 40, rule 1, and second appeal is barred against it. A. I. R. 1929 Mad. 20=114 Ind. Cas. 839. An order of a Court that a Receiver should be appointed in a case (without appointing any body by name as Receiver) and adjourning the case to late date for so appointing one is an order under Order 40, rule 1, and an appeal lies against it. 4 Pat. L. T. 210=1 Pat. 625=69 Ind. Cas. 929. An order dismissing an objection to the appointment of a Receiver of property of which the objector is in possession falls within this rule and an appeal lies on it. 3 Pat. L. J. 573=48 Ind. Cas. 133; see also A. I. R. 1924 Nag. 165=78 Ind. Cas. 1231; A. I. R. 1923 Mad. 129=16 L. W. 833=69 Ind. Cas. 373. Court of review can use its discretion where the trial Court has not used it. A. I. R. 1928 P. C. 49=55 C. 720=55 L. A. 131=32 C. W. N. 681 (P. C.). A Court of appeal should not generally disturb an order as to the appointment of a Receiver by the Court below. A. I. R. 1923 Lah. 623=5 Lah. L. J. 533=73 Ind. Cas. 600; see also A. I. R. 1924 Lah. 421=69 Ind. Cas. 361; A. I. R. 1927 Lah. 65=27 P. L. R. 138=94 Ind. Cas. 39. But discretion in appointing a Receiver must be exercised on sound judicial lines, and if the discretion is not exercised on these lines, the appellate Court should interfere with the order of appointment. 95 Ind. Cas. 30=A. I. R. 1926 Cal. 1092. An appellate Court should not interfere in selection of Receiver unless there be some fatal objection; but this rule holds good only in case of original appointment and not in that of substituted one. A. I. R. 1929 Pat. 114=115 Ind. Cas. 831. Where a Receiver is appointed in an appeal from interlocutory order, the only person materially prejudiced thereby would be the person entitled to present possession. Where no defendant is entitled to present possession, it is not necessary to have him on the record in the appeal. A. I. R. 1924 Cal. 456=28 C. W. N. 85=77 Ind. Cas. 783. Where a single Judge of High Court appoints a Receiver a Division Bench should refuse to interfere unless the discretion has been improperly exercised and contravenes any principle of law. A. I. R. 1922 Lah. 444=67 Ind. Cas. 383.

**2. [S. 503, Cl. (d).]** The Court may by general or special order fix the amount to be paid as remuneration for the services of the receiver.

Remuneration.

*N. B.*—For local amendment in Rangoon.—*Vide infra*.

**Notes.**—*Vide* A. I. R. 1931 Mad. 36=59 M. L. J. 833; A. I. R. 1931 Mad. 500; 91 Ind. Cas. 54; 90 Ind. Cas. 472.

Duties.

**3. [S. 503, second part.]** Every receiver so appointed shall—

(a) furnish such security (if any) as the Court thinks fit, duly to account for what he shall receive in respect of the property;

(b) submit his accounts at such periods and in such form as the Court directs;

(c) pay the amount due from him as the Court directs; and

(d) be responsible for any loss occasioned to the property by his wilful default or gross negligence.

**Notes.**—A suit lies against receiver for accounts. 53 C. 881=A. I. R. 1927 Cal. 1175; see also 40 C. L. J. 28=32 Ind. Cas. 419. Receiver is responsible to Court. A. I. R. 1931 Mad. 760; see also 54 Ind. Cas. 207. Receiver cannot lease out *debtor* property without the sanction of the Court. A. I. R. 1929 Cal. 828=50 C. L. J. 333=124 Ind. Cas. 517. In case of misappropriation of property by him the loss is to be borne by the decree-holder. A. I. R. 1929 Oudh 231 (F. B.)=6 O. W. N. 334. No appeal lies from an order under rule 3 but in a proper case it can be revised. A. I. R. 1924 Sind 35=18 S. L. R. 335=76 Ind. Cas. 203.

Enforcement of receiver's duties.

**4. [New.]** Where a receiver—

(a) fails to submit his accounts at such periods and in such form as the Court directs, or

(b) fails to pay the amount due from him as the Court directs, or

(c) occasions loss to the property by his wilful default or gross negligence,  
the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balance (if any) to the receiver.

*N. B.*—For local ameedment in Madras.—*Vide infra*.

**Notes.**—A. I. R. 1931 Mad. 760 ; 55 Ind. Cas. 15 ; 86 Ind. Cas. 246 ; A. I. R. 1930 Pat. 232 ; A. I. R. 1927 Rang 334=6 Bur. L. J. 15 ; 92 Ind. Cas. 631=3 Rang. 318 ; 40 C. W. N. 479 ; 70 M. L. J. 282=A. I. R. 1936 Mad. 321=43 L. W. 460.

**Appeal.**—70 Ind. Cas. 293 ; 43 M. L. J. 707=69 Ind. Cas. 203 ; 65 Ind. Cas. 403 ; 45 B 99=59 Ind. Cas. 421 ; 54 Ind. Cas. 207 ; A. I. R. 1934 All. 907=150 Ind. Cas. 750.

5. [S. 504.] Where the property is land paying revenue to the Government, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

## ORDER XLI.

### *Appeals from Original Decrees.*

1. [S. 541.] (1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his pleader and presented to the Court or to such officer as it appoints in this behalf. The memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses therewith) of the judgment on which it is founded.

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative ; and such grounds shall be numbered consecutively.

*N. B.*—For local amendments in Lahore, Madras and Rangoon.—*Vide infra*.

**Scope of Order 41.**—There is a tendency on the part of the subordinate Courts to ignore the provisions of order 47 and to set aside the decrees of trial Courts in its entirety. 59 B. 430=37 Bom. L. R. 247=A. I. R. 1935 Bom. 222.

**Notes.**—Copy means copy only certified. A. I. R. 1929 Lah. 771. Copy of the decree should be produced. A. I. R. 1930 Rang. 182. A copy of final judgment should only be filed. A. I. R. 1931 Lah. 202. "Judgment" means the statement of the final adjudication of the rights of parties. A. I. R. 1929 Lah. 481. Time for obtaining a copy of the decree and judgment should be excluded. 32 C. W. N. 845 P. C. Court can dispense with filing copy of judgment. A. I. R. 1928 Nag. 131. Where a detailed judgment has been filed in a connected suit the Court may condone the error of a counsel. A. I. R. 1930 Lah. 935=130 Ind. Cas. 519. The copy of the trial Court's order on the preliminary issue is not essential for presenting an appeal and the presentation of the appeal is not vitiated on that ground. 30 P. L. R. 236 ; see also A. I. R. 1929 Lah. 379. Court cannot consolidate appeals in case disposed of by single judgment of the lower Court, so as to enable the appellant to pay Court-fee on the value of consolidated appeals and file one *vakalatnama*. A. I. R. 1930 Mad. 376=53 M. 248. Under this rule, litigant has



no option to file or not to file a copy of judgment but Judge alone can dispense with it. A. I. R. 1928 Nag. 131=106 Ind. Cas. 57. Appellant need not file with Memorandum of Appeal a copy of an *interim* Order which he does not want to attack. A. I. R. 1927 Lah. 629=103 Ind. Cas. 224; see also A. I. R. 1927 Lah. 640=103 Ind. Cas. 73. It is a condition precedent to there being a valid Memorandum of Appeal that it should be accompanied by a copy of the decree appealed from. A. I. R. 1923 Mad. 482=17 L. W. 352=44 M. L. J. 279=72 Ind. Cas. 308; see also A. I. R. 1927 Lah. 423=28 P. L. R. 272; A. I. R. 1927 Lah. 912=100 Ind. Cas. 810; A. I. R. 1925 Nag. 52=81 Ind. Cas. 1001; 65 Ind. Cas. 68; 67 Ind. Cas. 670=3 Lah. L. J. 255; 77 Ind. Cas. 541=3 Lah. 215; 14 L. R. 879 (Rev); 58 B. 573=36 Bom. L. R. 1064=A. I. R. 1934 Bom. 489. It is doubtful whether as a matter of law an application for review must be accompanied by a copy of the order or judgment sought to be reviewed. A. I. R. 1935 Pat. 486=16 P. L. T. 595. The Memorandum of Appeal shall be accompanied by a copy of that part of the decree which is appealed from and against which the grounds of appeal are all directed. 40 C. W. N. 1298=A. I. R. 1936 Cal. 751. Where the papers which accompanied the Memorandum of Appeal were Urdu translations of the judgment and decree of the lower Court, there is no proper appeal before the Court. 38 P. L. R. 288. Person presenting the appeal must be duly authorized. A. I. R. 1936 Lah. 195; 1930 A. L. J. 394=A. I. R. 1930 All. 112. A Memorandum of Appeal or revision to the High Court should only contain very briefly and concisely the grounds upon which it is contended the Court's decision is wrong. 58 M. 771=41 L. W. 257=1935 M. W. N. 172=A. I. R. 1935 Mad. 282=68 M. L. J. 218. The admission of a defective Memorandum of Appeal operates as decision and bars a later objection when the defect is quite obvious. A. I. R. 1927 Lah. 451=109 Ind. Cas. 397. A plaint or Memorandum of Appeal can be presented during a vacation or even on a Sunday, provided it is presented to a proper office and that officer receives it. 2 Pat. 264=71 Ind. Cas. 426=3 P. L. T. 820. A second appeal should be presented with unattested copy of first Court's judgment, when an attested copy is applied for, but the report is that the record cannot be traced. A. I. R. 1926 Lah. 404.

**2. [S. 542.]** The appellant shall not, except by leave of the Court, urge Grounds which may be taken or be heard in support of any ground of objection in appeal, tion not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the Court under this rule:

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

**Notes.**—Points not raised in memorandum of appeal should not be gone into. 33 C. W. N. 559; see also A. I. R. 1929 Lah. 548; A. I. R. 1929 Mad. 573; A. I. R. 1926 Lah. 11; 54 Ind. Cas. 631; 68 Ind. Cas. 227. New ground can be heard if evidence is on record or when the ground raises legal questions. 11 L. W. 611=57 Ind. Cas. 800; see also A. I. R. 1931 All. 556. One appellant dying other can rely on his grounds. 33 C. W. N. 150. Additional grounds can be filed after period of limitation with Court's permission. A. I. R. 1931 Rang. 314.

**3. [S. 543.]** (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, it may be Rejection or amendment of the memorandum, rejected, or be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

(2) Where the Court rejects any memorandum, it shall record the reasons for such rejection.

(3) Where a memorandum of appeal is amended, the Judge, or such officer as he appoints in this behalf, shall sign or initial the amendment.

**N. B.**—For local amendments in Allahabad, Bombay and Oudh.—*Vide infra*.

**Notes.**—Misdescription of respondent can be amended. 21 C. W. N. 774. Time-barred appeal cannot be rejected. 60 Ind. Cas. 493. Amendment cannot be allowed after great delay. A. I. R. 1926 Lah. 626. Insufficiently stamped appeal

can be rejected. A. I. R. 1929 All. 75. Deficit in stamp is no ground to reject appeal. A. I. R. 1923 All. 349=21 A. L. J. 333=74 Ind. Cas. 757.

4. [S. 544] Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

Notes.—Rule 4 does not apply when one of the appellants dies. A. I. R. 1934 Lah. 206. In appeal by one, decree in favour of all, can be passed. A. I. R. 1929 All. 393; see also A. I. R. 1929 Mad. 230; 37 C. W. N. 504; A. I. R. 1932 All. 710. Whether appellant can represent defendant not filing written statement is doubtful. A. I. R. 1932 All. 326. Rule 4 can apply when the omission of the parties is brought to the notice of the Court and it consciously decides to apply the rule. A. I. R. 1926 Mad. 591; see also A. I. R. 1927 Pat. 103; A. I. R. 1927 All. 311; A. I. R. 1926 All. 64. Common ground is essential condition to apply rule 4. 40 Ind. Cas. 184. Court can vary decree in favour of persons not party to appeal. 63 Ind. Cas. 973; 23 C. W. N. 372; 60 Ind. Cas. 430; 35 Ind. Cas. 547. This rule applies to appellant only. A. I. R. 1926 Cal. 335=30 C. W. N. 45=90 Ind. Cas. 886. One plaintiff can appeal by making other respondents. 110 Ind. Cas. 250; see also A. I. R. 1928 Lah. 43=106 Ind. Cas. 313; A. I. R. 1927 Nag. 406=99 Ind. Cas. 104; A. I. R. 1929 All. 393=119 Ind. Cas. 434; A. I. R. 1925 Mal. 235=82 Ind. Cas. 420=20 L.W. 402; 81 Ind. Cas. 484=A. I. R. 1924 Oudh 385; 31 C. L. J. 75=24 C. W. N. 463=55 Ind. Cas. 154; 63 Ind. Cas. 95; 61 C. 919; 15 Lah. 657; 59 C. L. J. 318. Rule 4 does not authorise one plaintiff to proceed with the appeal without making the other plaintiffs parties thereto. 21 A. L. J. 91=45 A. 286=71 Ind. Cas. 321; 53 Ind. Cas. 548. Appellate Court has no power to set aside decree from which no appeal was filed. 116 P. R. 1919=53 Ind. Cas. 883. All plaintiffs interested in claim must be made respondents. 66 Ind. Cas. 780=3 P. L. T. 456. The appeal is incompetent if one of the necessary parties in whose absence the appeal could not proceed, was not on the record. A. I. R. 1928 Cal. 184=32 C. W. N. 299=47 C. L. J. 82. Respondent can be made appellant and decree can be passed in his favour. A. I. R. 1930 All. 786. Appeal not filed by all sanctioned under s. 92, C. P. Code, is incompetent. A. I. R. 1927 Lah. 380=100 Ind. Cas. 838. Court may vary decree in favour of person not party to appeal. 63 Ind. Cas. 973; 60 Ind. Cas. 460; 23 C. W. N. 372; 35 Ind. Cas. 547; 31 Ind. Cas. 885; 44 Ind. Cas. 480; 40 M. 846=41 Ind. Cas. 544, 35 Ind. Cas. 743. Rule 4 is limited to a case of appellants and does not apply to a case where all the respondents are not present on the record as parties to the appeal. 1935 O. W. N. 401=A. I. R. 1935 Oudh 329=154 Ind. Cas. 897. Rule 4 does not apply to cases where several persons who have obtained the leave of the Collector under s. 92. A. I. R. 1935 Lah. 251=16 Lah. 782. Where the decree is against several defendants on common ground, appeal by one alone without impleading others is competent. 40 C. W. N. 553=A. I. R. 1936 Cal. 424=165 Ind. Cas. 606; see also A. I. R. 1936 Lah. 612=165 Ind. Cas. 66; A. I. R. 1936 Pesh. 20=160 Ind. Cas. 1005; 157 Ind. Cas. 502=A. I. R. 1935 Pesh. 106.

#### *Stay of Proceedings and of Execution.*

5. [S. 545.] (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the appellate Court may for sufficient cause order stay of execution of such decree.

(2) Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—

(a) that substantial loss may result to the party applying for stay of execution unless the order is made ;

(b) that the application has been made without unreasonable delay ; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Notwithstanding anything contained in sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application.

*N. B.*—For local amendment in Madras.—*Vide infra.*

**Notes**—Mere filing of appeal does not stay proceedings. A. I. R. 1930 Pat. 227 ; 46 C. 670=23 C. W. N. 721. (P. C.). High Court cannot stay proceedings in Revenue Court. A. I. R. 1931 All. 57. Rule 5 does not apply to a revision. A. I. R. 1929 Lah. 167. Rule 5 is not confined to execution but applies to final decree proceeding also. A. I. R. 1930 Lah. 108 ; see also 31 P. L. R. 216. An appellant before filing an appeal can obtain an order for stay. 23 C. L. J. 310. Stay of execution is effective when communicated to the Lower Court. 43 Ind. Cas. 214 ; 41 Ind. Cas. 752. A stay of execution can not be granted where judgment-debtor does not file security. 2 Lah. L. J. 330. The execution of a decree for possession of property, movable or immovable, should not be stayed unless all the conditions of rule 5 (3) are satisfied. 61 Ind. Cas. 827. The burden of proof is on the appellant to show that substantial loss may result unless execution is stayed. A. I. R. 1934 Nag. 160=150 Ind. Cas. 59. Though rule 5 does not empower Court impose terms prior to granting stay, yet it prohibits stay except in the circumstances mentioned in clause (3) of the rule. A. I. R. 1934 Nag. 160=150 Ind. Cas. 59 ; 35 P. L. R. 727 ; 40 L. W. 650=152 Ind. Cas. 687 ; A. I. R. 1935 Nag. 16. In cases relating to possession of land it is ordinarily desirable not to disturb the possession of a party unless good ground to the contrary is shown to exist. A. I. R. 1934 Lah. 361=150 Ind. Cas. 985. The mere fact that an appeal has been filed against a preliminary decree is no justification whatsoever for staying the hand of the Court below and ordering it not to go in the ordinary course with the proceeding leading up to the final decree. 158 Ind. Cas. 894=37 P. L. R. 259=A. I. R. 1935 Lah. 181. Proceedings under s. 144 cannot be stayed under rule 5 by filing appeal. 117 Ind. Cas. 288=A. I. R. 1929 Nag. 138. Surety beyond jurisdiction cannot be accepted. A. I. R. 1929 Lah. 161=112 Ind. Cas. 689. Mere filing of appeal is no bar to execution. Court may stay on taking security. A. I. R. 1927 Mad. 416=52 M. L. J. 182 ; A. I. R. 1924 Lah. 602=76 Ind. Cas. 174. In an application by the judgment-debtor for staying execution pending disposal of appeal, the balance of convenience should be looked to. 79 Ind. Cas. 188=1 P. L. R. 393=A. I. R. 1923 Pat. 597=4 P. L. T. 508 ; A. I. R. 1922 Lah. 364=99 Ind. Cas. 763 ; A. I. R. 1922 Lah. 185=77 Ind. Cas. 327.

Hypothecation bond executed to stay execution can be enforced by suit only not by execution proceedings. A. I. R. 1931 All. 65=1930 A. L. J. 913=52 A. 964 ; 117 Ind. Cas. 65. Judgment-debtor cannot cancel security bond when he has obtained stay thereon on the ground that it had not yet been accepted by the Court. A. I. R. 1929 Lah. 769=30 P. L. R. 278=116 Ind. Cas. 224. Amount of security in case of *mesne profits* undetermined should not be paid. A. I. R. 1929 Lah. 161=112 Ind. Cas. 689. Uncommunicated stay order does not annul a sale held where decree-holder is purchaser. A. I. R. 1927 All. 401 (F. B.)=25 A. L. J. 530=102 Ind. Cas. 665 ; but see 33 M. L. J. 515=41 M. 151 (F. B.)=43 Ind. Cas. 214. Notice of application for stay must be given to decree-holder. 79 Ind. Cas. 1=5 P. L. T. 556. A Court cannot stay execution upon a mere vague speculation. 58 Ind. Cas. 442. Unless irreparable injury will otherwise be caused, stay of proceedings for taking accounts should not be allowed. 61 Ind. Cas. 9. Unless it has seisin of the case in which the sale is ordered to take place an Appellate Court cannot order stay of sale. 43 A. 513=19 A. L. J. 462=63 Ind. Cas. 837. Matters relating to stay of execution are governed by s. 47. 75 Ind. Cas. 789=A. I. R. 1925 Lah. 69. Order rejecting security is not appealable. A. I. R. 1927 Lah. 527. An order granting injunction staying execution is appealable. A. I. R. 1927 Mad. 592=52 M. L. J. 670=102 Ind. Cas. 396. No appeal lies from order refusing to stay. A. I. R. 1927 Lah. 235=100 Ind. Cas. 76. No appeal lies on order staying execution. A. I. R. 1927

Lah. 852=28 P. L. R. 607=9 Lah. L. J. 193=100 Ind. Cas. 23 ; see also A. I. R. 1926 Cal. 850 ; but see A. I. R. 1924 Lah. 631=75 Ind. Cas. 615. In case of loss of security bond, the presumption is that it is in proper form. A. I. R. 1935 Nag. 16=31 N. L. R. 172.

Where a surety undertakes to be bound by any decree passed, he is bound by consent decree as well. A. I. R. 1935 Nag. 16=154 Ind. Cas. 46=31 N. L. R. 172. A security bond under Order 41, rules 5 and 6 must be in the form of a bond to some one and not a mere undertaking to the Court. The bond must be addressed to some officer of the Court. 40 C. W. N. 1281. A security bond executed by a surety under rules 5 and 6 does not become operative unless it is accepted by the Court. 15 Lah. 282=149 Ind. Cas. 300=36 P. L. R. 386=A. I. R. 1934 Lah. 138 (F. B.). The decree-holder can move the executing Court to enforce the bond as against the surety. A. I. R. 1934 Lah. 138=149 Ind. Cas. 300=15 Lah. 282 (F. B.).

6. [S. 546.] (1) Where an order is made for the execution of a decree

Security in case of order for execution of decree appealed from. from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restitution of any

property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the Appellate Court may for like cause direct the Court which passed the decree to take such security.

(2) Where an order has been made for the sale of immovable property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

Notes—Rule 6 applies only to parties to suit. 34 Bom. L. R. 379. Application under rule 6 must be made to executing Court. A. I. R. 1932 Lah. 30. Order accepting or rejecting security is not appealable. A. I. R. 1932 Lah. 120. Court must stay sale on proper condition as to security, etc. 75 Ind. Cas. 515 ; see also 75 Ind. Cas. 789 ; 75 Ind. Cas. 1001 ; 41 M. 813 ; A. I. R. 1929 Lah. 68 ; but see 77 Ind. Cas. 116 ; 108 Ind. Cas. 272 (Lah). An order under rule 6 is appealable. 32 P. L. R. 756. Security bond does not become operative until accepted by Court. A. I. R. 1934 Lah. 138 (F. B.). Proceedings taken in pursuance of an order under Order 34 are to be deemed proceedings relating to the execution of a decree and this rule applies. A. I. R. 1929 Lah. 552=30 P. L. R. 371=117 Ind. Cas. 88. While an appeal to the Privy Council is pending the trial Court cannot pass an order under this rule. Only High Court can do so. A. I. R. 1925 Rang. 254=3 Rang. 158=88 Ind. Cas. 992. Where there is no waste by the respondent and debts by him are secured on his property and the respondent being a successful party, an order to give security cannot be passed against him. A. I. R. 1928 Pat. 187=9 P. L. T. 87. The mere fact that an execution has been stayed under this rule as regards immovable properties does not prevent a decree-holder from executing his decree against the movable properties or person of the judgment-debtor. A. I. R. 1926 Lah. 463=93 Ind. Cas. 897. Security should not be ordered without enquiring as to the value of the property attached. A. I. R. 1925 Lah. 256=6 Lah. L. J. 510. Where decree for possession is granted and possession under decree is granted conditional on giving security for *mesne* profits, surety's liability continues upto ultimate decision of Court. A. I. R. 1919 P. C. 55=55 Ind. Cas. 550. For stay of sale of immovable property, the execution Court can impose terms and even require the judgment-debtor to deposit the whole amount of the decree. A. I. R. 1936 Pat. 443=161 Ind. Cas. 936 ; see also 40 L. W. 704=A. I. R. 1934 Mad. 709=67 M. L. J. 656 ; A. I. R. 1934 Lah. 117=148 Ind. Cas. 941.

Section 47 includes an order under this rule and permits the institution of an appeal against an improper order passed under that section. A. I. R. 1927 Lah. 915=9 Lah. L. J. 189=28 P. L. J. 617=102. Ind. Cas. 25 ; but see A. I. R. 1934 Bom. 252=58 B. 485=36 Bom. L. R. 499. A surety under this rule should not be discharged on the death of the decree-holder. 32 Ind. Cas. 807. A surety against whom an order for cost has been passed can apply under this rule pending appeal. A. I. R. 1934 Bom. 252=36 Bom. L. R. 499=58 Bom. 485.

7. *No security to be required from the Government or a public officer in certain cases.*—Omitted by G. I. Order and G. B. Order of 1937.

8. [New.] The powers conferred by rules 5 and 6 shall be exercisable where an appeal may be or has been preferred from order made in execution of decree not from the decree but from an order made in execution of such decree.

### *Procedure on Admission of Appeal.*

9. [S. 548.] (1) Where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Court, shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

Registry of memorandum of appeal.

Register of appeal.

(2) Such book shall be called the Register of appeals.

N. B.—For local amendment in Madras.—*Vide infra*.

10. [S. 549.] (1) The Appellate Court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both :

Appellate Court may require appellant to furnish security for costs.

Provided that the Court shall demand such security in all cases in which the appellant is residing out of British India, and is not possessed of any sufficient immovable property within British India other than the property (if any) to which the appeal relates

Where appellant resides out of British India.

(2) Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal.

N. B.—For local amendment in Allahabad.—*Vide infra*.

**Notes.**—Application for security for costs must be made promptly. A. I. R. 1930 Cal. 520. Poverty alone is not sufficient. A. I. R. 1930 Lah. 629. Non-compliance entails dismissal. A. I. R. 1930 Mad. 355. Order is discretionary. A. I. R. 1930 Nag. 28. Applies to Letters Patent appeal. 25 C. W. N. 557 (P. C.). Provision of sub-section (2) are mandatory. *Ibid*. This rule does not apply to pauper appeals. 42 B. 5=19 Bom. L. R. 771=42 Ind. Cas. 67; A. I. R. 1930 Nag. 28. This rule has no application to appeals from order of the High Court in its insolvency jurisdiction. 42 C. 243=20 C. W. N. 140=23 C. L. J. 24=32 Ind. Cas. 3 This rule applies to appeals from the judgment on the original civil side. 28 C. W. N. 676=80 Ind. Cas. 275=51 C. 695; 87 Ind. Cas. 346=21 L. W. 662. The poverty of the appellant is not sufficient ground for ordering to furnish security. A. I. R. 1930 Lah. 381=11 Lah. L. J. 157=114 Ind. Cas. 708; see also A. I. R. 1930 Lah. 382=120 Ind. Cas. 538. Where Appellate Court directs subordinate Court to take security, it is directly interested in seeing whether its orders have been properly complied with or not. A. I. R. 1937 Pat. 380. Security bond by member of joint *Mitakshara* family including minors should not be accepted. A. I. R. 1937 Pat. 380. Where surety bond is signed by representative of appellant his authority must be proved. A. I. R. 1927 P. C. 264=114 Ind. Cas. 349. This rule is limited to costs incurred up to and in the High Court and not to costs of Privy Council. A. I. R. 1927 All. 522=101 Ind. Cas. 551. Application for security of costs should be made promptly. 44 Ind. Cas. 23=20 P. L. R. 1918.

**Sub-section (2).**—Provisions of rule 10 (2) are mandatory. 48 C. 481=48 I. A. 76=19 A. L. J. 281=23 Bom. L. R. 681=25 C. W. N. 557 (P. C.); 1931 M. W. N.

1124=61 M. L. J. 688. Where appellant is a lady and is unable to pay costs of both the Courts if unsuccessful and suit is *benami* for her husband, her husband's security for costs should be ordered to be furnished. 58 C. 117=34 C. W. N. 495=A. I. R. 1931 Cal. 40. An Appellate Court has power to ask for security from a pauper appellant for the respondent's cost under this rule. 43 M. 902=58 Ind. Cas. 794=1920 M. W. N. 534; 1931 M. W. N. 1157; but see 42 B. 5=42 Ind. Cas. 67=19 Bom. L. R. 771; 48 Ind. Cas. 971; 67 Ind. Cas. 256; 13 Rang. 511; 149 Ind. Cas. 453. Mere poverty of the appellant is no ground for demanding security under r. 10. It must be shown that appellant is puppet or acts nominally for others. 55 Ind. Cas. 835=A. I. R. 1921 Pat. 233. Once an Appellate Court rejects appeal for failure to furnish security, it cannot extend the time for furnishing security. A. I. R. 1923 Cal. 317=67 Ind. Cas. 883. Mere want of means of appellant is not a sufficient ground for dispensing with security. A. I. R. 1923 Mad. 204=17 L. W. 26=70 Ind. Cas. 586; see also 72 Ind. Cas. 285=25 Bom. L. R. 195. This rule is limited to costs incurred up to and in the High Court and not to costs of Privy Council. A. I. R. 1927 All. 522=101 Ind. Cas. 551. The mere fact that the appellant on losing may not pay the costs of the appeal is not a sufficient ground for demanding security. A. I. R. 1923 Bom. 399=25 Bom. L. R. 468=73 Ind. Cas. 474. Only for non-payment of respondent's costs in original suit a party should not be asked to give security unless his conduct has been vexatious. A. I. R. 1931 Lah. 70=31 P. L. R. 950=130 Ind. Cas. 771. The appeal should be rejected in the absence of security within the time fixed by the Court. 2 Lah. L. J. 391=68 Ind. Cas. 306; see also 47 Ind. Cas. 928. Where there is mistake in security bond by appellant on account of clerical error the Court should allow the alleged clerical error to be corrected and not reject the appeal. A. I. R. 1925 Oudh. 402=12 O. L. J. 83=86 Ind. Cas. 752. A Judge can re-admit an appeal but he cannot do so without notice to the other side. 40 Ind. Cas. 234=28 O. L. J. 163; see also A. I. R. 1929 Rang. 289=7 R. 445=120 Ind. Cas. 140. The High Court can in its inherent powers re-consider upon cause shown an order rejecting an appeal under Order 41, rule 10 (2). 42 A. 626=18 A. L. J. 838=60 Ind. Cas. 81. This rule gives an absolute discretion to Court to decide in what class of cases security is to be demanded. Each case depends upon its own merits. A. I. R. 1936 Pat. 433=17 Pat. L. T. 187; 14 Rang. 289=A. I. R. 1936 Rang. 294. Delegation of powers to decide sufficiency of security to lower Court does not oust the jurisdiction of Appellate Court, 35 Bom. L. R. 1114=A. I. R. 1934 Bom. 13=148 Ind. Cas. 1140. An Appellate Court can restore an appeal rejected under this rule. 117 Ind. Cas. 791=A. I. R. 1928 Mad. 964=55 M. L. J. 330. The High Court can revise the opinion of the joining officer as to amount for security for costs. A. I. R. 1927 Bom. 499=29 Bom. L. R. 1031.

No appeal lies from an order of rejection of an appeal for failure to furnish security for the costs of appeal and of the original suit under rule 10. 49 C. 355=35 C. L. J. 131=26 C. W. N. 1020=62 Ind. Cas. 751; see also 42 A. 626=18 A. L. J. 838=60 Ind. Cas. 81; A. I. R. 1936 Rang. 109. Where after filing security the appellant has applied for correction of security bond, the Court cannot by rejecting the application, reject the appeal. A. I. R. 1925 Oudh. 402=12 O. L. J. 83=86 Ind. Cas. 752.

# 11. [S. 551.] (1) The Appellate Court, after sending for the record if

Power to dismiss appeal without sending notice to lower Court.

it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the

Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred.

**Notes.**—This discretion is a judicial one. 33 Ind. Cas. 666. Court must write judgments showing points raised. 27 C. W. N. 501; see also 43 C. L. J. 499; A. I. R. 1926 Rang. 129=4 Rang. 66; but see A. I. R. 1934 Pat. 341; A. I. R. 1929 Nag. 68. Dismissal order is a decree. 30 C. W. N. 334. No revision is allowed where

a second appeal has been dismissed under rule 11. 27 C. W. N. 1918=36 C. L. J. 76 ; see also 21 C. W. N. 430. Judgment should comply with rule 31. 53 A. 528. No revision lies. A. I. R. 1934 Cal. 26. Appeal can be admitted in part and dismissed in part. A. I. R. 1934 Bom. 207 (F. B.). No review lies where a second appeal has been dismissed under this rule. 27 C. W. N. 918=36 C. L. J. 76=70 Ind. Cas. 408 ; see also 24 C. L. J. 517=21 C. W. N. 430=36 Ind. Cas. 460. In case of an appeal from a mortgage decree being summarily dismissed under Order XLI, rule 11, there is no extension of time for payment of the mortgage money, the decree appealed from not being confirmed. A. I. R. 1924 Bom 98=47 Bom 950=25 Bom. L. R. 990=76 Ind. Cas. 1023. If appeal is revisable, the Appellate Court can admit the appeal in part and to dismiss it in part. A. I. R. 1935 Lah. 34=36 P. L. R. 417 Under this rule the Appellate Court is bound to fix a date for hearing. 18 N. L. J. 157. If the appeal is not admitted a simple Order of dismissal may be passed. A. I. R. 1934 Pat. 341=15 P. L. T. 293=13 Pat. 540. An order under this rule is governed by the provisions of Order 41, rule 31. A. I. R. 1931 All. 589 =53 A. 528=132 Ind. Cas. 200 ; 1931 A. L. J. 875=A. I. R. 1931 All. 527 (F. B.) ; but see A. I. R. 1934 Cal. 26=59 C. L. J. 293=147 Ind. Cas. 194.

**12. [S. 552]** (1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day.

Appellate Court to give notice to Court whose decree appealed from. **13. [S. 550.]** (1) Where the appeal is not dismissed under rule 11, the Appellate Court shall send notice of the appeal to the Court from whose decree the appeal is preferred.

(2) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, the Court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the Appellate Court.

(3) Either party may apply in writing to the Court from whose decree the appeal is preferred, specifying any of the papers in such Court of which he requires copies to be made ; and copies of such papers shall be made at the expense of, and given to the applicant.

**14. [S. 533.]** (1) Notice of the day fixed under rule 12 shall be affixed in the Appellate Court-house, and a like notice shall be sent by the Appellate Court to the Court from whose decree the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer ; and all the provisions applicable to such summons, and to proceedings with reference to the service thereof shall apply to the service of such notice.

(2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate Court may itself cause notice to be served on the respondent or his pleader under the provisions above referred to.

*N.B.*—For local amendments in Allahabad, Calcutta, C. P., Madras, Oudh, Patna and Rangoon.—*Vide infra.*

**Notes.**—Notice should specify date. 36 Ind. Cas. 62. It must be served on respondent. 41 Ind. Cas. 889 ; see also 50 B. 815. Substituted service is sufficient. 69 Ind. Cas. 667. Where notice to respondent is returned unserved and application for issue of fresh notice is not made within the time may be extended excusing

delay under s. 148. A. I. R. 1927 Bom. 68=50 B. 815=28 Bom. L. R. 1446=100 Ind. Cas. 147. An appeal is not barred because of the absence of service of notice on a respondent who has no interest in the subject-matter of appeal. A. I. R. 1923 Cal. 221=49 C. 1043=36 C. L. J. 215=70 Ind. Cas. 687.

15. [S. 554.] The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed, the appeal will be heard *ex parte*.

Contents of notice.

*Procedure on Hearing.*

16. [S. 555.] (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

Right to begin.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply.

Notes.—*Vide* A. I. R. 1929 Nag. 89=11 N. L. J. 238 ; 28 Bom. L. R. 738 ; 63 Ind. Cas. 945.

17. [S. 556.] Where on the day fixed, or on any other day to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court make an order that the appeal be dismissed.

Dismissal of appeal for appellant's defaults.

Hearing appeal *ex parte*.

(2) Where the appellant appears and the respondent does not appear, the appeal shall be heard *ex parte*.

Sub-section (1).—Rules 17 and 19 are exhaustive in respect of cases of appellant's absence and the Court cannot in its inherent powers restore an appeal dismissed for default. 45 M. L. J. 813=47 M. 171=76 Ind. Cas. 836 ; see also A. I. R. 1927 Lah. 622=28 P. L. R. 554=103 Ind. Cas. 425. The Court may make an order that the appeal to be dismissed mean that the Court may dismiss the appeal or may adjourn it to some other date or pass other order, but the Court cannot consider an appeal in the absence of the appellant and decide it on merits. Appellate Court must hear both parties to the appeal and then decide it according to its judgment. A. I. R. 1929 Cal. 475=56 C. 412=119 Ind. Cas. 129. The mere unpreparedness of the appellant's counsel to argue the appeal is no ground for dismissing the appeal for default. A. I. R. 1929 Nag. 89=115 Ind. Cas. 173=11 N. L. J. 238. Court should dismiss the appeal on merits under this rule. A. I. R. 1924 All. 144=45 All. 669=21 A. L. J. 667=74 Ind. Cas. 905. Where no date is fixed for hearing of an appeal and no notice is given to the parties of date of hearing an order dismissing the appeal for default is without jurisdiction. A. I. R. 1924 Lah. 279=69 Ind. Cas. 618. Where appellant is absent, the case should be adjourned to give appellant an opportunity of being heard. A. I. R. 1925 Rang. 96=4 U. B. R. 164=76 Ind. Cas. 166 ; see also A. I. R. 1929 Rang. 11=6 Rang. 612=114 Ind. Cas. 302. The powers of Appellate Court under r. 17, are wider than those of trial Court under rule 8, Order IX. 57 Ind. Cas. 75=2 Pat. L. T. 36=A. I. R. 1921 Pat. 325. Incapacity of pleader to argue must be treated as non-appearance. In order to constitute appearance by a pleader it is necessary to show that the pleader was ready to place materials before the Court upon which the Court could apply its judicial mind. 74 Ind. Cas. 941=A. I. R. 1923 Pat. 520 ; see also 45 M. 882=43 M. L. J. 317=69 Ind. Cas. 513 ; 10 L. B. R. 329=62 Ind. Cas. 57 ; 54 Ind. Cas. 715=5 Pat. L. J. 17=1 Pat. L. T. 155 ; 99 Ind. Cas. 32=A. I. R. 1927 Mad. 109=51 M. L. J. 684 ; A. I. R. 1925 Oudh 549=28 O. C. 166=85 Ind. Cas. 811 ; 134 Ind. Cas. 120. Appeals dismissed for default under this rule, can only be restored on sufficient cause being shown. A. I. R. 1927 Lah. 622=28 P. L. R. 554=103 Ind. Cas. 425. Dismissal of appeal for default puts the parties in same position as if there had been no appeal or as if it had been dismissed on the merits. 68 Ind. Cas. 239=7 N. L. J. 163=A. I. R. 1923 Nag. 1. Appellate Court cannot dismiss an application to restore an appeal dismissed under rule 17, for default without giving the appellant an opportunity as required under rule 19. A. I. R. 1927 Cal. 888=104 Ind. Cas. 347. No appeal lies to Privy Council from order



dismissing application for restoration of the appeal dismissed for default, as it is not a decree or final order passed in appeal nor an order passed in the exercise of the original civil jurisdiction of the High Court. 79 Ind. Cas. 504=A. I. R. 1924 Rang. 208=2 Bur. L. J. 294. Where an appeal is transferred by the District Judge from one subordinate Court to another without notice to any party and the appellants are thereby unable to be present in the latter Court when the case is called on, it is a sufficient cause to restore the appeal dismissed for default. 46 Ind. Cas. 881. The clerk of Court has no power to fix a date in the absence of the Judge, and the failure of the appellant to appear on a date so fixed does not justify dismissal in default. A. I. R. 1934 Lah. 984=36 P. L. R. 63.

18. [S 557.] Where on the day fixed, or any other day to which the hearing may be adjourned it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit within the period fixed, the sum required to defray the cost of serving the notice, the Court may make an order that the appeal be dismissed :

Dismissal of appeal where notice not served in consequence of appellant's failure to deposit costs.

Provided that no such order shall be made although the notice has not been served upon the respondent, if on any such day the respondent appears when the appeal is called on for hearing.

*N.B.*—For local amendment in Madras.—*Vide infra*.

**Notes.**—No distinction lies between an appeal dismissed for default in payment of process fee under rule 18 on the day of hearing and appeal dismissed before the hearing for default in payment of process-fee or the costs of preparing the paper book. A. I. R. 1930 Rang. 228=8 Rang. 380=127 Ind. Cas. 161. Where a notice to respondent is not served, failure of appellant to supply identifier is no ground for dismissal of appeal. 65 Ind. Cas. 49=3 P. L. T. 498. An order passed under this rule is not appealable. 169 P. R. 1919=51 Ind. Cas. 179.

19. [S 558.] Where an appeal is dismissed under rule 11, sub-rule (2) or rule 17 or rule 18, the appellant may apply to the Appellate Court for the re-admission of the appeal; and, where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing or from depositing the sum so required, the Court shall re-admit the appeal on such terms as to costs or otherwise as it thinks fit.

*N.B.*—For local amendment in Madras.—*Vide infra*.

**Notes.**—Appeal can be re-admitted for sufficient cause. 82 Ind. Cas. 330. Mere illness of party is not sufficient cause. 118 Ind. Cas. 362. Absence of knowledge of date is. A. I. R. 1927 Lah. 375; A. I. R. 1926 Mad. 1210. Engagement of pleader in another Court is. 44 C. L. J. 165. Late appearance of pleader owing to rain is not. A. I. R. 1926 Cal. 1152. Laches of advocate is not. A. I. R. 1926 Rang. 50; A. I. R. 1925 Lah. 617; 71 Ind. Cas. 813; 68 Ind. Cas. 785; 51 Ind. Cas. 607. Where date of the case is not communicated it is. 43 Ind. Cas. 925; 32 Ind. Cas. 936; A. I. R. 1933 Pat. 128; A. I. R. 1933 Lah. 642; A. I. R. 1933 Lah. 1043. In dealing with applications to set aside order of dismissal for default, the Court has to consider the position of the party concerned rather than the conduct of the members of the bar. As regards the position of the party, a litigant should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be set right by his being ordered to pay costs; where the non-appearance is due to the default of counsel engaged in the case, a similar consideration will *mutatis mutandis* be applicable, when the Court has to decide whether there was sufficient cause for the non-appearance of the party or of his counsel. A. I. R. 1937 Mad. 503. Without giving an appellant the opportunity of being heard an application for restoration under this rule, should not be dismissed for default. A. I. R. 1930 Lah. 112=120 Ind. Cas. 791; see also 31 P. L. R. 969=132 Ind. Cas. 5. Where an appeal is dismissed for default the applicant should be allowed to show sufficient cause before rejecting his application for restoration of appeal. 57 Ind. Cas. 762; see also 52

Ind. Cas. 926=69 P. L. R. 1919=38 P. W. R. 1919. Where an appeal is dismissed for default and both parties ask for restoration and request the compromise to be filed the Court should restore the appeal. 68 Ind. Cas. 448=A. I. R. 1923 Cal. 319. "For any other sufficient reason" in rule 1 of Order XLVII govern the case where there is a good ground for not filing the deficit printing costs, and therefore, an application to set aside a dismissal of appeal for failure to file printing costs is one for review and not an application under Order XLI, rule 19. A. I. R. 1926 Pat. 27=4 Pat. 704=7 Pat. L. T. 291=91 Ind. Cas. 483; see also 6 P. L. J. 625=63 Ind. Cas. 99. Where the appeal is called on at an unexpected time and is dismissed for default, the case should be restored on payment of costs. A. I. R. 1926 Rang. 109=4 Rang. 18=5 Bur. L. J. 8=95 Ind. Cas. 521. The High Court can re-admit an appeal dismissed for default in the exercise of its inherent powers for the ends of justice in a proper case. 45 B. 648=23 Bom. L. R. 110=60 Ind. Cas. 910. When a next friend of the minor defendants is not served with a notice of the date fixed, the order of dismissal for default cannot be sustained. 53 Ind. Cas. 333. Where a pleader is engaged in another Court some one should be left behind to inform the Court of the fact, so that if it likes it can take up some other business. Otherwise if the appeal is dismissed, the appellant will not be granted a rehearing. 79 Ind. Cas. 550=A. I. R. 1925 Oudh. 234. Where there is a transfer of appeal from District Judge's Court to the Court of the Additional District Judge and appellant is ignorant of transfer and hence is absent and the appeal is dismissed for default, the dismissal should be set aside. A. I. R. 1925 Cal. 500=79 Ind. Cas. 319; see also 46 Ind. Cas. 881. Where the pleader soon after the dismissal appears and satisfies the Court that failure to appear is wholly unintentional, the appeal can be restored. 5 Lah. L. J. 89=79 Ind. Cas. 504. A fresh appeal on the dismissal for default of a previously filed appeal can be entertained provided the latter appeal was otherwise in order and was filed within the period of limitation. A fresh appeal will be barred if dismissal of the previous appeal would operate as *res judicata* to the hearing of the fresh appeal. The omission of a provision for fresh appeal in Order XLI, rule 19, cannot take away such right if it is not otherwise barred. A. I. R. 1923 Pat. 514=4 P. L. T. 405=2 Pat. 739=75 Ind. Cas. 284. The order of a Judge in chambers rejecting an application under this rule for re-admission of an appeal dismissed for default is appealable. 89 Ind. Cas. 795=A. I. R. 1925 Lah. 617. An opportunity should be given to the applicant under this rule to substantiate his case. 31 P. L. R. 969=132 Ind. Cas. 5. This rule is not extension of the circumstances in which the Court can re-admit an appeal or an application dismissed for default. A. I. R. 1931 Sind 153=134 Ind. Cas. 1169. If a party does all he is required to do under the law *z. e.*, to retain a pleader and if he betrayed by the pleader, it is manifestly unjust to visit the party with penalty. A. I. R. 1936 Nag. 85. An appeal should be re-admitted if the appellant can prove that he was prevented by sufficient cause from appearing on the date fixed. A. I. R. 1935 Pesh. 110=157 Ind. Cas. 171.

20. [S. 559.] Where it appears to the Court at the hearing that any person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

Notes.—Court should implead proper party. A. I. R. 1930 Lah. 295. This rule is permissive. 14 R. D. 88 (B. R.). Person not party to original suit cannot be added. 53 B. 598. Where party is left out owing to *bona-fide* mistake he should be made party. 56 M. L. J. 315. Rule 20 does not exhaust appellate Court's power to add parties. A. I. R. 1933 Mad. 806=65 M. L. J. 548. Discretionary power should be refused if party is deprived of his valuable right. A. I. R. 1932 Sind 220=26 S. L. R. 362. This rule is permissive and it does not bind a Court to act on that rule in order to bring in a necessary party against whom an appeal is already time-barred. 14 R. D. 88 (B. R.). But under this rule a party to the proceedings in the Court below can be added as a respondent to the appeal even after limitation. A. I. R. 1928 Lah. 120=103 Ind. Cas. 223; see also 9 Lah. L. J. 550=A. I. R. 1928 Lah. 202; A. I. R. 1926 Lah. 614. Rule 20 deals with the addition of a respondent whom the appellant has not made a party to the appeal. Court can make such party a respondent when it appears to the Court that he is interested in the result of the appeal. A defendant against whom a suit has been dismissed and as against

whom the right of appeal has become barred cannot be claimed to be interested in the result of the appeal filed by the plaintiff against the other defendants. Plaintiff appellant has to show what is the nature of the interest of such defendant. A. I. R. 1927 P. C. 252=6 Rang. 29=32 C. W. N. 281=30 Bom. L. R. 220=26 A. L. J. 371=107 Ind. Cas. 237=47 C. L. J. 136 (P. C.)=107 Ind. Cas. 237. Where the pleader for plaintiff-appellant does not implead co-plaintiffs in the appeal under mistaken view of Order 41, rule 4, the Court can allow them to be joined as respondents at the hearing. A. I. R. 1928 Lah. 43=106 Ind. Cas. 313. The power to take action under this rule is discretionary and the law of limitation does not apply in such cases. A. I. R. 1924 Lah. 629=76 Ind. Cas. 285; A. I. R. 1923 Lah. 503=75 Ind. Cas. 90; see also 66 Ind. Cas. 217=5 N. L. J. 192; 15 R. D. 217; but see 1931 A. L. J. 1004. This rule applies where a person who was a party to the suit in the lower Court is not made a party to the appeal. 1935 O. W. N. 401=A. I. R. 1935 Oudh 329=154 Ind. Cas. 897. It must be shown that a person was not added in the list of respondents owing to *bona fide* mistake that is a mistake which has crept in inspite of the exercise of due care and caution. A. I. R. 1935 Lah. 802. A person against whom an appeal has abated is not a person interested in the result of the appeal within the meaning of this rule. 156 Ind. Cas. 110=41 L. W. 111=1935 M. W. N. 398=A. I. R. 1935 Mad. 175. The discretion under this rule cannot be exercised when the respondent has obtained a valuable right as against the person sought to be impleaded. A. I. R. 1935 Pesh. 106=157 Ind. Cas. 502.

Ordinarily rules of limitation relating to appeals do not apply where justice requires a party to the suit to be added. A. I. R. 1924 Pat. 773=5 P. L. T. 509=82 Ind. Cas. 600. But Court will not generally add new respondents after limitation for appeal against them. A. I. R. 1925 Rang. 108=84 Ind. Cas. 522. Where a party has not filed an appeal against another non-appellant party and the time for so doing has expired he cannot have him added in order to file a memorandum of objections although Appellate Court can do so. A. I. R. 1929 Mad. 479=120 Ind. Cas. 369. Order under this rule should be strongly used where the appellant omits to implead the necessary respondents through oversight. A. I. R. 1928 Lah. 947=111 Ind. Cas. 692; see also A. I. R. 1929 Sind 120=115 Ind. Cas. 305; A. I. R. 1927 Lah. 738=104 Ind. Cas. 400; A. I. R. 1927 Pat. 23=5 Pat. 755=8 P. L. T. 373=98 Ind. Cas. 1003. Rule 20 applies to case of a necessary party, and to admittedly necessary parties. Also it applies to cases where the Court itself discovers the defect as to the non-joinder of the parties, and to cases where the appellant applies for addition of a party. A. I. R. 1926 Lah. 689=8 Lah. L. J. 473=27 P. L. R. 731=97 Ind. Cas. 223; see also A. I. R. 1926 Cal. 893=53 C. 752=43 C. L. J. 401=95 Ind. Cas. 649; A. I. R. 1926 Cal. 335=30 C. W. N. 45=90 Ind. Cas. 986. The Appellate Court should refuse to add the representatives of the deceased respondent under Order 41, rules 20 and 43 of the C. P. Code, where the appellant could well have impleaded them in time and thus prevented an abatement. 24 C. W. N. 44=30 C. L. J. 217=54 Ind. Cas. 822. The Court can act only when the particular person to be added was a party to the suit in the Court from whose decree the appeal is preferred. A. I. R. 1923 Rang. 114=1 Bur. L. J. 272=72 Ind. Cas. 205. An Appellate Court cannot implead those who were complete strangers to the suit. Powers of a Court to implead parties under s. 151, are circumscribed by this rule and the inherent powers under s. 151 can be invoked under exceptional circumstances. A. I. R. 1923 Lah. 490=73 Ind. Cas. 136; 47 A. 853=23 A. L. J. 757=88 Ind. Cas. 493. Where one of two plaintiffs does not appeal against dismissal of suit and suit is decreed in appeal and defendant appeals but joins only the appealing plaintiff, the appeal is not infructuous. A. I. R. 1927 Cal. 733=46 C. L. J. 51=104 Ind. Cas. 151. Appellate Court cannot implead under Order XLI, rule 20, a person not a party to the decree though a party to the suit, as the person is not "interested in the result of the appeal". A. I. R. 1926 Lah. 199=8 Lah. 161=8 Lah. L. J. 333=27 P. L. R. 576=97 Ind. Cas. 338. A person need not be made a party to an appeal simply to enable one of the respondents to prefer a cross-objection against him. A. I. R. 1926 Cal. 535=53 C. 270=91 Ind. Cas. 649. Where names of certain defendants are omitted by mistake, in a memorandum of appeal, the Court can add them as parties under this rule. 4 N. L. J. 138=63 Ind. Cas. 352. Apart from all questions as to the scope of this rule and rule 33 of this order, the Court can add a respondent to the appeal. 34 C. L. J. 405=67 Ind. Cas. 10=A. I. R. 1921 Cal. 722. An appellate Court can in second appeal add as respondents persons impleaded in the original Court but not in first appeal even after expiry of limitation. 10 L. B. R. 191=59 Ind. Cas. 798; but see 57 Ind. Cas. 259=2 Lah. L. J. 5. A respondent to

an appeal can proceed against his co-respondent by way of cross-objections and join him as party to the appeal though previously he was not interested. 27 M. L. T. 266=11 L. W. 602=56 Ind. Cas. 612. The powers of the Court, however ample they may be within this rule and rule 33 cannot be used to the detriment of a person against whom no appeal has been preferred. 58 C. 923=133 Ind. Cas. 177=A. I. R. 1931 Cal. 738.

**21. [S. 560.]** Where an appeal is heard *ex parte* and judgment is pronounced against the respondent, he may apply to the Appellate Court to re-hear the appeal; and if he satisfies the Court that the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on such terms as to costs or otherwise as it thinks fit to impose upon him.

*N. B.*—For local amendment in C. P.—*Vide infra.*

**Notes.**—Where respondent is a lady and her agent fails to attend Court due to illness of daughter there is sufficient cause to set aside *ex parte* decree. A. I. R. 1921 All. 264=63 Ind. Cas. 737=19 A. L. J. 547; but see 15 A. L. J. 413=39 A. 388=39 Ind. Cas. 636. Pendency of appeal does not bar application of this rule. 43 Ind. Cas. 902=14 N. L. R. 30. Where son is not residing with father, service on son is not service on father. A. I. R. 1933 Lah. 797. Conditions necessary are that no counsel was engaged, no notice was served on appellant and the application was filed within 30 days. A. I. R. 1933 Lah. 882. To claim re-hearing under this section a respondent can show that he was never duly served with notice. 1931 M. W. N. 1069=34 L. W. 495=A. I. R. 1931 Mad. 813=61 M. L. J. 813.

**22. [S. 561.]** (1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may seem fit to allow.

(2) Such cross-objection shall be in the form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeals, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall cause a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of the respondent.

(4) Where in any case in which any respondent has under this rule filed a memorandum of objection, the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule.

**Scope**—Rule 22 provides for cross-objections aimed against an appellant from a decree of a lower Court and are not cross-objections against a co-respondent. Such cross-objections will not be allowed as against a co-respondent, where the respondent could have preferred them by way of appeal. A. I. R. 1930 Bom. 1=31 Bom. L. R. 1179. The provisions of Order XL, r. 22, must be interpreted strictly. A. I. R. 1931 Rang. 38=8 Rang. 538. Object of r. 22 is to allow respondent content with decree in his favour an opportunity of contesting findings against him if his opponent appeals. 56 Ind. Cas. 262=1 P. L. T. 434; see also 55 Ind. Cas. 214=1 P. L. T. 65. Party is entitled to support decree on new ground. 31 Ind. Cas. 740=45 P. R.

1916. Where appeal is dismissed as time-barred, cross-objections filed within time cannot be heard. 48 Ind. Cas. 203=41 M. 904. Respondent cannot support decree by taking entirely new ground which was not decided against him and not made subject of adjudication. 21 C. W. N. 423. It is doubtful if plaintiff respondent can raise cross-objections against defendant who is not appellant. 38 Ind. Cas. 641. Appeal cannot be heard within one month of date of issue of notice to respondent and thereby depriving him of right of preferring cross-objections. 38 Ind. Cas. 522=1 P. L. W. 680. Cross-objections may be filed against entire or part of decree though it may not be subject-matter of decree. 35 M. L. J. 83=48 Ind. Cas. 1003.

Cross-objection cannot be entertained against stranger to appeal. 54 Ind. Cas. 971 ; 37 Ind. Cas. 662=2 P. L. J. 162 ; 53 C. 270=A. I. R. 1926 Cal. 533. Though there be dismissal of appeal on appellant's admission that appeal was incompetent, cross-objection can be heard. 54 Ind. Cas. 50=10 L. W. 605. The memorandum of objections may be treated as a separate cross-appeal. 52 M. 521=A. I. R. 1929 Mad. 429. Where a person cannot prefer an independent appeal against an order, his mere addition as *pro forma* respondent in the appeal against the order cannot entitle him to raise any cross-objection to the order. A. I. R. 1929 Nag. 361. Where appeals relating to the matters in cross-objections are dismissed under Order 41, rule 11, cross-objections should not be heard in the cross-appeal. 32 C. W. N. 863. This rule does not extend to revision petitions. A. I. R. 1928 Mad. 794. The limitation of 30 days from the date of the decree does not apply to applications for permission to file cross-objections in *forma pauperis*. A. I. R. 1929 Pat. 31. The cross-objections cannot be heard when the appeal has abated. A. I. R. 1928 Lah. 596=10 Lah. 208. The cross-objections cannot be filed against a *pro forma* co-respondent who is not interested in appeal. A. I. R. 1929 All. 195. Appellate Court can grant relief to respondent although no cross-objection or appeal is filed. A. I. R. 1927 All. 453=49 A. 224. Cross-objections filed prior to withdrawal or dismissal in default of appeal must be heard and determined. 22 A. L. J. 365=78 Ind. Cas. 677. Rule 22 is not applicable to appeals under Letters Patent. A. I. R. 1922 All. 55=70 Ind. Cas. 488 ; see also 29 C. W. N. 1016.

Set-off not decreed can be claimed in cross-objection. A. I. R. 1934 All. 543. Cross-objections against co-respondents should be heard if justice so required. 66 Ind. Cas. 642=8 O. L. J. 358 ; see also 54 Ind. Cas. 332 ; 40 A. 536=51 Ind. Cas. 646 ; 20 C. W. N. 370 ; 69 Ind. Cas. 330=5 Lah. L. J. 92 ; 53 Ind. Cas. 659=6 O. L. J. 495 ; 56 Ind. Cas. 469=2 Lah. L. J. 747. But cross-objection against co-respondent cannot be entertained unless grounds are common to co-respondent and appellant. A. I. R. 1934 Cal. 345 ; A. I. R. 1934 Pat. 134 ; 36 C. W. N. 263. Where both parties appeal, but appeal of one is time-barred, his appeal can be converted into cross-objection. A. I. R. 1934 Lah. 273. Court is not bound to hear cross-objection if by conduct respondent has disentitled himself to the hearing thereof. A. I. R. 1934 Lah. 136. Transferee from respondent cannot file cross-objections after 30 days' period is over. A. I. R. 1932 All. 45=1931 A. L. J. 606. Respondent in appeal cannot take cross-objections unless he has filed memorandum of objections. A. I. R. 1933 Mad. 465 ; see also A. I. R. 1931 Mad. 513. The word "default" in sub-rule (4), includes any default made by appellant which would amount to non-prosecution of the appeal *e. g.*, non paying of deficit Court-fees. A. I. R. 1931 Mad. 133=1930 M. W. N. 1236 ; but see A. I. R. 1932 Nag. 41=28 N. L. R. 25 ; 8 Rang. 538=A. I. R. 1931 Rang. 120. When defendant is not party to appeal, cross-objections cannot be filed against him if plaintiff's claim is independent from claim against appealing defendant. A. I. R. 1933 Nag. 186=29 N. L. R. 173. Pauper objections can be filed. A. I. R. 1933 Nag. 158=29 N. L. R. 225. Respondent cannot take a point in cross objection unless he could have filed appeal himself on such point. A. I. R. 1933 Rang. 377.

Mere criticism of judgment is not tantamount to cross-objection. 1 Pat. 258. Petition supporting decrees does not amount to cross-objection. A. I. R. 1926 All. 280=44 A. 577=68 Ind. Cas. 861. Rule 33 is not controlled by rule 22. 62 Ind. Cas. 623. Cross-objections should be filed within one month from date of service of notice of appeal or within such further time as Appellate Court may permit. 39 Ind. Cas. 125. Court can admit cross-objection even after 30 days from service of notice of appeal on respondent. A. I. R. 1922 Nag. 213=66 Ind. Cas. 217. Respondent preferring appeal cannot file cross-objection. 79 Ind. Cas. 670. Cross-examinations cannot be entertained when respondent tries to get different relief indirectly. 24 P. R. 1916=34 Ind. Cas. 916. Cross-objections are not to

be entertained against co-respondent, if question raised thereby is quite different from question in controversy in appeal. 28 C. L. J. 123=48 Ind. Cas. 78. Where no cross-objections have been filed, Appellate Court is not justified to meddle with trial Court's decree under the rule 33. 22 C. W. N. 526=46 Ind. Cas. 142. Where a respondent by filing a cross-objection is supporting the decree in a suit dismissed in *totò* against him, that objection does not amount to cross-objection and no Court-fee is required. 15 A. L. J. 325=39 Ind. Cas. 176. Respondent though not filing cross-objections in appeal may urge that lower Court decree errs in favour of appellant and should not be disturbed. 45 Ind. Cas. 232=48 P. W. R. 1918=125 P. L. R. 1918; see also 40 Ind. Cas. 237=103 P. L. R. 1917=85 P. W. R. 1917; 39 Ind. Cas. 153=4 O. L. J. 101. Where appeal is barred by time, cross-objections filed cannot be heard. A. I. R. 1924 Lah. 43=4 Lah. 140=5 Lah. L. J. 345; see also A. I. R. 1924 Pat. 200=4 P. L. T. 652=72 Ind. Cas. 643. Cross-objection cannot be revived long after dismissal of appeal. Pendency of appeal is condition precedent to filing of cross-objections. The word "cross" indicates that objections referred to must be against appellants and not against co-respondent. 70 Ind. Cas. 79=A. I. R. 1923 Oudh 108=25 O. C. 280; *contra*; 69 Ind. Cas. 330=5 Lah. L. J. 92=A. I. R. 1923 Lah. 39.

Objection not filed as cross-objection or if it is not in support of decree is not maintainable. A. I. R. 1925 Cal. 94=40 C. L. J. 67=84 Ind. Cas. 124. Respondent cannot take cross-objection which he has already taken by way of appeal and which has been decided against him. A. I. R. 1924 All. 867=22 A. L. J. 365=78 Ind. Cas. 677. Respondent preferring appeal cannot file cross-objection. A. I. R. 1925 Lah. 2=79 Ind. Cas. 670. Where no cross-objection has been filed by respondent, appellant cannot be damnified in appeal. 11 S. L. R. 260=79 Ind. Cas. 553. Cross-objection can be filed in appeal from original side. A. I. R. 1926 Mad. 316 (F. B.)=49 M. 291=50 M. L. J. 190=24 L. W. 571=93 Ind. Cas. 293. Cross-objections though adverse to appellants and also to plaintiff respondents' interest can be maintained by respondent if it is consistent with his contentions. 29 C. W. N. 784=A. I. R. 1925 Cal. 973=88 Ind. Cas. 866. The party "who may be affected" does not absolutely empower a respondent to file cross-objections against a co-respondent, even where such co-respondent is not an interested party at all and no relief is claimed against him in the appeal. In such cases the discretion under Order XLI. rule 33, should not be exercised. A. I. R. 1929 All. 195=107 Ind. Cas. 569. Cross-objections if amounting to appeal against non-appealable order is not maintainable. A. I. R. 1927 Oudh 218=1 Luck. Cas. 24=102 Ind. Cas. 467. Where appeal from original side of High Court is dismissed for default, memo of objection can be treated as appeal. A. I. R. 1925 Mad. 725=48 M. 631=48 M. L. J. 384=88 Ind. Cas. 443. Where an appeal is filed from decree dismissing a suit, the defendant can support the decree even on grounds decided against him, and the decree being one of dismissal of whole suit he need not file any formal cross-objection. A. I. R. 1928 Nag. 181=108 Ind. Cas. 801. Respondent instead of supporting the decree of the Court below cannot be allowed to attack it under rule 22 without filing cross-objections. A. I. R. 1929 Lah. 684; see also A. I. R. 1928 Lah. 221=106 Ind. Cas. 817; A. I. R. 1929 Lah. 161=112 Ind. Cas. 689. Cross-objections in second appeal must relate to particular decree of lower Appellate Court and not any other decree arising out of single decree of trial Court. A. I. R. 1926 All. 582=24 A. L. J. 694=96 Ind. Cas. 67. Rule 22 enables lower Court's decision being supported on grounds different from those on which lower Court proceeded. A. I. R. 1927 Mad. 801=50 M. 866=53 M. L. J. 189=104 Ind. Cas. 472. The cross-objection relating to costs, should bear Court-fee upon the amount claimed. A. I. R. 1929 Pat. 286=8 Pat. 543=10 P. L. T. 224. The words "support the decree" do not mean merely "support the decision". 12 Pat. L. T. 659. The provisions of sub-rule (4) must be interpreted strictly and not extended beyond their obvious meaning. Apart from two instances excepted in sub-rule (4) cross-objections cannot be entertained if the appeal fails. 8 Rang. 533=A. I. R. 1931 Rang. 38=129 Ind. Cas. 500.

Even where an appeal is filed by two out of 96 defendants the plaintiff is entitled to file cross objections. Such cross-objection cannot be refused on the ground that in any case the decree would remain in tact as against the 94 defendants who had not appealed. A. I. R. 1934 Oudh. 131=11 O. W. N. 258=151 Ind. Cas. 530. A defendant respondent whose set-off has not been decreed or has not been referred to in the decree, may make this ground of cross-examinations in

appeal. 150 Ind. Cas. 433=A. I. R. 1934 All. 543. It is doubtful whether on abatement of the appeal by death of the appellant, the cross-objections can be heard after bringing the legal representatives on the record. 151 Ind. Cas. 387=A. I. R. 1934 Lah. 136. Under clause (3) the respondent should file with cross-objection a written acknowledgment of notice from the party who may be affected by such an objection. 150 Ind. Cas. 364=A. I. R. 1934 Cal. 345=58 C. L. J. 534. A cross-objection which seeks to raise a question as between two respondents *inter se* and is purely a lateral attack in which the appellant is not concerned or interested, is not maintainable. 158 Ind. Cas. 708=1935 O. W. N. 1139. The expression "cross-objection" in this rule indicates that it should be directed against the appellant, but it may also be taken against another respondent if there is community of interests between the appellant and the latter. 57 A. 580=155 Ind. Cas. 89=A. I. R. 1935 All. 134=1935 A. L. J. 145. Where in an appeal filed by the defendant the cross-objection filed by the plaintiff is allowed and the plaintiff files a second appeal not being completely satisfied with the lower appellate Court's decree it is open to the defendant either to file a cross-appeal from the other part or to file a cross-objection to the plaintiff's appeal. In either case the Appellate Court is seized of the whole matter and has jurisdiction to dispose of the entire suit. A. I. R. 1935 All. 494=1935 A. L. J. 418=158 Ind. Cas. 100.

**23. [S. 562.]** Where the Court from whose decree an appeal is preferred

has disposed of the suit upon a preliminary point and the decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to readmit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.

*N. B.*—For local amendment in Madras—*Vide infra*.

**Grounds for remand.**—Where a case is not decided on preliminary point Appellate Court cannot remand the case under this rule. 35 C. L. J. 345=70 Ind. Cas. 547; see also 70 Ind. Cas. 1008; 24 Bom. L. R. 820=67 Ind. Cas. 965, A. I. R. 1923 Lah. 480; 95 Ind. Cas. 44; A. I. R. 1927 Lah. 618; A. I. R. 1930 Lah. 639; A. I. R. 1930 Lah. 181. A preliminary point within the meaning of Order 41, rule 23, is any point the decision of which avoids the necessity for the full hearing of the suit. A. I. R. 1934 Pat. 13. It must be independent of merits. A. I. R. 1934 Cal. 49. The test of finality is whether rights of parties are finally disposed of. 37 C. W. N. 495 P. C. "Preliminary point" comprehends all points whether of law or of fact which prevent Court from disposing of case on merits. A. I. R. 1933 Rang. 413. Remand order can be under inherent power. A. I. R. 1933 Pat. 706; see also A. I. R. 1933 Lah. 135=34 P. L. R. 270; A. I. R. 1932 Lah. 311=33 P. L. R. 285; 37 C. W. N. 1084. Under r. 23 suit must be disposed of on preliminary point. 33 P. L. R. 54=A. I. R. 1932 Lah. 219. There cannot be any remand where the trial Court made its finding on all points. 33 C. W. N. 1211. Where the trial Court decides the suit on merits, it is not open to the Appellate Court to remand the case under rule 23, as though the suit had been decided on a preliminary point but under r. 24 or r. 25. 66 Ind. Cas. 922; see also 56 Ind. Cas. 984; 55 Ind. Cas. 484.

If decision of the lower Court is clearly right in law remand is improper because it may have been based upon a debatable point of law. A. I. R. 1929 Mad. 718=30 L. W. 230=119 Ind. Cas. 43. Where a case is tried on various material issues, it should not be remanded. A. I. R. 1930 All. 180=1930 A. L. J. 99=123 Ind. Cas. 324. The District Court can remand case for determination of a question of fact essential to the right decision of the suit upon its merits. A. I. R. 1930 Rang. 188=127 Ind. Cas. 598; A. I. R. 1930 Pat. 7=11 P. L. T. 637=124 Ind. Cas. 385; A. I. R. 1928 Lah. 774=10 Lah. 360=30 P. L. R. 541=112 Ind. Cas. 736; A. I. R. 1927 Nag. 192=101 Ind. Cas. 281. Where original Court fails to frame and determine particular issue, case should be remanded for finding on that issue and not for trial. 38 Ind. Cas. 641. Order of remand is illegal where evidence is recorded on material issues. 41 Ind. Cas. 735; see also 35 Ind. Cas. 239. Where evidence is recorded, but some issues are not decided, proper order of Appellate Court is to call for

findings under rule 25 and not under rule 23. 38 A. 520=14 A. L. J. 754=36 Ind. Cas. 245. Where in a pre-emption suit, custom is pleaded in the first Court and extract in the Appellate Court the latter Court should not decide the point but allow amendment and remand case. A. I. R. 1922 All. 281=44 A. 571=20 A. L. J. 464=66 Ind. Cas. 572. Order for remand for adducing further evidence and disposal and also setting aside trial Court's decree dismissing suit is illegal. A. I. R. 1929 Bom. 175=31 Bom. L. R. 208=53 B. 335=118 Ind. Cas. 790. Where the record showed that the judgment of the final Court was based upon the consent of the parties and the fact was controverted in appeal before Board of Judicial Committee and the Board found that the recital of consent was in some way erroneous and that no judgment upon the merits had been pronounced by the Court Board sent back the record so that it might be reconsidered and dealt with in the ordinary way. A. I. R. 1931 P. C. 107=35 C. W. N. 612=60 M. L. J. 618=33 L. W. 723 (P. C.)=131 Ind. Cas. 316. Where Judge has jurisdiction to try a case under the ordinary procedure, mere fact that he tries it under special procedure is no ground for dismissing it. Proper procedure is to remand the case. A. I. R. 1927 Lah. 174=8 Lah. 156=9 Lah. L. J. 57=28 P. L. R. 539=99 Ind. Cas. 648. Where issues framed by the trial Court are exhaustive and there is no alternative relief prayed, it is not competent for the Appellate Court to set up new case and remand the case. A. I. R. 1927 Lah. 42=98 Ind. Cas. 906. Court need not remand a case if the only object is to have an enquiry under the Bengal Tenancy Act, s. 158. A. I. R. 1928 Cal. 43=105 Ind. Cas. 133. If Appellate Court is not satisfied with local investigation accepted by trial Court it can direct trial Court to take evidence under rules 27, 28, 29 but cannot order retrial. A. I. R. 1928 Cal. 748=110 Ind. Cas. 448. Where appeal is preferred against preliminary decree in partition suit and Appellate Court remands case for retrial the proper order would be under rule 25 and not under rule 23. A. I. R. 1927 Oudh 591=101 Ind. Cas. 89. Where documents put in are mechanically exhibited without the trial Court and objection to admissibility is put forth in second appeal an order for retrial is justified. A. I. R. 1927. Lah. 45=8 Lah. L. J. 537=99 Ind. Cas. 920.

**Remand under inherent power.**—Even where rule 23 does not apply, the Appellate Court has inherent power to make a remand under s. 151. A. I. R. 1930 Mad. 72; see also 32 C. W. N. 101; A. I. R. 1927 Pat. 295=6 Pat. 380; A. I. R. 1927 Mad. 1190; A. I. R. 1927 Mad. 335=52 M. L. J. 90; 43 C. L. J. 601=A. I. R. 1926 Cal. 1076; A. I. R. 1926 Lah. 537. Where there is no question of any preliminary point and the order of remand affects the whole decision of the whole suit the remand must be taken to have been under inherent powers. A. I. R. 1925 Pat. 760; see also A. I. R. 1926 Pat. 516=7 P. L. T. 811; 87 Ind. Cas. 575; 84 Ind. Cas. 965=48 M. 713; 31 Ind. Cas. 263; 32 Ind. Cas. 906; A. I. R. 1933 Cal. 632; A. I. R. 1929 Nag. 63; 76 Ind. Cas. 496; 37 C. L. J. 122; 73 Ind. Cas. 915; 73 Ind. Cas. 591; 43 C. 1001; 44 C. 929 (F. B.); 41 Ind. Cas. 598; 58 Ind. Cas. 444; 37 C. L. J. 491; 69 Ind. Cas. 826. Although Appellate Court has inherent powers to remand case not falling under rules 23 and 25 that power should be cautiously exercised. 43 Ind. Cas. 959=3 Pat. L. J. 253; see also 44 C. 929=21 C. W. N. 278; 64 Ind. Cas. 599. Where a case is remanded in the exercise of the Court's inherent jurisdiction no appeal lies from the order of remand. 37 M. L. J. 536=53 Ind. Cas. 417; 78 Ind. Cas. 408; A. I. R. 1928 Cal. 305; A. I. R. 1927 Mad. 859. Improper use of inherent power under s. 151 in remanding a case is not a case of jurisdiction, an order is not revisable. A. I. R. 1927 Mad. 335=52 M. L. J. 90. High Court can deal with small question of fact to avoid remand. 34 C. W. N. 951. The High Court has ample powers to make a remand in order that a point which has not been considered by the lower Court may be considered. A. I. R. 1934 Rang. 168. An Appellate Court has an inherent power to remand a case even where rule 23 does not apply provided that the interest of the justice requires it. A. I. R. 1935 Bom. 216=37 Bom. L. R. 203=156 Ind. Cas. 381.

**Order under the rule.**—Where the trial Court has disposed of suit completely on the merits, it is beyond the competence of Appellate Court to direct a remand upon grounds which do not arise from the pleadings. 119 Ind. Cas. 2. Where remanding suit to the trial Court for fresh disposal it should be made quite clear whether the order of remand is under Order 41, rule 23 or independently of it. A. I. R. 1929 Mad. 205=119 Ind. Cas. 705; see also 45 C. L. J. 194. It is the duty of the Court to which remand is made to record findings to all the questions sent on remand and not to omit certain answers because of the view it takes of the law. A.



I. R. 1927 Bom. 594=51 B. 1026. No order of remand can be regarded as made under rule 23, unless the case has been disposed of without entering into the full merits by reason of a decision on law or fact which has prevented the case being tried to the end. 73 Ind. Cas. 591. The High Court has authority to limit the scope of certain appeal remanded to the lower Court without keeping them on its own file. 20 C. W. N. 584. The issues decided by the order of remand under rule 23 cannot be re-opened between the parties at any subsequent stage of litigation. 70 Ind. Cas. 983. When all points have been decided by the lower Court remand should be under rule 25 and not under rule 23. A. I. R. 1932 Lah. 443=33 P. L. R. 487. Except under rule 23 no case shall be remanded for a second decision which can be disposed of finally by first Appellate Court. 36 Ind. Cas. 241=12 N. L. R. 120. Where case is decided on important point but remanded to lower Court for some purpose, the order is not a decree. A. I. R. 1928 All. 13=26 A. L. J. 103=107 Ind. Cas. 677. Mere omission to pass order for refund of Court-fees does not make order of remand one under any other law. A. I. R. 1929 Lah. 175=118 Ind. Cas. 393. Where case is remanded to find whether person has title, it includes inquiry whether he has lost title or whether he is precluded from relying on it. 20 C. W. N. 149=31 Ind. Cas. 987. Power of remand under the new Code is not only to be used where the trial Court has disposed of a case on a preliminary issue but also where important evidence has been wrongly excluded or important questions wrongly disallowed. 36 Ind. Cas. 813; see also 39 Ind. Cas. 951. An order of remand is an interlocutory order and therefore not subject of appeal to His Majesty in Council. 2 Lah. 106=60 Ind. Cas. 522. Where the order of remand decides a certain question it cannot be re-opened on appeal after remand. 53 Ind. Cas. 677; see also A. I. R. 1923 Pat. 226=76 Ind. Cas. 135. Where on second appeal the case is remanded to lower Appellate Court, it is not open to that Court, to consider arguments abandoned or not raised in second appeal or to come to a fresh findings on points decided by order of remand. 61 Ind. Cas. 575. Where trial Court decides a suit on all the issues and dismisses the order of Appellate Court remanding the suit for fresh disposal being of contrary opinion on one issue without disturbing the findings of the first Court on the other issues is improper. A. I. R. 1923 Mad. 227=76 Ind. Cas. 1041. An order under rule 23 is a final order which is subject to appeal and cannot be considered by the Court which passed it except on review whereas an order under rule 25 is an interlocutory order which it is open to the Court to reconsider. 25 O. C. 189=9 O. L. J. 235=69 Ind. Cas. 730. The power of remanding a case, otherwise than under rule 23, should be most sparingly used in first appeal. A. I. R. 1929 Nag. 63=26 N. L. R. 44=117 Ind. Cas. 280. Jurisdiction of a Court trying remanded case depends entirely on the order of the Appellate Court when remanding. A. I. R. 1923 Mad. 351=44 M. L. J. 238=72 Ind. Cas. 314. The word remand should be used only when a case is returned for decision and not for return of a case for finding. A. I. R. 1925 Rang 302=92 Ind. Cas. 370. An Appellate Court is not confined to the grounds mentioned in r. 23 and may do so on any other ground. 5 Lah. L. J. 269=74 Ind. Cas. 497.

**Appellate Court.**—Appellate Court cannot remand a case, not disposed on a preliminary point, for a fresh decision on taking further evidence. 27 C. L. J. 596=46 Ind. Cas. 333. Under rule 23, Appellate Court can only frame issue and remand case for finding, it cannot remand for further evidence and pass fresh decree itself. 38 Ind. Cas. 797. Even if it be competent to the High Court on second appeal to remit case for re-hearing on an issue not raised in the pleadings or even suggested in the Court below, this ought only to be done in exceptional cases for good cause shown and on payment of all costs. 43 C. 1104=43 Ind. Cas. 172=20 C. W. N. 1245 (P. C.). Appellate Court can remand whole case where plaint is allowed to be amended by addition of parties in appeal. 43 C. 938=32 Ind. Cas. 791=20 C. W. N. 517. Contention not arising out of pleadings and not raised in lower Court is not to be allowed to be raised on remand. 38 Ind. Cas. 509=1 Pat. L. W. 188=2 Pat. L. J. 8; see also 44 Ind. Cas. 416. Where an Appellate Court passed an order of remand without specifying the provisions of law under which it is made, it must be presumed to be under rule 23, and it is appealable. A. I. R. 1922 All. 226=20 A. L. J. 321=44 A. 192=67 Ind. Cas. 713. Where trial Court omits to put in issue an important point, Appellate Court can raise that issue and remand case. 64 P. R. 1919=51 Ind. Cas. 712. Appellate Court can decide case on evidence on record after excluding irrelevant or unsatisfactory portions. 50 Ind. Cas. 391. If the defendant appeals against *ex parte* decree without seeking to set it aside, Appellate Court should not

remand case under rule 23, but should itself dispose it on merits. 24 P. L. R. 1917=39 Ind. Cas. 749; see also 25 C. L. J. 473=39 Ind. Cas. 886; but see 56 Ind. Cas. 255=(1919) 3 U. B. R. 193. Where the lower Appellate Court reversed the decree of the Court below, modifying one of the issues and remanding the case for a *de novo* trial on the modified issue, the order is wrong. A. I. R. 1922 Cal. 456=35 C. L. J. 345=70 Ind. Cas. 547. Remand order can not confer on the subordinate Court a jurisdiction which that Court would not have had but for the remand. A. I. R. 1929 Lah. 534=30 P. L. R. 244=116 Ind. Cas. 324. An Appellate Court has power to transfer a case from one Court to another Court. 25 P. W. R. 1922=66 Ind. Cas. 113; see also 24 C. L. J. 457=35 Ind. Cas. 698; but see 66 Ind. Cas. 113. This rule contemplates a position in which the Appellate Court does not retain seizin of the case. The remand under it is for a 'determination of the suit,' and after remand the Appellate Court has nothing more to do with the matter unless it comes back to it by way of a fresh appeal. A. I. R. 1936 Nag. 140. But when the Appellate Court retains seizin of the case when remanding for finding on issue rule 20 or rule 27 is more applicable. A. I. R. 1936 Nag. 140. Where a District Judge remands a suit to the trial Court and the suit is ultimately dismissed by the trial Judge and an appeal is preferred again to his successor, it is competent for him to go behind the finding of his predecessor. 38 P. L. R. 567=A. I. R. 1936 Lah. 708. Remand order by Appellate Court is proper where the trial Court adopted unjustifiable and unsatisfactory procedure. A. I. R. 1936 Cal. 195=162 Ind. Cas. 697.

**Preliminary Point.**—The expression "preliminary point" is not confined to such legal points only as may be pleaded in bar of suit but comprehend all such points as may have prevented the Court disposing of the case on the merits, whether such points are pure question of law or pure questions of fact. There are many instances of such point such as, that a suit is barred by limitation; that the Court has no jurisdiction under the Estates Land Act; that evidence tendered was not admissible, that on the plaintiffs' evidence there is no evidence for the defendant to answer; in a libel suit that there is no proof of publication. 45 M. 900=69 Ind. Cas. 828; see also 2 Pat. L. J. 398=41 Ind. Cas. 202; 61 Ind. Cas. 829=13 L. W. 54; 48 M. L. J. 100=86 Ind. Cas. 548; A. I. R. 1927 Mad. 1159; A. I. R. 1935 Pat. 49; A. I. R. 1935 Rang. 34. In a mortgage suit the question whether plaintiff is entitled to an unconditional decree for possession or one subject to defendant's right to redeem is a preliminary point. A. I. R. 1930 Mad. 1017=60 M. L. J. 72. Decision as to rejection of evidence in order to make it a decision on a preliminary point within Order XLI, r. 23, must be found to have restricted the trial of the suit. A. I. R. 1928 Mad. 991. Dismissal of suit on the ground of the inadmissibility of document is dismissal on a preliminary point. A. I. R. 1927 Lah. 592; see also 5 P. L. J. 410. Where a suit is remanded for retrial on amended plaint the remand is on a preliminary point. A. I. R. 1927 Lah. 196=100 Ind. Cas. 42. Where Court records findings on all issues but dismissing suit as not maintainable the disposal is on preliminary point. 4 P. L. J. 645=52 Ind. Cas. 125. The expression "in disposed of the suit on a preliminary point" means disposed of the whole suit on a preliminary point only. 57 Ind. Cas. 800. Where the death of one defendant is brought to the notice of the Court, but the Court continued the suit and passes a decree without legal representative, the Court must be deemed to have disposed of the suit on a preliminary point justifying a remand under rule 23. 74 Ind. Cas. 682=5 Lah. L. J. 187. Appellate Court can remand suit if lower Court overlooks defendants' plea of subsisting tenancy. 38 A. 533=14 A. L. J. 734. Where the lower Court has admitted inadmissible evidence the proper procedure for the Appellate Court is to remand the case. 55 Ind. Cas. 922; see also 34 C. L. J. 205. A case decided on a wrong view of s. 107 and s. 108 of the Evidence Act should be remanded to the Court, as a case of wrong disposal on preliminary point. 22 Bom. L. R. 771=57 Ind. Cas. 525. No remand is justifiable where plaintiff fails to prove documents. A. I. R. 1937 Lah. 454. Where a trial Court disposes of a suit completely on merits the Appellate Court is not justified under rule 23 to direct remand upon grounds which do not arise from the pleadings. 119 Ind. Cas. 2. A preliminary point when determined in favour of the plaintiff, permits the progress of the suit, but when determined against him concludes it. A. I. R. 1930 Nag. 295=128 Ind. Cas. 407. A preliminary point must be decided as a preliminary point at the earliest stage of the

suit. A. I. R. 1930 All. 863=128 Ind. Cas. 827. Where Court appears to have decided every issue, the fact that its decision on a preliminary point covers the decision on the remaining points does not justify its being held that the decision was only on a preliminary point. A. I. R. 1924 Oudh 97=74 Ind. Cas. 582. A preliminary point within the meaning of Order 41, rule 23, is any point the decision of which avoids the necessity for the full hearing of the suit. 151 Ind. Cas. 947=A. I. R. 1934 Pat. 13. Where a case has been decided by the lower Court wholly on merits and not on any preliminary point, the case must be remanded by the Appellate Court under rule 25 and not under rule 23. 151 Ind. Cas. 493=36 P. L. R. 269=A. I. R. 1934 Lah. 576. Even under this rule no case should be remanded for second decision by the trial Court which can be finally disposed of by the first Appellate Court. 31 N. L. R. (Supp) 72=165 Ind. Cas. 202=A. I. R. 1936 Nag. 8. Where the Judge of an Appellate Court allows an appeal on a preliminary point of law which necessitates the remand of the suit for further trial or retrial of the suit he should refrain from making any remarks in his judgment. Concerning the merits of the claim, as by so doing, he must necessarily prejudice the further trial or new trial on remand. A. I. R. 1936 Rang. 251=163 Ind. Cas. 397. This rule is applicable where a Court decides a case on a preliminary point. A. I. R. 1935 Rang. 123.

**Appeal.**—An order of remand can be appealed against only if it is made under Order XLI, rule 23 *i. e.*, where the trial Court has disposed of the suit on a preliminary point and not if it is made under s. 151. A. I. R. 1929 Mad. 205=119 Ind. Cas. 705; see also A. I. R. 1930 Lah. 221=30 P. L. R. 645=119 Ind. Cas. 330; A. I. R. 1928 Lah. 753=110 Ind. Cas. 748; A. I. R. 1928 Lah. 341=107 Ind. Cas. 284; A. I. R. 1927 Cal. 642=31 C. W. N. 878=104 Ind. Cas. 422; A. I. R. 1925 Rang. 320=4 Bur. L. J. 159=3 Rang. 490=92 Ind. Cas. 368; 24 C. W. N. 708=31 C. L. J. 360=56 Ind. Cas. 516; A. I. R. 1922 Mad. 112=45 M. L. J. 449=42 M. L. J. 372=30 M. L. T. 217=68 Ind. Cas. 869; A. I. R. 1928 Mad. 1200=110 Ind. Cas. 692. Rule 23 applies only to cases where the whole suit has been determined upon a preliminary point and not to cases where a portion only of the suit has been so decided and reversed on appeal. A. I. R. 1926 Pat. 514=8 P. L. T. 9=97 Ind. Cas. 1. No appeal lies from remand order where trial Court disposes of all issues. 1926 M. W. N. 48=92 Ind. Cas. 1045. Order of rejection of plaint set aside by Appellate Court is not an order under this rule and is not appealable. A. I. R. 1929 Lah. 83=108 Ind. Cas. 597. Where the Appellate Court decides the main point and remands the case for disposal of the remaining issues, the decision is not one on a preliminary point and is not appealable. 12 L. W. 667=60 Ind. Cas. 609. Where the remanding judgment clearly adjudicates upon the rights of the parties in regard to certain matters in controversy between them, it has all the force of a decree and is appealable as such. A. I. R. 1928 Nag. 68=105 Ind. Cas. 567. Where trial Court dismissed suit without entering into merits on ground of defect in description of defendant and the Appellate Court directed amendment of plaint and remanded case and Court-fee on appeal was ordered to be refunded, Appellate Court's order was held one of remand. A. I. R. 1925 Cal. 716=52 C. 783=29 C. W. N. 614=95 Ind. Cas. 426. An appeal from an order of an Appellate Court under rule 23 does lie in all cases except where absolutely no right of second appeal is given in the body of the Court or by any other law. A. I. R. 1922 Lah. 178=3 Lah. 218=4 Lah. L. J. 359 (F. B.)=68 Ind. Cas. 849. An order of remand by an Appellate Court which is such in form and in substance, though irregular, is order under rule 23. A. I. R. 1925 Cal. 1258=42 C. L. J. 22=30 C. W. N. 41=89 Ind. Cas. 744; see also A. I. R. 1922 Cal. 279=80 Ind. Cas. 172; 71 Ind. Cas. 204=A. I. R. 1923 Mad. 331=17 L. W. 159; 64 Ind. Cas. 878=44 A. 176=19 A. L. J. 971. The policy of the Legislature being not to allow a second appeal on facts, an appellant coming in appeal under Order 43, rule 1 (u), cannot question findings of fact in this Court. 59 Ind. Cas. 715=31 P. W. R. 1921=36 P. L. R. 1919. If a Court purports to pass an order of remand under Order 41, rule 23, even if the order is wrongly passed under that rule, an appeal lies from the order. 31 N. L. R. (Supp) 72=160 Ind. Cas. 202=A. I. R. 1936 Nag. 8. A distinction has to be drawn between an order of remand under Order 41, rule 23 and an order under rule 25, remitting issues for decision. An order under rule 25 does not amount an "order remanding a case", within Order 43, rule 1 (u) and is not therefore appealable. A. I. R. 1935 Oudh 333=1935 O. W. N. 352=154 Ind. C. 676.

**Revision.**—Where order of remand is not justified High Court can interfere in revision. A. I. R. 1930 All. 863=128 Ind. Cas. 827; A. I. R. 1925 Mad. 171=79

Ind. Cas. 857. An order of remand finally disposing of matter before Court is revisable. A. I. R. 1926 All. 55=48 A. 27=23 A. L. J. 891=89 Ind. Cas. 409. Where both parties have no evidence to offer on points in issues and trial Court decides case on admissions order of Appellate Court allowing fresh questions to be raised and remanding case for fresh evidence can be set aside in revision. A. I. R. 1929 Mad. 205=119 Ind. Cas. 705.

24. [S. 565.] Where the evidence upon the record is sufficient to enable the Appellate Court to pronounce judgment, the Appellate Court may, after re-settling the issues, if necessary, finally determine the suit notwithstanding that the judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds.

Notes.—First Appellate Court can consider question of relevancy of document though the question was not raised in the trial Court. A. I. R. 1928 Cal. 512=109 Ind. Cas. 26.

25. [S. 566.] Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required ;

and such Court shall proceed to try such issues and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor.

Scope.—Under Order 41, when the Appellate Court is of opinion that certain findings of fact are necessary for the proper disposal of appeal and that evidence should be led on these points the proper procedure is under rule 25 and partly under rule 26 by calling for further findings. A. I. R. 1929 Bom. 175=53 B. 335. Appellate Court can frame additional issues and remand a case. A. I. R. 1928 Mad. 984. Where trial Court does not come to a finding on a point considering it to be unnecessary for it to do so, lower Appellate Court is not bound to remand the case but can legally come to any finding of fact on the point. A. I. R. 1928 Mad. 535=110 Ind. Cas. 548. Where Appellate Court is of opinion that parties should be allowed to adduce evidence on certain issue not tried by trial Court, the proper procedure is to make order under rule 25. 110 Ind. Cas. 444. The order of remand, on the ground that the Court wrongly decided necessary issue on plea of *res judicata* not raised, and without considering evidence is under rule 25. A. I. R. 1929 Lah. 376=29 P. L. R. 270. Where lower Appellate Court has omitted to determine question of facts essential to right decision, High Court can frame necessary issues and refer them for trial. 43 M. 567=35 C. W. N. 485=22 Bom. L. R. 578=18 A. L. J. 707 (P. C.). Remand of specific issues under rule 25 is open to reconsideration. 25 O. C. 189=69 Ind. Cas. 730. Where plaintiff fails to produce evidence that is necessary to establish his right in trial Court, remand cannot be granted. 71 Ind. Cas. 284.

Remand order does not take away Appellate Court's seizin of the case. A. I. R. 1932 Rang. 137=10 Rang. 335. In first appeal the High Court can investigate facts in interest of justice. A. I. R. 1932 Pat. 286=11 Pat. 513. Where important evidence has been disregarded by lower Court, case should be remanded. A. I. R. 1933 Pat. 472. Where party knew but failed to discharge, remand is not proper though issue is not clear. A. I. R. 1932 Lah. 293=32 P. L. R. 861. Appellate Court cannot make new case and remand the suit. A. I. R. 1933 All. 829=17 R. D. 775. As regards whether a remand is under rule 23 or rule 25, *vide* A. I. R. 1933 Oudh 560. Appointment of Commissioner by Appellate Court to examine accounts and to give findings on mixed questions of fact and law is irregular. The proper

course is to frame issue and refer it to trial Court under Order 41, rule 25. 35 C. W. N. 841=33 Bom. L. R. 988=A. I. R. 1931 P. C. 136 (P. C.). Under Order 41, rule 25, case stands pending during appeal and before final judgment. Court may give different consideration before final judgment. 46 Ind. Cas. 922 ; see also 24 C. W. N. 145=30 C. L. J. 428=54 Ind. Cas. 700. Exercise of power of remand is within the discretion of the Appellate Court. 67 Ind. Cas. 244. Where Appellate Court finds that parties failed to grasp essential questions and adduce evidence, adequately, it can frame new issues and remand them for trial. 66 Ind. Cas. 833 ; see also 34 C. L. J. 160=26 C. W. N. 1022. Court to which case is remanded must give opportunity to both parties to produce evidence. 19 A. L. J. 79=62 Ind. Cas. 447. In case of remand under rule 25, the Appellate Court can re consider the view of the law on which the remand was based. 68 Ind. Cas. 242. Suit should not be remanded unless omitted issue is likely to affect final result of suit. 27 O. C. 383=80 Ind. Cas. 591=A. I. R. 1925 Oudh 97. Where issues though necessary is not framed case should not be remanded but issue referred for taking additional evidence and for returning case with findings. 78 Ind. Cas. 1=A. I. R. 1925 Mad. 169. It cannot be affirmed broadly that when order has been made under rule 25, the Court called upon to determine the appeal finally under Order 41, rule 26, is competent to treat the order as erroneously made, when an order has been made under rule 25, the appeal remains pending and undisposed of on the file of the Court. The order, till it has been set aside in an appropriate proceeding must be treated as an interlocutory one which is operative in law. If the order had been made under Order 41, rule 23, its propriety would not have been challenged in an appeal against the final decree made after remand. The same principle is applicable to order under Order XLI, rule 25, subject to the reservation that as the appeal remains pending, the alternate decision must be based upon a consideration of all the findings before and after the order under Order XLI, rule 25. The evidence and findings become part of the record in the suit and the Court proceeds to determine the appeal, such determination must be based upon all the materials on the record. A. I. R. 1923 Cal. 521=37 C. L. J. 122=74 Ind. Cas. 392.

Where High Court remits certain issues to lower Appellate Court and that Court in its turn remits those issues to the subordinate Court, the procedure is wrong. A. I. R. 1924 Lah. 354=71 Ind. Cas. 895 ; A. I. R. 1927 Lah. 769=102 Ind. Cas. 273. Where lower Appellate Court fails to determine issues, case should be remanded to that Court for determining issues according to law. A. I. R. 1929 Pat. 98=10 P. L. T. 10=115 Ind. Cas. 674.

An order of remand made under this rule decides nothing, and the reasons that the Court gives for its support are given merely for its own convenience and for helping the lower Court to proceed rightly in carrying out order. The Court either the same or differently constituted, when determining the appeal finally has ample jurisdiction to go back on the views as expressed in the order of remand passed under Order XLI, rule 25. The finding or decision of a Division Bench of a High Court in remanding a case is not conclusive and it can be re-opened at the final determination of the appeal. A. I. R. 1928 Cal. 186=47 C. L. J. 112=32 C. W. N. 1233=107 Ind. Cas. 730. Appellate Court reversing decision on one issue cannot remand whole case for retrial. Remand can only be made under Order XLI, rule 25. A. I. R. 1927 Bom. 111=29 Bom. L. R. 56=100 Ind. Cas. 578. Where though the case is remitted twice but the lower Court does not determine the issue High Court can remand the case even a third time for that purpose. A. I. R. 1922 P. C. 292=45 M. 536=16 L. W. 102=49 I. A. 286=37 C. L. J. 199=27 C. W. N. 245 (P. C.)=68 Ind. Cas. 538. Dismissal of suit is improper where on appeal against decree in partition suit, Appellate Court remands suit for fresh disposal as regards appellant. 22 P. L. R. 1918=44 P. W. R. 1918=44 Ind. Cas. 135. Where issues are remanded to lower Appellate Court it may ask trial Court to record evidence but the finding must be recorded by the lower Appellate Court itself. 9 S. L. R. 148=32 Ind. Cas. 634. Record of Rights being published after decision is no ground for admitting additional evidence. Remand should not be had where Court has considered and understood evidence. 43 Ind. Cas. 750=2 Pat. L. J. 564. Even if an Appellate Court be deemed competent to remit a case for re-hearing on an issue not raised in pleadings, this ought only to be done in exceptional cases. 66 Ind. Cas. 647=34 C. L. J. 319=A. I. R. 1921 Cal. 509. The High Court can on second appeal remand case for findings even on points not taken in the grounds of appeal. The finding of the lower Appellate Court on a question of fact not put in issue can be challenged in second appeal. A. I. R. 1921 Lah. 256=85 Ind. Cas. 92.

Order wrongly remitting issue to trial Court though not appealable can be reversed when appeal from decree of lower Appellate Court is heard and determined. A. I. R. 1927 Oudh 499=4 O. W. N. 958=105 Ind. Cas. 410. Where an issue is necessary for fair disposal of a case but parties are not prejudiced by omission, suit will not be remanded. A. I. R. 1927 All. 410=100 Ind. Cas. 650. Where Appellate Court frames additional issues and remand case reversing decree instead of calling for finding retaining case on its file remand order is not appealable either under Order XLIII, rule 1 (u) or under s. 100, it not being a decree within s. 2. A. I. R. 1917 Cal. 850=55 C. 219=47 C. L. J. 69=103 Ind. Cas. 864. Where decision of trial Court is reversed in appeal and additional issues are remitted to trial Court, remand not being remand on preliminary point is not appealable under Order XLI, r. 23. A. I. R. 1926 Mad. 695=23 L. W. 540=95 Ind. Cas. 325. Appeal does not lie from order of remand under rule 25. A. I. R. 1924 Rang. 131=76 Ind. Cas. 816=2 Bur. L. J. 216. The High Court has power under second appeals to frame issues and refer them for trial to the first Court. A. I. R. 1934 Nag. 207. An appeal does not lie from an order remitting a certain issue to the trial Court under Order 41, rule 25. 4 P. W. R. 1120. Where a case is remanded under rule 25, it is not open to a Court of second appeal to examine the facts, except in so far as it is empowered to do so under s. 103, and it is immaterial whether the first Court takes the evidence or the lower Appellate Court. A. I. R. 1936 Nag. 140.

Findings and evidence to be put on record. Objections to finding.

26. [S. 587.] (1) Such evidence and findings shall form part of the record in the suit, and either party may, within a time to be fixed by the Appellate Court present a memorandum of objections to any finding.

(2) After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.

**Notes**—Appellate Court must give decisions on issues even though findings have not been objected. 40 Ind. Cas. 405. Court may not hear at hearing objections to memorandum of objections which have not been filed. 3 Lah. L. J. 230=67 Ind. Cas. 845. No Court-fee is payable on memorandum of objections filed under rule 26. A. I. R. 1928 Pat. 85.

27. [S. 588] (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, but if—

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,

the appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced, by an Appellate Court, the Court shall record the reasons for its admission.

**Notes**.—Additional evidence is allowed not for benefit of party but when evidence recorded is defective. 1 P. L. J. 435=37 Ind. Cas. 1008; see also 57 Ind. Cas. 843; 54 Ind. Cas. 666; 53 Ind. Cas. 825; 44 Ind. Cas. 670. Negligent party cannot be helped by way of rule 27. 47 C. 662=25 C. W. N. 417=22 Bom. L. R. 557=55 Ind. Cas. 954 (P. C.). Appellate Court can allow production of evidence. 2 Pat. 676=50 I. A. 183=25 Bom. L. R. 1253=28 C. W. N. 277 (P. C.). Additional evidence must be allowed where justice demands it. A. I. R. 1930 Oudh 110=6 O. W. N. 1060. The language of rule 27 is very strict and it is only whether the Appellate Court "requires" it that additional evidence can be admitted. Where it does not require it to enable it to pronounce judgment or for any other substantial cause additional evidence cannot be admitted. 147 Ind. Cas. 339=A. I. R. 1934 All. 175; see also A. I. R. 1934 Pat. 60=150 Ind. Cas. 788; A. I. R. 1934 Lah. 529=148 Ind. Cas. 820; A. I. R. 1934 Lah. 664=35 P. L. R. 779. Before a Court can admit additional evidence in appeal under Order 41, rule 27, C. P. Code, it must

record its reason for doing so ; and it is only when the Court itself requires additional evidence and finds it needful in order to pronounce judgment for any other substantial cause, that such evidence can be admitted. 38 C. W. N. 763=A. I. R. 1934 Cal. 707. This rule is intended to obtain additional evidence and cannot be used to test the evidence of witness. A. I. R. 1935 Rang. 39=155 Ind. Cas. 511. This power should be used very sparingly in second appeal. 18 R. D. 665. In the absence of any *lacuna* in the evidence as it stands on the record, the Appellate Court will be going out of its way if it summons additional evidence in an appeal for the sole purpose of comparison of handwriting and signature in documents. A. I. R. 1935 Lah. 555=156 Ind. Cas. 253 ; A. I. R. 1935 Rang. 21 ; 39 C. W. N. 658=62 C. L. J. 251. Documents should not be admitted by the Appellate Court after argument. 37 P. L. R. 563. It is not within the power of the Appellate Court to admit evidence which might have been produced in the lower Court, merely because the Court has drawn an adverse inference from the non-production of such evidence, more especially in the absence of special circumstances explaining such non-production at the proper time. 159 Ind. Cas. 191=1935 M. W. N. 1255=42 L. W. 658=69 M. L. J. 707 ; 39 C. W. N. 322 ; 61 C. L. J. 373. The Appellate Court must give an opportunity to the other side to rebut evidence to be produced. 1935 R. D. 319. The grounds upon which an additional evidence may be admitted in appeal are confined to those laid down in rule 27. Where the lower Court has not refused to admit evidence which is tendered in appeal and when the Appellate Court is not unable to pronounce judgment in the absence of additional evidence, there is no reason which would justify the Appellate Court in admitting evidence in appeal. 70 M. L. J. 400=A. I. R. 1936 Mad. 385 ; A. I. R. 1936 Pat. 600=17 Pat. L. T. 709 ; A. I. R. 1936 Pat. 57 ; A. I. R. 1936 Lah. 933=38 P. L. R. 511 ; A. I. R. 1935 Lah. 37=38 P. L. R. 748. Fresh evidence can be admitted in appeal if it has been discovered after exercise of necessary diligence. A. I. R. 1930 Lah. 1004=12 Lah. L. J. 172. Document cannot be produced in appeal if its non-production is not accounted in lower Court. A. I. R. 1930 Mad. 824=54 M. 132. It is no sufficient cause if pleader neglects to produce important evidence in lower Court. A. I. R. 1930 Bom. 272=32 Bom. L. R. 608. Litigant unsuccessful in lower Court cannot patch up weak parts of his case and fill up omissions in Court of appeal. 35 C. W. N. 786 P. C.=33 Bom. L. R. 1015=1931 A. L. J. 513=61 M. L. J. 489=A. I. R. 1931 P. C. 143 (P. C.) ; A. I. R. 1932 Mad. 709 ; A. I. R. 1932 Mad. 148. Where Judge is satisfied that documents could not be discovered at earlier stage such documents can be admitted in appeal. A. I. R. 1933 All. 104=1932 A. L. J. 1081. Appellate Court has power to issue commission for local investigation and need not record reasons under Order 41, rule 27. A. I. R. 1932 All. 270. Court exercising power under rule 27 shall make direct reference to rule 27 giving reasons. A. I. R. 1932 Bom. 230=34 Bom. L. R. 372 ; see also A. I. R. 1933 Cal. 319=56 C. L. J. 246 ; 35 C. W. N. 925=33 Bom. L. R. 1251=1931 A. L. J. 550=A. I. R. 1931 P. C. 175 (P. C.) ; A. I. R. 1933 Lah. 823 ; A. I. R. 1933 Lah. 547=14 Lah. 153. In appeal additional evidence should be admitted very carefully and cautiously. 8 Luck. 18=A. I. R. 1932 Oudh 227 ; see also A. I. R. 1933 Lah. 1024. Additional evidence admitted by Appellate Court disregarding rules 27 and 29 should be ruled out. A. I. R. 1932 All. 264=1932 A. L. J. 117. For applying rule 26 some inherent *lacuna* or defect apparent on examination of evidence must exist. 8 O. W. N. 627=A. I. R. 1931 Oudh 298 ; see also A. I. R. 1933 Mad. 407=64 M. L. J. 449 ; A. I. R. 1934 Pat. 60. Where additional evidence is taken on apparently obscure point not affecting finding in case, reason need not be given. A. I. R. 1933 Lah. 328=34 P. L. R. 99. Where party was given opportunity to produce evidence but failed to avail himself of it, he cannot be allowed to produce it in appellate Court. 8 O. W. N. 627=A. I. R. 1931 Oudh 298 ; but see A. I. R. 1932 Lah. 202. Error of law by itself would not furnish ground for revision unless Court has not capriciously or unjustly exercised its discretion under this rule. 33 P. L. R. 330 ; see also A. I. R. 1932 Lah. 93 ; A. I. R. 1934 Cal. 269. No second appeal lies from refusal to admit fresh evidence under rule 27. A. I. R. 1931 Lah. 506. Opportunity must be given to opposite party to rebut the evidence. A. I. R. 1934 Lah. 462. Additional evidence on points not in issue in trial Court cannot be admitted in appeal and if it is allowed opposite party should be given a fair chance to rebut it. A. I. R. 1930 All. 220=127 Ind. Cas. 515. Where inherent defect becomes obvious then alone additional evidence should be allowed. A. I. R. 1930 Sind 105=24 S. L. R. 15=125 Ind. Cas. 803. Pleader's negligence to submit documents at proper time is no ground for its admissibility in appeal.

A. I. R. 1930 Sind 318=125 Ind. Cas. 33. An objection being raised in appeal for first time, to documents allowed in trial Court without proof, Court must allow documents to be formally proved. 30 P. L. R. 693=125 Ind. Cas. 62. Additional evidence which could not be produced in first Court should be allowed. 74 Ind. Cas. 1038=37 C. L. J. 491.

Additional evidence should not be admitted except for sufficient grounds and where justice demands it. A. I. R. 1930 Mad. 343=120 Ind. Cas. 746. Rule 27 states general principles of law regarding admissibility of additional evidence. Court is to decide if particular evidence must be admitted or not during the appeal. A. I. R. 1927 Cal. 140=98 Ind. Cas. 129. Rebuttal of additional evidence must be allowed. A. I. R. 1927 Cal. 140=98 Ind. Cas. 129. Phrase "any other sufficient cause" gives wider discretion to Court. 76 Ind. Cas. 474. Additional evidence should be accepted only if it can serve purpose for which it is submitted. A. I. R. 1929 All. 375=119 Ind. Cas. 561. Additional evidence taken must be duly recorded legally. 118 Ind. Cas. 315.

Documents of which secondary evidence is given can be admitted in appeal. 32 Ind. Cas. 711. Admission of a document without recording reason is illegal. 3 L. W. 163=32 Ind. Cas. 826; but see A. I. R. 1927 Cal. 126=98 Ind. Cas. 137. Additional evidence should be disallowed where appellant has been negligent to produce it in lower Court. A. I. R. 1927 Nag. 378=102 Ind. Cas. 27. Other party should be allowed to raise objections where additional evidence in appeal is received after arguments and before judgment. A. I. R. 1924 Cal. 403=73 Ind. Cas. 95. Other party must be allowed to rebut any new point raised by giving additional evidence. 2 Pat. 607. Unless inherent defect exists additional evidence cannot be allowed. A. I. R. 1923 Pat. 446=71 Ind. Cas. 881=4 P.L.T. 418. Fresh evidence which has become available after dismissal of suit can be allowed. A. I. R. 1923 Cal. 606=37 C. L. J. 491=71 Ind. Cas. 453. Section 27 controls Appellate Court's power of admitting additional evidence. A. I. R. 1923 Cal. 300=68 Ind. Cas. 293. Admission of additional evidence cannot be claimed as of right but depends upon Court's discretion. A. I. R. 1923 Cal. 285=67 Ind. Cas. 770. Record of reason is essential. 22 P. L. R. 1919=50 Ind. Cas. 805. Omission of recording reasons for admission of evidence though consented vitiates the order. 49 Ind. Cas. 510; but see 64 Ind. Cas. 238; 51 Ind. Cas. 50. Rule 27 limits power of the Court to admit further evidence. 4 Lah. L. J. 371=A. I. R. 1921 Lah. 279. Evidence cannot be taken *suo motu* and without recording reasons. 63 Ind. Cas. 423=19 A. L. J. 407=A. I. R. 1921 All. 408. Refusal of adjournment for producing evidence is ground to allow evidence in appeal. A. I. R. 1921 Bom. 267=23 Bom. L. R. 769=45 B. 184=63 Ind. Cas. 478. Evidence unsatisfactory and insufficient is not a substantial cause. 25 C. L. J. 473=38 Ind. Cas. 886. Defect in evidence is the only ground for admission of evidence. 47 Ind. Cas. 141. Rule 27 is not intended for enabling Appellate Court to re-examine witnesses already examined. 38 A. 191=14 A. L. J. 121=33 Ind. Cas. 334. In interpreting the words "for other substantial cause" in r. 27, each case must be judged on its merits. 32 Ind. Cas. 908. Defect in evidence and not discovery of fresh evidence is ground for allowing evidence in appeal. 55 Ind. Cas. 226; 43 Ind. Cas. 567. Attesting witness not called through inadvertence cannot be examined. 5 P. L. J. 263=56 Ind. Cas. 983. New and important evidence can be tendered by way of review and not under rule 27. L. R. 3A. 12 Rev. Irregularity in allowing evidence in case not under rule 27, not causing defect, can be condoned. A. I. R. 1921 Sind 155=16 S. L. R. 17=66 Ind. Cas. 833.

Admitting additional evidence on ground of its necessity to pronounce judgment is no sufficient reason. A. I. R. 1924 All. 303=71 Ind. Cas. 289. Discretion under rules 27 and 23 to allow further evidence should be scrupulously exercised. 36 C. L. J. 345=50 C. 276=70 Ind. Cas. 510. Ignorance of document is no grounds for its admissibility in appeal. Order refusing to admit document can be reviewed. A. I. R. 1923 Cal. 273=68 Ind. Cas. 334. Opportunity must be given to rebut additional evidence. 43 Ind. Cas. 320; see also 35 Ind. Cas. 955. Power under rule 27 is discretionary. 15 A. L. J. 21; see also 129 P. R. 1916=83 Paf. L. R. 1917=36 Ind. Cas. 382. Documentary evidence omitted through mistake may be admitted. 14 P. R. 1916=33 Ind. Cas. 813=195 P. W. R. 195. Rule 27 applies to second appeals. 52 Ind. Cas. 625. Public documents coming into existence after the filing of second appeals may be admitted in evidence in the High Court. 4 P. L. J. 312=50 Ind. Cas. 857. Admission of document after closing of case and without



opportunity of rebuttal and without assigning reasons is bad. 21 C. L. J. 457=35 Ind. Cas. 698; 65 Ind. Cas. 504; 6 Lah. L. J. 234=80 Ind. Cas. 530; 41 C. L. J. 194. Fresh evidence must not be admitted when opportunity to adduce evidence has not been availed of in lower Court. 5 O. L. J. 768=49 Ind. Cas. 1007. When evidence not given through *bona fide* mistake and wrong belief it will be ground for allowing evidence in appeal. 5 O. L. J. 746=48 Ind. Cas. 1007. Omission of parties to grasp the questions arising out of pleadings justified taking of evidence. 66 Ind. Cas. 833=16 S. L. R. 17=A. I. R. 1921 Sind 155.

An Appellate Court will not consider the Record of Rights published under the decree. A. I. R. 1922 Pat. 28=3 P. L. T. 107. Evidence in appeal can be taken if defect in evidence detected or fresh evidence is discovered and requested to be taken. 66 Ind. Cas. 370 (Lah). Additional evidence may be allowed if Court is unable to decide on record. A. I. R. 1923 Lah. 115=3 Lah. 382=77 Ind. Cas. 207. Case cannot be remanded for further evidence though ruling as to question of onus is pronounced after suit. A. I. R. 1926 Lah. 474=7 Lah. 297=27 P. L. R. 463=96 Ind. Cas. 630. Document in party's possession is inadmissible in second appeal. A. I. R. 1927 Lah. 574=103 Ind. Cas. 215. Additional oral evidence may be taken when justice needs any point to be cleared. 28 C. W. N. 497=41 C. L. J. 1=81 Ind. Cas. 471. Fresh evidence of determination of facts is inadmissible in second appeal. A. I. R. 1926 Cal. 941=95 Ind. Cas. 300; see also 80 Ind. Cas. 998=5 Lah. 84=A. I. R. 1924 Lah. 444. Additional evidence cannot be allowed merely because it is discovered at appellate stage whether before appeal is heard or judgment is passed. A. I. R. 1924 Bom. 227=47 B. 674=25 Bom. L. R. 310=84 Ind. Cas. 74. Additional evidence may be allowed even at party's instance with right of rebuttal to opponent. A. I. R. 1925 Mad. 181=48 M. L. J. 32=20 L. W. 810=85 Ind. Cas. 385. Discretion under this rule should be scrupulously exercised. A. I. R. 1923 Sind 42=84 Ind. Cas. 137. Additional evidence though possible not submitted in lower Appellate Court is inadmissible in second appeal. 21 A. L. J. 899=79 Ind. Cas. 367=A. I. R. 1924 All. 231. Appellate Court should admit evidence refused by trial Court on insufficient grounds. A. I. R. 1924 Oudh 252=10 O. L. J. 595=27 O. C. 114=77 Ind. Cas. 256. Procedure where trial Court is asked to take additional evidence by Appellate Court without expressly setting aside decree is materially irregular and is open to revision. 1 Rang. 656=79 Ind. Cas. 482. Finding based on evidence which has been admitted without stating reasons is not binding in second appeal. A. I. R. 1923 All. 413=79 Ind. Cas. 408. Additional evidence may be admitted on party's application. A. I. R. 1926 Lah. 801=89 Ind. Cas. 997. Admission of additional evidence depends upon Court's discretion. A. I. R. 1925 Pat. 504=85 Ind. Cas. 459. Application for admission of evidence discovered during appeal cannot lie. A. I. R. 1925 Nag. 284=86 Ind. Cas. 505. In appeal and equally in second appeal Court should be reluctant in allowing new evidence. A. I. R. 1927 Nag. 398=102 Ind. Cas. 27. Where local inquiry is necessary Appellate Court itself may do it or ask trial Court to do the same but cannot remand case for retrial even under its inherent power. A. I. R. 1926 Cal. 897=94 Ind. Cas. 393. Evidence not existing at time of suit may be admitted in appeal. A. I. R. 1925 Pat. 612=3 Pat. L. R. 174=88 Ind. Cas. 553; see also 86 Ind. Cas. 761=47 A. 412=23 A. L. J. 193=86 Ind. Cas. 761; 89 Ind. Cas. 359=A. I. R. 1926 Oudh 74; 28 C. W. N. 945=82 Ind. Cas. 104; A. I. R. 1929 Pat. 245=8 Pat. 776. Refusal to permit examination of witness by commission for non-production of medical certificate does not preclude such evidence to give under Order XI.I, rule 27. A. I. R. 1926 Cal. 318=90 Ind. Cas. 630. Besides rules 27 and 28 Appellate Court has inherent powers of admitting rejected evidence. A. I. R. 1928 Mad. 991=1928 M. W. N. 164=112 Ind. Cas. 1. Documentary evidence may be allowed in appeal if undebatable but opposite party must be allowed to rebut it. A. I. R. 1930 Pat. 105=11 P. L. T. 470=124 Ind. Cas. 87. Genuine documents should not be rejected by first Appellate Court for mere technical reasons. A. I. R. 1929 Pat. 327=10 P. L. T. 356=120 Ind. Cas. 291. Party seeking production of additional evidence must show that it could not be produced in trial Court even after due diligence. A. I. R. 1929 Pat. 98=10 P. L. T. 10=115 Ind. Cas. 674. Guardian's negligence is not sufficient cause. A. I. R. 1929 Lah. 91=110 Ind. Cas. 447. Appellate Court not satisfied with trial Court's evidence can direct taking of additional evidence; but not order retrial. A. I. R. 1928 Cal. 748=110 Ind. Cas. 448; see also A. I. R. 1928 Cal. 749=110 Ind. Cas. 427. Statements of witnesses in proceedings under the Lunacy Act, commenced after dismissal of suit between same parties may be admitted in Appellate Court. A. I. R.

1927 P. C. 123=1927 M. W. N. 456=25 L. W. 94=31 C. W. N. 1087=101 Ind. Cas. 363 (P. C.). Production of witness to rebut additional evidence and adjournment for protection must be allowed. A. I. R. 1920 Nag 486=96 Ind. Cas. 1006. Appellant is estopped from complaining admissibility of evidence if taken in his favour. A. I. R. 1929 Cal. 492=49 C. L. J. 478=120 Ind. Cas. 460. Court's inherent power shall not be invoked where additional evidence can be admitted under Order XLI, rule 27 (1) (b) A. I. R. 1930 Lah. 441=122 Ind. Cas. 485. Income-tax and Civil proceedings stand on the same footing regarding production of additional evidence in appeal. A. I. R. 1930 Rang 4=7 Rang. 635. Where the lower Appellate Court calls for its own motion, a witness not called by the parties, in order to elucidate a point involved in the appeal, and gives good reasons for the calling of the witness, there is nothing illegal in the exercise of its discretion by the lower Appellate Court and it is not open to the Court in second appeal to decide whether the discretion has not been rightly exercised. A. I. R. 1937 Lah. 115. Evidence which will introduce new and inconsistent claim cannot be admitted. A. I. R. 1937 Lah. 370. Where a party to an appeal makes an application that certain documents should be admitted as additional evidence Court should not entertain such an application. A. I. R. 1935 Cal. 641=158 Ind. Cas. 656. Additional evidence may be admitted if the Court finds it necessary to enable it to pronounce judgment. 14 Pat. 595=A. I. R. 1935 Pat. 178=16 Pat. L. T. 613; see also 10 P. 654=58 I. A. 254. Where a party had ample opportunity to produce a document it should not be taken in the appellate stage. A. I. R. 1936 Pat. 600=17 Pat. L. T. 709; 1936 O. W. N. 722.

**Appeal.**—It being discretionary with Court to admit fresh evidence, High Court should not meddle. A. I. R. 1939 Pat. 98=10 P. L. T. 10=115 Ind. Cas. 674; see also A. I. R. 1923 Oudh 109=9 O. L. J. 503=26 O. C. 65; 42 M. 737=37 M. L. J. 125=53 Ind. Cas. 274; 16 P. L. T. 702. Second Appellate Court cannot question lower Appellate Court's refusal to admit additional evidence. A. I. R. 1927 Mad. 1099=99 Ind. Cas. 669; 70 Ind. Cas. 830. Procedure of recording additional evidence without reasons and without requiring party to its necessity is improper and order in such procedure is subject to second appeal. 81 Ind. Cas. 999=39 C. L. J. 261=A. I. R. 1925 Cal. 98; see also 77 Ind. Cas. 556=A. I. R. 1922 Cal. 148. An Order by an Appellate Court refusing to admit fresh evidence under this rule is not appealable. 16 L. R. 135 (Rev).

28. [S. 569.] Wherever additional evidence is allowed to be produced, the Appellate Court may either take Mode of taking additional evidence. such evidence, or direct the Court from whose evidence. decree the appeal is preferred, or on any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court.

**Scope.**—On remand the second appeal under rule 28, Commissioner for examination of witness can be appointed. 81 Ind. Cas. 589=5 Lah. 252. Appellate Court has discretion to decide case with or without taking evidence. A. I. R. 1933 Lah. 1014.

29. [S. 570.] Where additional evidence is directed or allowed to be taken, the Appellate Court shall specify the Points to be defined and recorded. the points to which the evidence is to be confined, and record on its proceedings the points so specified.

### *Judgment in Appeal.*

30. [S. 571.] The Appellate Court, after hearing the parties or their pleaders, and referring to any part of the Judgment when and where pronounced. proceedings, whether on appeal or in the Court from whose decree the appeal is preferred, to which reference may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day of which notice shall be given to the parties or their pleaders.

**Notes.**—Judgment without notice to parties and not in open Court will be ground for excusing delay in filing appeal. 51 Ind. Cas. 239. Silence in judgment

as to some grounds of appeal will mean that they were abandoned unless the presumption is rebutted. A. I. R. 1927 Lah. 768=9 Lah. L. J. 309=28 P. L. R. 330. Court is not entitled to dismiss an appeal for want of prosecution only because the appellant if he appears personally or his pleader who represents him, is for any reason unable to argue the appeal. Court should proceed in the manner laid down by Order 41, rules 30 and 31, and is bound to pronounce the proper judgment. A. I. R. 1937 All. 284.

Contents, date and signature of judgment. **31. [S. 574.]** The judgment of the Appellate Court shall be in writing and shall state—

- (a) the points for determination ;
- (b) the decision thereon ;
- (c) the reasons for the decision ; and,

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled ;  
and shall at the time that it is pronounced be signed and dated by the Judge or by the Judge's concurring therein.

*N. B.*—For local amendment in Madras.—*Vide infra.*

**Scope.**—Rule 31 does not apply to the Chartered High Courts. A. I. R. 1929 All. 403=(1929) A. L. J. 713. Reversing judgment should discuss matters fully. A. I. R. 1934 Mad. 169. Lower Courts should pronounce opinion on all important points. A. I. R. 1933 P. C. 33=37 C. W. N. 221=57 C. L. J. 51=60 I. A. 49=64 M. L. J. 142. Judgment is no judgment where there is non-compliance with provision of Order 41, rule 31. 34 P. L. R. 199=A. I. R. 1933 Lah. 333. Judgment of dismissal under rule 11 must conform to rule 31. 65 Ind. Cas. 479. Affirming judgment need not be at length if all facts are considered. 68 Ind. Cas. 467. All objections to decree should be considered as in trial Court. A. I. R. 1929 Cal. 110=55 C. 1216=49 C. L. J. 70. Approval after consideration of the reasons of the decision by trial Court is sufficient compliance of rule 31. A. I. R. 1928 Oudh 489. Decision should preferably be on all points and not on preliminary point. A. I. R. 1931 Cal. 353=34 C. W. N. 839 ; see also A. I. R. 1928 Oudh 374. Summarily to dispose of the appeal by saying the trial Court has discussed the matter fully is not a proper method. 112 Ind. Cas. 698. Court must give its reason and not merely approve of lower Court's reasons. A. I. R. 1928 Lah. 655=10 Lah. L. J. 257. Confirming judgment may not be in detail such as in reversal. A. I. R. 1926 Cal. 515=91 Ind. Cas. 478. Adoption of reason after considering all facts is not bad. A. I. R. 1927 Cal. 323=97 Ind. Cas. 760. Rule 31 must be strictly followed. A. I. R. 1927 Oudh 95=13 O. L. J. 586=27 O. C. 330=95 Ind. Cas. 925. Reason for reversal must be given. 55 Ind. Cas. 816. A judgment based on an indefinite conclusion is not in accordance with law. 1 P. L. T. 27. Appellate Court is bound to discuss all issues in its judgment. 42 Ind. Cas. 838. A re-arrangement of a section in a new Code does not necessarily imply a change in the law. The arrangement of the rules in Order XLI does not lead to the conclusion that rule 31 does not apply to judgment pronounced under rule 11. A. I. R. 1926 Rang. 129=5 Bur. L. J. 60=95 Ind. Cas. 881. Judgment must be written in case of dismissal under rule 11 of Order XLI also. A. I. R. 1926 Cal. 992=43 C. L. J. 499=96 Ind. Cas. 136. Judgment should be complete and self-contained. A. I. R. 1926 Oudh 458=29 O. C. 271=13 O. L. J. 265=3 O. W. N. 392=94 Ind. Cas. 349. Judgment must deal with whole and not part of subject-matter. A. I. R. 1926 Lah. 351=93 Ind. Cas. 829. In a reversing judgment the Appellate Court has to meet the reasoning employed by the trial Judge therein to upset the latter's conclusions. A. I. R. 1926 Nag. 435=95 Ind. Cas. 614. Concerning decision of basis of issues discussed in trial Court is not bad. L. R. 3 A. 454. Judgments must comply with requirements of law and set forth the matters in dispute between parties with findings thereon. 35 Ind. Cas. 942 ; see also 37 Ind. Cas. 435=3 O. L. J. 620 ; 2 A. L. J. 8=38 Ind. Cas. 509 ; 51 Ind. Cas. 751 ; 51 Ind. Cas. 46 ; 51 Ind. Cas. 11 ; 46 Ind. Cas. 328. Judgment must show that Appellate Court has arrived at its independent conclusions by giving reasons of its own. 20 Bom. L. R. 461=46 Ind. Cas. 161. Judgment must show that evidence is considered and conclusions drawn independently. 49 Ind. Cas. 733. Omission to consider important piece of evidence vitiates the whole trial. 49 Ind. Cas. 832. Refusal to administer justice according to the law of the land is not justified.

83 P. W. R. 1917=87 P. L. R. 1917=42 Ind. Cas. 244. In appealable cases, to obviate any cause for remand, Courts should give their finding on all important points. A. I. R. 1925 Cal. 316=82 Ind. Cas. 318.

Judgment must decide point of fact and not merely confirm the lower Court's judgment. A. I. R. 1928 Cal. 408=101 Ind. Cas. 245. Courts must examine grounds on which lower Courts' judgment is based and point out why they do not support it. A. I. R. 1926 Nag. 55=89 Ind. Cas. 763. A general and wholesale adoption of the judgment of the Court of first instance cannot be considered as a sufficient compliance with the law. A. I. R. 1923 Lah. 658=75 Ind. Cas. 1013. Failure to consider new grounds set up in appeal is not fatal. A. I. R. 1923 Lah. 259=5 Lah. L. J. 97=73 Ind. Cas. 817. Disposal of a finding remarking that burden of proof not discharged without discussion is bad. A. I. R. 1923 All. 412=79 Ind. Cas. 408. Where question of fact is not urged but question of law only is argued question of fact may be disregarded. A. I. R. 1925 All. 585=47 A. 929=23 A. L. J. 653=89 Ind. Cas. 374. Appellate Courts' judgment based on lower Courts' judgment, which was *obiter* as case decided on preliminary point is bad. A. I. R. 1927 Lah. 418=9 Lah. L. J. 174=28 P. L. R. 330=102 Ind. Cas. 280. Affirming judgment merely stating that there is no reason to interfere is unsatisfactory. 21 O. C. 309=49 Ind. Cas. 56. Law imposes upon the Appellate Court the imperative duty and obligation of giving an adequate and satisfactory judgment. 43 Ind. Cas. 973. The judgment of the Appellate Court must state questions for determination and the nature of the evidence and must show that the evidence has been considered. 38 Ind. Cas. 814; see also 108 P. L. R. 1916=132 P. W. R. 1916=37 Ind. Cas. 6; 34 Ind. Cas. 942; 34 Ind. Cas. 185. Appellate judgment must conform strictly to the provisions of rule 31 and contain the points raised for determination and the reasons for its decision thereon. 9 Bur. L. T. 59=31 Ind. Cas. 896. A reversing judgment of the Appellate Court should discuss the matters fully; but where it fails to do so but has taken into account all evidence in arriving at the conclusion the second Appellate Court will not interfere. 150 Ind. Cas. 1137=39 L. W. 701=A. I. R. 1934 Mad. 169=66 M. L. J. 342; see also 36 P. L. R. 253=A. I. R. 1934 Lah. 1039. There is no authority which lays down that the Appellate Court before recording a finding of fact should refer to each and every document or piece of evidence on the record while recording its finding. It should be assumed that all the relevant evidence was brought to the notice of the Judge and he had it in his mind when he delivered his judgment. 164 Ind. Cas. 252=A. I. R. 1936 Lah. 543. Where a Judge disposes of in a single judgment four appeals, each of which raises a question quite distinct from that raised in the other three and the parties are also not the same, and the Judge has not given proper consideration to the points for decision in the appeals, in one of the four appeals can the so-called judgment be regarded as a judgment within the meaning of Order 41, rule 31. A. I. R. 1936 Rang. 262.

32. [S. 577.] The judgment may be for confirming, varying or reversing the decree from which the appeal is preferred, What judgment may direct. or, if the parties to the appeal agree as to the form which the decree in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly.

Notes.—A. I. R. 1928 Oudh 22=2 Luck. 425; 6 Lah. L. J. 506=84 Ind. Cas. 946.

33. [New.] The Appellate Court shall have power to pass any decree and make any order which ought to have been Power of Court of Appeal. passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection:

\*[Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order].

\* This proviso was added by s. 4 of Act 9 of 1922.

*Illustration.*

A claims a sum of money as due to him from X or Y, and in a suit against both obtains a decree against X. X appeals and A and Y are respondents. The Appellate Court decides in favour of X. It has power to pass a decree against Y.

**Scope.**—The “parties” in rule 33, includes persons other than those who have been arrayed as appellants or respondents in the appeal. A. I. R. 1929 All. 243=51 A. 575. Appellate Court must take notice of events happened since the institution of the suit or appeal and mould its decree according to the circumstances at the time of the final decree. A. I. R. 1930 Bom. 254=54 B. 125=32 Bom. L. R. 135. Rule 33 must be applied with caution. A. I. R. 1934 Pat. 134. Appellate Court can pass decree which it thinks fit and proper. A. I. R. 1932 Rang. 123 (F. B.) =10 Rang. 412. Those Rules should be applied only in cases where but for re-course to it ends of justice would be defeated. A. I. R. 1933 Cal. 165=56 C. L. J. 285. Appellate Court would not interfere except for very cogent reason. 34 P. L. R. 844=A. I. R. 1933 Lah. 682. Appellate Court can under Order 41, rule 33, alter decree of trial Court when appellant is entitled equitably to such relief. A. I. R. 1931 Lah. 370. Power under rule 33 can be exercised in favour of party not on record in appeal. A. I. R. 1933 Mad. 806. Rule 33 gives discretion in order to further ends of justice and not to favour one party as against another. A. I. R. 1933 Pat. 224. Discretion should not be exercised unless success of appeal would render granting of relief just against non-appealing party. A. I. R. 1933 Nag. 186. Ordinarily the exercise of the power conferred under rule 33 should be limited to cases where, as the result of the Appellate Court's interference in favour of the appellants a further interference is required to adjust the rights of the parties in accordance with justice, equity and good conscience. A. I. R. 1928 Cal. 448=113 Ind. Cas. 32. The illustration to the rule is only a type of class of cases does not by any means exhaust the class of cases in which the powers of the Appellate Court under this rule may be invoked. 53 M. 881=A. I. R. 1930 Mad. 801=32 L. W. 395. Appellate Court has power to pass a decree in favour of persons who have not appealed or preferred objection. A. I. R. 1929 Cal. 123=32 C. W. N. 1228=56 C. 589=48 C. L. J. 281. Power of the Appellate Court in appeal from *ex parte* decree is not confined only to the investigation of the cause of non-appearance. A. I. R. 1929 Cal. 322=56 C. 21=121 Ind. Cas. 675. Appellate Court becomes seized of the entire proceedings and becomes vested with the jurisdiction of confirming, varying and reversing the decree from which the appeal is preferred. A. I. R. 1930 Oudh 13=6 O. W. N. 644=119 Ind. Cas. 462. The Appellate Court can grant relief to a defendant who had a right to appeal but has not appealed. A. I. R. 1929 All. 334=117 Ind. Cas. 111; but see 1930 A. L. J. 1298. Where appeal against the whole decree has been preferred by one defendant, on a ground common to all, it can be set aside as against all. A. I. R. 1929 Mad. 230=29 L. W. 220=55 M. L. J. 255=116 Ind. Cas. 844. Any Appellate Court can exercise its discretionary powers under this rule in favour of a respondent though cross-appeal not preferred or memorandum of cross-objections challenging the decree passed by the first Court not filed. A. I. R. 1930 Mad. 801=127 Ind. Cas. 624=53 M. 881 (F. B.); see also A. I. R. 1930 Mad. 801=1930 M. W. N. 798=59 M. L. J. 634=53 M. 881=127 Ind. Cas. 626; A. I. R. 1930 Rang. 190=127 Ind. Cas. 597; 42 Ind. Cas. 443; 42 Ind. Cas. 414; 42 Ind. Cas. 411. Appellate Court can declare not only that the appeal has abated but also that the suit has abated. A. I. R. 1929 Lah. 256=118 Ind. Cas. 437.

A mere danger of multiplicity of suits is not sufficient for the dismissal of the whole appeal when a decree in favour of the plaintiffs against one set of defendants is possible. A. I. R. 1928 All. 172=50 A. 559=26 A. L. J. 217=114 Ind. Cas. 117. Appellate Court has no power under this rule to reverse the mortgage decree of the lower Court and pass money decree instead, inspite of the fact that the mortgagors have not appealed nor filed a cross-objection. A. I. R. 1928 Nag. 322=112 Ind. Cas. 893. In a suit by some co-sharers making others co-defendants, the Appellate Court is competent to make all co-defendants as plaintiffs and pass decree in their favour. 43 C. 660=20 C. W. N. 522=30 M. L. J. 529=18 Bom. L. R. 418=24 C. L. J. 1=33 Ind. Cas. 452. In case of erroneous decree of trial Judge, High Court can modify it when appellant brings whole decree on appeal. 44 C. 759=44 I. A. 65=15 A. L. J. 217=25 C. L. J. 279=21 C. W. N. 577=19 Bom. L. R. 450 (P. C.)=39 Ind. Cas. 156. This rule must be applied very carefully. This rule should never be applied to enable litigant to evade provisions of other statutes. 48 Ind. Cas. 78=28 C. L. J. 123; see also 38 Ind. Cas. 361; 20 C. W. N. 544=32 Ind. Cas. 499=22 C. L. J. 397;

22 C. L. J. 394=20 C. W. N. 542=32 Ind. Cas. 494. Where there is no cross-objection by any other party the Court has no power to set aside so much of a decree as has been in favour of appellant. 11 Bur. L. T. 19=39 Ind. Cas. 380. Appellate Court is empowered to grant relief against defendant who is not a party. 64 Ind. Cas. 178 ; see also 1 P. L. T. 434=56 Ind. Cas. 262=5 P. L. J. 328 ; 3 Lah. L. J. 231=60 Ind. Cas. 705 ; 44 Ind. Cas. 51 ; but see 63 Ind. Cas. 973=13 Bur. L. T. 163. The rule is not controlled by Order XXII. 62 Ind. Cas. 623. Appellate Court is competent to modify decree in favour of defendant not impleaded generally. Court should implead absent party when necessary. 53 Ind. Cas. 201=10 L. W. 357=(1919) M. W. N. 807 ; see also 34 M. L. J. 177=45 Ind. Cas. 949=24 M. L. T. 280. 31 Ind. Cas. 978. Appellate Court is empowered to pass decree against any or all co-defendants. 37 Ind. Cas. 842 ; see also 38 Ind. Cas. 140 ; 39 Ind. Cas. 149. Appellate Court should not pass decree for relief not claimed in plaint. 2 Pat. L. J. 698=43 Ind. Cas. 463. Power of Appellate Court to remand is not limited to one under Order XLI, r. 23 it has power to remand a case for retrial. 23 Bom. L. R. 769=46 B. 184.

Rule 33 is discretionary and no Court would pass decree in favour of non-appelling party or in favour of person not made party in appeal. 1 Lah. 396=54 Ind. Cas. 971 ; see also 49 Ind. Cas. 834=23 C. W. N. 223 ; 47 Ind. Cas. 917. Appellate Court is empowered to pass decree in favour of any party or to vary or reverse it. 51 Ind. Cas. 981 ; see also 51 Ind. Cas. 819=59 P. W. R. 1919 ; 36 Ind. Cas. 499=43 C. 417 ; 5 Pat. L. W. 213=36 Ind. Cas. 537=(1918) Pat. 26. Appellate Court can correct accidental slips in judgment or decree of lower Court on its own motion. 48 Ind. Cas. 193. Appellate Court should take note of events during suit. 4 Pat. L. J. 312=50 Ind. Cas. 857. Appellate Court is competent to remand the whole case on merits where suit had been partly decreed in appeal and no second appeal is preferred against portion allowed. 46 C. 738=52 Ind. Cas. 801. Rule 33 gives Court wide discretion when justice requires it. 5 P. L. J. 328=1 P. L. T. 434=56 Ind. Cas. 262 ; see also A. I. R. 1922 Cal. 398=49 C. 379=69 Ind. Cas. 981. Appellate Court has powers under rule 33 to interfere with a portion of the decree of the trial Court which has not been appealed against in a case where the Appellate Court adopts the ground of decision of the trial Court and tries to give complete effect to it. A. I. R. 1924 Pat. 322=72 Ind. Cas. 96. The Appellate Court has no power to order by its judgment that a respondent who had not been formally transposed as appellant, should be shown as appellant. A. I. R. 1923 All. 119=20 A. L. J. 980=71 Ind. Cas. 424. Where the plaint was rejected in the trial Court on the ground of insufficiency of Court-fee, Appellate Court can reverse the decision and has power to reject the plaint on any other ground *i.e.*, limitation. A. I. R. 1923 Nag. 30=69 Ind. Cas. 521. Appellate Court can make such orders as are necessary to terminate the controversies and to do justice between the parties by making the necessary alterations in the decree of the lower Court. 68 Ind. Cas. 307=4 U. P. L. R. 25. Apart from scope under Order 41, rules 20 and 33 Court possesses inherent power to add parties. A. I. R. 1921 Cal. 722=24 C. L. J. 405=67 Ind. Cas. 10. Power of Appellate Court under rule 33 can be exercised in revision to make the decree consistent. A. I. R. 1923 Mad. 392=17 L. W. 254=74 Ind. Cas. 416. Reversal in favour of non-appelling defendant can be effected under rule 33. A. I. R. 1924 Pat. 336=75 Ind. Cas. 946.

High Court should under rule 33, exercise powers with care and discretion and only when the party appealing to it can fairly be said to be entitled to the relief equitably. A. I. R. 1928 Lah. 599=9 Lah. R. 291=29 P. L. R. 477=112 Ind. Cas. 425 ; see also A. I. R. 1928 All. 746=51 A. 63=26 A. L. J. 1139=111 Ind. Cas. 751. But there is nothing in this rule to indicate that relief would be granted to a person who is not before the Court and whose rights are not the subject-matter of enquiry in the appeal and whose presence is not necessary for the final settlement of any dispute between the parties who are actually before the Court, and whose legal rights would not be in any way affected by any decision at which the Court might arrive after the hearing of the case. A. I. R. 1928 All. 746=51 A. 63=26 A. L. J. 1139=111 Ind. Cas. 751. The word "parties" under rule 33, does not include persons other than those who are arrayed as appellants or respondents in the appeal. *Ibid.* Appellate Court has power to vary decree in favour of respondent even in his absence. A. I. R. 1927 Nag. 196=101 Ind. Cas. 255. Rule 33 empowers the Court to vary the decree in such a way or pass such an order as to make the party in whose favour the order of the lower Court

was passed liable under the order passed by the Appellate Court. A. I. R. 1926 Cal. 335=30 C. W. N. 45=90 Ind. Cas. 986. Under this rule it is competent to the Appellate Court to vary the decree. A. I. R. 1937 Cal. 10. A technical mistake can be rectified under this rule. A. I. R. 1937 All. 401.

While Order 41, rule 33, C. P. Code, authorises the Appellate Court to pass a decree in favour of a party who has not been heard, it does not authorise the Court to pass a decree against a person who is not a party to the appeal. The powers under the rule cannot be exercised to the detriment or prejudice of a person who is not given a hearing. 61 C. 919. Under this rule, the Appellate Court has power to deal with a case in such a manner as to adjust the rights of all the parties concerned. 59 C. L. J. 318. This rule ought not to be applied to cases where there has been distinct and separate decree against the defendants who have not chosen to appeal. A. I. R. 1934 Pat. 524=150 Ind. Cas. 784. The Appellate Court under rule 33 records the compromise and gives a decree in terms of it. 15 L. R. 14 (Rev.). Order 41, rule 22, does not enable a respondent as a matter of right to urge cross-objections against another respondent, though the very wide discretion given by rule 33 will entitle the Court, in exceptional case where justice requires it, to entertain objections by one respondent against another. A. I. R. 1934 Pat. 134=13 Pat. 200=15 Pat. L. T. 42. It is open to an Appellate Court to grant relief to a party by way of a perpetual injunction, which has been refused by the trial Court although there is no appeal or cross-objection by that party on the point. 63 C. 1008=40 C. W. N. 916=63 C. L. J. 210. Where an appeal is filed by the defendant, the Court in a proper case can grant a relief to the plaintiff respondent, which was refused by the lower Court even when against that finding there is neither appeal nor cross-appeal by the respondent. 40 C. W. N. 1397; but see 39 C. W. N. 420=A. I. R. 1935 Cal. 458. Addition of party after expiry of limitation by lower Appellate Court is not proper. A. I. R. 1935 Rang. 364=159 Ind. Cas. 186. Very wide powers are given to the Appellate Court by this rule. A. I. R. 1935 Lah. 378=158 Ind. Cas. 71. Where one of the two appeals from a decree is found to be time-barred, and the appellants in that appeal, who happen to be respondents in the other appeal, seek under this rule whatever relief is given to the appellants in the second appeal, but the interest of each of the appellants is distinct and independent, such relief cannot be granted. A. I. R. 1935 Lah. 889.

Rule 33 does not authorise modification of decree in favour of a person not a party to appeal. A. I. R. 1926 Nag. 135=89 Ind. Cas. 803. Where suit is decreed as against the first two defendants but dismissed as against the third defendant and the first two defendants appealing but the plaintiff did not, the Appellate Court can pass a decree against the 3rd. defendant alone exonerating the first two defendants. A. I. R. 1925 All. 555=47 All. 597=23 A. L. J. 501=88 Ind. Cas. 438.

Court will not apply rule 33 in favour of party who has appealed or filed cross-objections and failed without strong reasons. A. I. R. 1925 Lah. 2=17 P. W. R. 1923=79 Ind. Cas. 670. Where only one of the defendants appeals from a decree, Appellate Court is quite competent to set aside the whole decree although the other defendant had not appealed. 75 Ind. Cas. 946=A. I. R. 1924 Pat. 336=(1923) Pat. 332; see also 32 Ind. Cas. 491=22 C. L. J. 391. Appellate Court is enabled to deal with the entire decree although the appeal may be as to a part of the decree, and also to give directions in favour of parties who have actually not filed any appeal or objection. 79 Ind. Cas. 794=3 Pat. 327=5 P. L. T. 21. Save when it is necessary in the interest of justice to give effect to the Appellate Court's decision by interfering in some way or other with the rights of those parties which are not the subject of appeal before the Appellate Court there is no right whatever in the Appellate Court to interfere. 82 Ind. Cas. 984=A. I. R. 1925 Pat. 285=4 Pat. 37. Court cannot exercise its discretionary power under rule 20 or under rule 33 to add new respondents to an appeal after the period of limitation for filing an appeal has elapsed and the lower Court's decree has become *res judicata*. A. I. R. 1925 Rang. 108=2 Rang. 541=3 Bur. L. J. 259=84 Ind. Cas. 522; 32 C. W. N. 281=A. I. R. 1927 P. C. 252. Rule 33 enables the Court to do complete justice between the parties to the appeal. Court may grant relief to the respondent although he has not filed an appeal or preferred an objection. A. I. R. 1928 All. 77=50 All. 218=25 A. L. J. 1017=108 Ind. Cas. 728.

Rule 33 should not be construed too widely, lest it lead to an abrogation of the rule of C. P. Code, the Court Fees Act and the Limitation Act. It should be

limited to cases where in interfering on behalf of the appellant it becomes necessary to alter the decree in favour of the respondent or respondents against other respondents lest injustice result. This rule does not give a right to a respondent to urge something in his favour against another respondent who has nothing to do with the result of the appeal, without his filing an appeal or memorandum of objections himself. A. I. R. 1927 Mad. 620=50 M. L. J. 612=25 L. W. 699=103 Ind. Cas. 394 ; see also A. I. R. 1929 All. 195=107 Ind. Cas. 569.

Where one of the alternative reliefs has been refused by the lower Court, the Appellate Court for the ends of justice can refuse that relief and can grant the relief which has been refused by the lower Court. A. I. R. 1927 Cal. 831=46 C. L. J. 247=105 Ind. Cas. 600. Ordinarily the powers contained in rule 33 are limited to those cases where as a result of the Appellate Court's interference with a decree in favour of the appellant, a further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience. A. I. R. 1926 Cal. 57=89 Ind. Cas. 24. Court has power to consider the circumstances subsequent to the decree appealed from. A. I. R. 1925 Nag. 251=8 N. L. J. 14=95 Ind. Cas. 371. Where only one plaintiff appeals against the dismissal of a suit Court has power to set aside the entire decree and grant relief to all the plaintiffs. A. I. R. 1926 All. 425=94 Ind. Cas. 315. Appellate Court has power to vary the decree appealed against where there is a common defence even in favour of persons who have not appealed but who were parties to the suit. 94 Ind. Cas. 347=1927 All. 37=24 A. L. J. 586. The omission on the part of the party to file a memorandum of objections praying for the amendment of the decree when Appellate Court has cognizance of the case, does not affect the party's inherent right to have a decree in accordance with the judgment passed in his favour. A. I. R. 1925 Mad. 735=49 M. L. J. 385=88 Ind. Cas. 828. Appellate Court can give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require under rule 33 although the appeal may be from a part of the judgment only, and although the respondent may not complain of the decision. A. I. R. 1926 Oudh 304=13 O. L. J. 648=3 O. W. N. 299=95 Ind. Cas. 957 ; see also 45 C. L. J. 119=30 C. W. N. 885=A. I. R. 1926 Cal. 1042=96 Ind. Cas. 474. In a mortgage suit, Appellate Court is at liberty under this rule to make a decree for sale of the mortgaged property, including the part of it in which some of the other defendants are interested against all the defendants if they are all parties before it. A. I. R. 1927 Mad. 349=52 M. L. J. 135. Rule 33 is not applicable where a person is a party to a suit but not made party to the decree. A. I. R. 1926 Lah. 497=8 Lah. L. J. 333=27 P. L. R. 576=97 Ind. Cas. 338. Where no appeal is filed by party against whom a decree has been passed nor cross-objections when the opponent files an appeal, he cannot be allowed to dispute the decision of the Court below against him. A. I. R. 1927 Bom. 128=28 Bom. L. R. 627=93 Ind. Cas. 383.

**34. [S 576.]** Where the appeal is heard by more Judges than one, any

Dissent to be recorded.

Judge dissenting from the judgment of the Court shall state in writing the decision or order which he thinks should be passed on the appeal, and he may state his reasons for the same.

### *Decree in Appeal.*

Date and contents of decree.

**35. [S. 579.]** (1) The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the relief granted or other adjudication made.

(3) The decree shall also state the amount of costs incurred, in the appeal, and by whom, or out of what property, and in what proportions such costs and the costs in the suit are to be paid.

(4) The decree shall be signed and dated by the Judge or Judges who passed it :



Provided that where there are more Judges than one and there is a difference of opinion among them, it shall not be necessary for any Judge dissenting from the judgment of the Court to sign the decree.

*N. B.*—For local amendments in Lahore and Madras.—*Vide infra*.

*Notes.*—31 Ind. Cas. 986 ; 22 C. L. J. 391.

**36 [S. 580.]** Certified copies of the judgment and decree in appeal shall be furnished to the parties on application to the Appellate Court and at their expense.

Copies of judgment and decree to be furnished to parties.

**37. [S. 581]** A copy of the judgment and of the decree, certified by the Appellate Court or such officer as it appoints in this behalf, shall be sent to the Court which passed the decree appealed from and shall be filed with the original proceedings in the suit, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

*N. B.*—For additional rules in Allahabad, Bombay, Lahore, Madras, Oudh, Patna, Sind and Peshwar.—*Vide infra*.

## ORDER XLII.

### *Appeals from Appellate Decrees.*

**1. [S. 587.]** The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees.

*N. B.*—For local amendments in Allahabad, Lahore, Madras and Sind.—*Vide infra*.

**Scope**—Memo must be accompanied by copy of judgment of first Court. Failure within time entails rejection of appeal. 73. Ind. Cas. 910 ; see 63 Ind. Cas. 338=43 A. 660 ; A. I. R. 1927 All. 747 ; 67 Ind. Cas. 670=3 Lah. 255.

## ORDER XLIII.

### *Appeals from Orders.*

**1. [S. 588].** An appeal shall lie from the following orders under the provisions of section 104, namely :—

- (a) an order under rule 10 of Order VII returning a plaint to be presented to the proper Court ;
- (b) an order under rule 10 of Order VIII pronouncing judgment against a party ;
- (c) an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;
- (d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte* ;
- (e) an order under rule 4 of Order X pronouncing judgment against a party ;
- (f) an order under rule 21 of Order XI ;
- (g) an order under rule 10 of Order XVI for the attachment of property ;
- (h) an order under rule 20 of Order XVI pronouncing judgment against a party ;
- (i) an order under rule 34 of Order XXI on an objection to the draft of a document or of an endorsement ;

- (j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale ;
- (k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit ;
- (l) an order under rule 10 of Order XXII giving or refusing to give leave ;
- (m) an order under rule 3 of Order XXIII recording or refusing to record an agreement, compromise or satisfaction ;
- (n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit ;
- (o) an order under r. 2, r. 4 or r. 7 of Order XXXIV refusing to extend the time for the payment of mortgage-money ;
- (p) orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV ;
- (q) an order under rule 2, rule 3 or rule 6 of Order XXXVIII ;
- (r) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX ;
- (s) an order under rule 1 or rule 4 of Order XL ;
- (t) an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re hear an appeal ;
- (u) an order under rule 23 of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court .
- (v) an order made by any Court other than a High Court refusing the grant of a certificate under rule 6 of Order XLV ;
- (w) an order under rule 4 of Order XLVII granting an application for review.

*N. B.*—For local amendments in Allahabad, Bombay, Calcutta, Madras, Oudh and Rangoon.—*Vide infra*.

**Scope of the rule.**—"We suggest that there should be appeals from orders pronouncing judgment against a party under Order VIII, r. 10 ; Order X, r. 4 and Or. XVI, r. 20. These orders are under the present law appealable as decrees, but having regard to the definition of a decree under the Code they would no longer be appealable in the way, and we think it is necessary to make them appealable as orders. We have also given an appeal against an order made under rule 21 of Order XI."—*Report of the Select Committee*. There can be no doubt that the right of appeal is a creature of statute, and when such right is expressly conferred by the statute, there is no right of appeal. A. I. R. 1936 Cal. 485=63 C. L. J. 277=40 C. W. N. 992. Section 104 of the C. P. Code conferred a right of appeal only in respect of orders specified in that section or in Order 43, rule 1. 58 M. 814=157 Ind. Cas. 1012=1935 M. W. N. 582=41 L. W. 811=A. I. R. 1935 Mad. 609=69 M. L. J. 99. Appeal can lie on a portion of the order if the order itself is appealable. A. I. R. 1922 All. 92=20 A. L. J. 11=44 A. 209=64 Ind. Cas. 932.

**Clause (a).**—An order under rule 10 of Order VII by a Court of first instance returning a plaint to be presented to the proper Court is appealable under this order. 2 A. 357 ; 4 A. 478 ; 53 Ind. Cas. 1001=23 C. W. N. 942 ; 47 Ind. Cas. 7. Similarly an appeal is competent where such order is passed by a Court of first appeal. 25 A. 174 (F. B.) ; see also 26 C. 275=3 C. W. N. 243 ; 19 A. L. J. 305=62 Ind. Cas. 399 ; 79 Ind. Cas. 1024 ; 52 Ind. Cas. 801=46 C. 738 ; 97 Ind. Cas. 790=51 M. L. J. 119=A. I. R. 1926 Mad. 900 ; 22 Ind. Cas. 614=36 A. 58 ; 1 L. B. R. 32 ; but see A. I. R. 1930 Lah. 839=128 Ind. Cas. 491. An order returning a memorandum of appeal for presentation to the proper Court does not come within this rule and therefore is not appealable. 31 C. 344 ; 13 A. 320=11 A. W. N. 96 ; 63 Ind. Cas. 951=A. I. R. 1921 All. 177=19 A. L. J. 868=63 Ind. Cas. 951 ; 56 Ind. Cas. 865=2 Lah. L. J. 366 ; A. I. R. 1930 Lah. 832=31 P. L. R. 536=128 Ind. Cas. 491 ; 47 Ind. Cas. 16=16 A. L. J. 630=42 A. 659. No appeal lies from an order rejecting a plaint under Order VII, rule 11, when based on a question of valuation. 4 Pat. L. J. 57=49 Ind. Cas. 412. An order rejecting or returning an application for leave to sue in *forma pauperis* on the ground that the Court has no jurisdiction does not fall under this sub-clause and as such is not appealable. 158 Ind. Cas. 1012=1935 M. W. N. 1135=42 L. W. 647=A. I. R. 1935 Mad. 1043. Plaintiff does not

lose his right of appeal against an order returning a plaint by filing it in the Court to which he is directed. 34 M. L. J. 397=41 M. 721=45 Ind. Cas. 89. An order returning the plaint under rule 10 of Order VII, is appealable under Order XLIII, rule 1 clause (a) and as the order passed by the Appellate Court becomes final under s. 104, clause (2), section 105, does not preclude the aggrieved party from disputing the correctness of the remand order in second appeal if he is otherwise entitled to do so. A. I. R. 1926 Mad. 900=51 M. L. J. 119=97 Ind. Cas. 790. An application for a decree under Order 34, rule 6, cannot be considered to come under "plaint" and consequently an appeal does not lie under Order 43, rule 1 (a) from order returning such application to be presented to the proper Court. 1931 A. L. J. 893=A. I. R. 1931 All. 192.

**Clause (b).**—An order pronouncing a judgment is appealable. A. I. R. 1931 Lah. 77=31 P. L. R. 946=131 Ind. Cas. 129. Under this sub-rule, no appeal lies on an order refusing to pronounce judgment. *Ibid.*

**Clause (c).**—Where on dismissal of a suit for default of appearance, the plaintiff applied for restoration of the suit, and his application for restoration was dismissed for non-prosecution, the order of dismissal of the application is one under Order 9, rule 9 and an appeal therefore lies against that order to the District Judge under this sub-rule. 1936 A. L. J. 305=A. I. R. 1936 All. 737. This sub rule applies only in cases when a suit has been dismissed. While the order dismissing the petitioner's first application remains in force, no fresh application can be made to set aside the dismissal of the suit. The order dismissing the second application is not an order refusing to set aside the dismissal of a suit within the meaning of clause (c) of rule 1 of Order 43. 36 C. L. J. 184=69 Ind. Cas. 1003=A. I. R. 1922 Cal. 572. An application to set aside an *ex parte* decree was dismissed for default. An application was then made to have that dismissal set aside and for restoration of the original application, but that was dismissed on the merits. An appeal having been preferred against the latter order of dismissal: *Held* that no appeal lay under Order 43, rule 1(c). 58 Ind. Cas. 814=157 Ind. Cas. 1012=1935 M. W. N. 582=41 L. W. 811=A. I. R. 1935 Mad. 609=69 M. L. J. 99. Although an order rejecting an application under Order 9, rule 9, is open to appeal under this sub-rule, an order allowing such an application is not open to appeal. A. I. R. 1934 Oudh 491=11 O. W. N. 1373=152 Ind. Cas. 110. Where the plaintiff's application under Order IX, rule 9, is rejected on the ground of previous dismissal under Order XVII, rule 3 and not under Order XVII, rule 2, the plaintiff can appeal against it under Order XLIII, rule 1. A. I. R. 1923 Pat. 223=4 Pat. L. T. 46=73 Ind. Cas. 373. A dismissal of suit for default comes under Order IX, rule 8 and the dismissal of application for restoration is appealable under Order XLIII, r. 1(c). 2 U. P. L. R. (A) 288=57 Ind. Cas. 245. An order of dismissal of an application for restoration of the application, dismissed in default, for restoration of the suit, dismissed in default is appealable. A. I. R. 1923 Nag. 293=19 N. L. R. 119=75 Ind. Cas. 589. An appeal lies from an order of a Judge of the High Court in original jurisdiction rejecting an application under Order IX, rule 9 for the restoration of a suit dismissed for default. 20 C. W. N. 594=23 C. L. J. 443=43 C. 857=34 Ind. Cas. 634. "Case open to appeal" need not be necessarily construed only with reference to the decree and to no other order. A. I. R. 1928 Mad. 979=55 M. L. J. 262=29 L. W. 490=112 Ind. Cas. 691. An application to set aside a sale is a suit within clause (c). 20 C. W. N. 1203=33 Ind. Cas. 80. The words are perfectly general and they mean whether the case is open to appeal and not whether an appeal can be successfully prosecuted against the decree. 14 A. L. J. 332=38 A. 297=33 Ind. Cas. 80. No appeal lies from an order dismissing for default, an application to set aside the dismissal of a suit under Order IX, rule 9 as it is not covered by rule 1(c) of Order XLIII. A. I. R. 1928 Pat. 336=7 Pat. 333=9 P. L. T. 669=109 Ind. Cas. 264. Where an application to set aside a decree is dismissed for default and the Court refuses to set aside the order of dismissal and restore the application, no appeal lies against the order. A. I. R. 1922 All. 337=20 A. L. J. 519=67 Ind. Cas. 320. No appeal lies from an order rejecting an application to set aside the dismissal of an application for restoration of a suit dismissed in default. 28 N. L. R. 83=139 Ind. Cas. 296=A. I. R. 1932 Nag. 101.

**Clause (d)**—The words of Order 43, rule 1 (d), are perfectly general. The words "in a case open to appeal" have no reference to the appeal against the decree actually passed. If there could be no appeal against a decree that could be passed in the suit or proceeding under any circumstances, there would be no appeal against

an order refusing to set aside an *ex parte* decree passed in such a suit or proceeding. A case is not open to appeal within the meaning of this sub-rule when no appeal would lie against a decree under any circumstance. 63 C. L. J. 277=40 C. W. N. 992=A. I. R. 1936 Cal. 485. Under clause (d), an appeal lies against an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed *ex parte*. A. I. R. 1934 Rang. 202=149 Ind. Cas. 777=6 R. R. 325; see also 2 B. 644; A. I. R. 1927 Pat. 240=101 Ind. Cas. 753=6 Pat. 474=8 P. L. T. 604. An order refusing to set aside an *ex parte* preliminary decree in a mortgage-suit is appealable though a final decree has been passed before the filing of the appeal. A. I. R. 1928 Cal 721=48 C. L. J. 28=32 C. W. N. 858=117 Ind. Cas. 557. An order rejecting the application for an order to set aside a decree passed *ex parte* is appealable on ground that the conditions which lawfully imposed on the defendants are not complied with. A. I. R. 1927 Bom. 1=51 B. 67=28 Bom. L. R. 1245 (F. B.)=99 Ind. Cas. 384; see also A. I. R. 1925 Mad. 1182=88 Ind. Cas. 196. An appeal lies from an order dismissing for default an application to set aside an *ex parte* decree. 36 Ind. Cas. 798. An order setting aside an *ex parte* decree passed in a resumption suit, although not appealable under rule 1, is appealable under the Oudh Rent. Act. 3 O. L. J. 229=34 Ind. Cas. 702. An appeal lies to the District Judge only when an application lies to the Court of first instance under Order IX, rule 13. A. I. R. 1925 All. 267=47 A. 140=85 Ind. Cas. 470. Rejecting an application in Order XLIII, rule 1(d), implies an immediate rejection and not a conditional or prospective rejection, *i. e.*, an order imposing a condition before setting aside. 6 L. W. 757=43 Ind. Cas. 1. An appeal from the *ex parte* decree is no bar to appeal from an order rejecting an application for setting aside the *ex parte* decree. A. I. R. 1924 Lah. 224=72 Ind. Cas. 900. In an appeal from an order rejecting an application to set aside *ex parte* decree, the Appellate Court cannot transgress the provisions of Order IX, rule 13 for reasons for setting aside the decree. A. I. R. 1925 All. 610=24 A. L. J. 56=48 A. 175=90 Ind. Cas. 180. Where a Munsiff rejects the application to set aside the *ex parte* decree passed by a Munsiff, having small cause powers, who is succeeded by former who had no small cause powers, no appeal lies to the District Judge. 65 Ind. Cas. 967=A. I. R. 1922 All. 50=20 A. L. J. 208. An order purporting to be made under Order IX, rule 13, dismissing an application for restoration of an application to set aside an *ex parte* decree is not appealable. 49 Ind. Cas. 745. No appeal lies from an order granting an application under Order IX, rule 13. 17 A. L. J. 1052=52 Ind. Cas. 901. An order refusing to set aside a dismissal of a suit under Order IX, r. 4, is not appealable. 27 C. L. J. 117=43 Ind. Cas. 374. An order passed under Order IX, rule 9, dismissing for default, a petition to restore a suit dismissed for default is not appealable. 2 P. L. W. 221=2 P. L. J. 720=43 Ind. Cas. 54.

**Clause (e).**—This clause corresponds to clause (10) of old section 588. The order under s. 120 of the old Code from which an appeal was allowed by clause (10) of old section 588, was an order under the second paragraph of s. 120 passing a decree against the defaulting party. 3 O. C. 31. The sub-clause states that an appeal will lie against the order "pronouncing judgment against a party."

**Clause (f).**—Rule 21 of Order XI, corresponds to section 136 of the old Code. Under the old Code an order under s. 136 of the Code of Civil Procedure dismissing a suit, has been held to be decree, and as such is appealable. 6 C. L. J. 374; 19 B. 307; 7A. 159. An order under rule 21 of Order XI is made appealable by this sub-rule.

**Clause (g)**—Rule 10 of Order XVI corresponds to s. 168 of C. P. Code of 1982. An order of arrest before judgment and that of attachment before judgment are both appealable. The former is appealable under s. 104, C. P. Code. A. I. R. 1924 Rang. 361=2 Rang. 362=3 Bur. L. J. 159=84 Ind. Cas. 270. An order directing to furnish security or ordering attachment in default is appealable so far as attachment is concerned. A. I. R. 1923 Cal. 639=50 C. 215. No appeal lies where an application for attachment before judgment; is dismissed by the Court of first instance after hearing the defendants. 23 C. L. J. 392=33 Ind. Cas. 689.

**Clause (h).**—This clause corresponds to clause (10) of the old section.

**Clause (i).**—This clause corresponds to clause (15) of old section 588.

**Clause (j).**—This clause is not applicable to a case where a sale is set aside on the ground of fraud. 28 C. 116. Where the application under Order XXI, r. 90, is dismissed for non-appearance and the opposite party is present and ready to contest,

the order dismissing the application is an order under this sub-rule and an appeal lies on it. A. I. R. 1928 Cal. 25=104 Ind. Cas. 759=55C. 616. There is no clause in the C. P. Code, which forbids an appeal from an order setting aside a sale under s. 227 of the Orissa Tenancy Act. Such an order falls under clause (j) of Order 43, rule 1 and is therefore appealable. 15 Pat. 375=165 Inl. Cas. 929=17 Pat. L. T. 902=A. I. R. 1936 Pat. 621. Where a proceeding under Order XXI, rule 90, is compromised on condition of payment by judgment-debtor to decree holder and the judgment-debtor fails to pay the amount within the prescribed time and his application to set aside the sale is disallowed and the sale confirmed without his allegations being gone into, appeal lies under Order XLIII, rule 1. A. I. R. 1924 Pat. 346=4 Pat. L. T. 735=79 Ind. Cas. 594. No appeal lies from an order setting aside a sale under Order 21, rule 89. 27A. 263=1904 A. W. N. 237. Where an order has been passed under rule 92 of Order XXI, disallowing an objection under rule 90, an appeal is competent. 7A. 253; see also 4 M. L. T. 96; 104 P. L. R. 1907=21 P. W. R. 1908=25 P. R. 1907. An execution sale cannot be set aside without giving notice to the judgment-debtor. If an adverse order has been passed he is entitled to appeal and test the legality of the order in the superior tribunal. A. I. R. 1921 Lah. 156=3 Lah. L. J. 463=62 Ind. Cas. 986; see also 188 P. R. 1882; 2A. 352.

An order under Order XXI, rule 92 (2), in execution of a small cause decree transferred to the original side for execution is appealable. 10 L. W. 556=(1920) M. W. N. 151=53 Ind. Cas. 958. An appeal lies from an order dismissing for default, an application under Order XXI, r. 90. 38 Ind. Cas. 63. Dismissal of an application under rule 90 even for default confirms the sale under rule 92 and hence appeal lies against the order and the High Court cannot interfere with the order in revision. A. I. R. 1925 Cal. 51=41 C. L. J. 286=79 Ind. Cas. 351. An order refusing to set aside the dismissal of an application under Order XXI, rule 90, for default is not appealable. A. I. R. 1927 Cal. 938=45 C. L. J. 60=100 Ind. Cas. 343; 12 Pat. L. T. 505=A. I. R. 1931 Pat. 97. No appeal lies from an appellate order setting aside a sale. A. I. R. 1922 Oudh 145=25 O. C. 78=9 O. L. J. 50=66 Ind. Cas. 924. No second appeal lies against an order setting aside a sale on the ground of fraud under Order XXI, r. 92. 54 Ind. Cas. 941=168 P. R. 1919=2 Lah. L. J. 41; see also 62 Ind. Cas. 986=A. I. R. 1921 Lah. 156=3 Lah. L. J. 463. In an appeal from order refusing to set aside sale, auction-purchaser is a necessary party. 35 P. L. R. 658=A. I. R. 1934 Lah. 592. An order confirming a sale amounts to a refusal to set aside the sale, and hence is appealable. A. I. R. 1933 Lah. 210=34 P. L. R. 233=141 Ind. Cas. 421.

**Clause (k).**—An order refusing to set aside the abatement of an appeal is appealable since Order XXII, rule 11, makes the order apply to appeals. A. I. R. 1925 Pat. 162=2 Pat. L. R. 279=85 Ind. Cas. 1010. Where a suit abates against one of the defendants and application for setting aside abatement is dismissed and Court holds that consequently suit abated *in toto* in special circumstances of the case the former adjudication is appealable under Order XLIII, rule 1 (k) and the latter adjudication is appealable as a decree. 86 Ind. Cas. 104=A. I. R. 1925 Lah. 456=26 P. L. R. 32. Where no application to bring the representative of a deceased plaintiff is made within time the suit abates and an application for substitution made afterwards is an application under Order XXII, rule 9 (2) to set aside the abatement. A. I. R. 1923 Lah. 424=74 Ind. Cas. 17. An order setting aside an abatement is not appealable. A. I. R. 1926 Cal. 444=87 Ind. Cas. 173. Order setting aside the abatement and allowing substitution of heirs of deceased party cannot be questioned in appeal from a decree in suit where the order is passed. A. I. R. 1925 Cal. 473=40 C. L. J. 588=85 Ind. Cas. 100. One of the applications by rival claimants for coming on record as legal representatives of the plaintiff was allowed and the other dismissed: *Held*, no appeal lies under Order XLIII, rule 1 (k) or s. 96 against order of dismissal. A. I. R. 1924 Mad. 622=46 M. L. J. 129=19 L. W. 113=79 Ind. Cas. 860. An order under Order XXII, rule 3, is not appealable. An order under rule 9 is appealable under Order XLIII, rule 1 (k), but no appeal is allowed against an order under rule 3. A. I. R. 1924 Oudh 114=9 O. & A. L. R. 70=73 Ind. Cas. 230. An order declaring that the suit had abated because the legal representative of the deceased defendant had not been brought on the record in time is a decree and appealable as such. 10 Pat. 471=12 Pat. L. T. 909=A. I. R. 1931 Pat. 353=133 Ind. Cas. 767; see also 26 S. L. R. 81; A. I. R. 1934 Lah. 315. Though no second appeal lies from an

order of abatement, yet it may be questioned in second appeal if it "affects the decision of the case". 144 Ind. Cas. 133=1933 A. L. J. 561=A. I. R. 1933 All. 294.

**Clause (l).—**An order under Order XXII, rule 10, is appealable. A. I. R. 1921 Mad. 599=44 M. 919=41 M. L. J. 316=14 L. W. 287=1921 M. W. N. 649 (F. B.). Where in the case of devolution of an interest during the pendency of a suit, the Court orders addition of parties under Order XXII, rule 10, the party dissatisfied can prefer an appeal under Order XLIII, rule 1 (1) and not invoke the aid of s. 115. 104 Ind. Cas. 842=A. I. R. 1927 Cal. 844=54 C. 716. An application by a mortgagee to be added as a party to a partition suit is an application under Order 22, rule 10 and an order granting or refusing it is appealable in accordance with the provisions of Order 43, rule 1 (1). 134 Ind. Cas. 307=35 C. W. N. 296=A. I. R. 1931 Cal. 594.

**Clause (m).—**An appeal lies where the Court, holding that the compromise is not valid and binding on the parties, refuses to record the same. A. I. R. 1927 Lah. 546=103 Ind. Cas. 80. Order XXIII, rule 3, applies only to cases of valid compromise and an order finding that there was no compromise is not appealable. A. I. R. 1924 Lah. 248=73 Ind. Cas. 177. This sub-rule provides for an appeal in a case in which the trial Court finds that no compromise has been made and refuses to record it on that ground. 163 Ind. Cas. 929=1936 A. L. J. 336=A. I. R. 1936 All. 433; see also 70 M. L. J. 400=A. I. R. 1936 Mad. 385=43 L. W. 722=1936 M. W. N. 86=163 Ind. Cas. 161; 70 M. L. J. 471=A. I. R. 1936 Mad. 347=43 L. W. 386=161 Ind. Cas. 728; A. I. R. 1936 Sind 59. Where the trial Court holds that a compromise has been arrived at between the parties, the proper procedure is to record a separate order recording the compromise and then to pass a decree in accordance with it. In such a case no appeal would lie against the decree but an appeal should lie against the order recording the compromise and a petition for revision would lie to the High Court against the appellate order. A. I. R. 1936 Lah. 963. An appeal lies on an order refusing to record a compromise under Order 23, rule 3, whatever the reasons of refusal may be. A. I. R. 1929 Nag. 275=12 N. L. J. 124=119 Ind. Cas. 673; A. I. R. 1928 Lah. 39=28 P. L. R. 580=104 Ind. Cas. 561; 42 Ind. Cas. 192. Where the decree is passed immediately as part of the order recording the compromise, an appeal lies on the order recording the compromise. A. I. R. 1925 Mad. 606=43 M. L. J. 249=87 Ind. Cas. 124; 36 C. W. N. 1013. Appeal will lie from an order recording a compromise or refusing to record a compromise though followed by a decree. A. I. R. 1924 Lah. 466=6 Lah. L. J. 187=80 Ind. Cas. 696. Where a compromise decree gives reliefs which are not unlawful but which could not have been given, if the suit had been decided after trial, an appeal is the remedy. A. I. R. 1922 L. B. 22. A person denying to be a party to a compromise has a right to appeal. A. I. R. 1929 Sind 32=114 Ind. Cas. 101. An appeal may be filed from an order of a Court refusing to record a petition of compromise and not from the judgment given by the Court on the merits. 42 Ind. Cas. 192. Orders rejecting petitions filed by plaintiff depends for judgment and decree on admission by defendants are not appealable unless they take together amount to a lawful agreement or compromise within rule 3 of Order XXIII. 44 Ind. Cas. 145. In case of compromise by pleader without authority, a separate suit to set aside the compromise and decree will lie, and Order 43, rule 1 (m), is no bar to the suit. 150 Ind. Cas. 838=11 O. W. N. 1030=A. I. R. 1934 Oudh 417. The right of appeal under Order 43, rule 1, against an order recording a compromise under Order 23, rule 3, C. P. Code, is not lost because the decree involved in the order is not appealed against. It would be more correct to appeal against the decree, but if the order is set aside on appeal, the decree must go with it. 61 C. 910=59 C. L. J. 421=A. I. R. 1934 Cal. 846.

**Clause (n).—**A suit does not include an execution proceeding. A. I. R. 1923 All. 460=45 A. 148=21 A. L. J. 135=73 Ind. Cas. 453.

**Clause (o).—**Where the Judge on the original side directed that the Registrar might be at liberty to sell the mortgaged property without reserve, held that the order was not appealable. 60 C. 506=A. I. R. 1933 Cal. 534=145 Ind. Cas. 318.

**Clause (p).—**This clause corresponds to clause 23 of old section 588. An adjudication upon the claims of defendants in an interpleader-suit is a decree and appealable as such under s. 540 of the Code of Civil Procedure of 1882 and not under section 588 of the Code. 30 A. 22=4 A. L. J. 683.

**Clause (q).**—No appeal lies from an order rejecting an application for attachment under Order 38, rule 6, C. P. Code when there has been no conditional order of attachment under rule 5 (3) of Order 38. 14 Pat. 1=186 Ind. Cas. 981=16 Pat. L. T. 291=A. I. R. 1935 Pat. 219. An unconditional attachment can be ordered under rule 6 only where attachment is unconditional it may be taken that the order is under rule 6 even though the Judge passing the order purports to have acted under rule 5 and such an order is appealable under Order 43, rule 1 (q). A. I. R. 1928 Lah. 445=107 Ind. Cas. 276. An order of attachment before judgment is appealable. 21 B. 273. Where in response to a notice issued to the defendant under Order 38, rule 5, defendant appears in Court and shows cause why no order for furnishing security for costs should be passed against him and why no order should be passed directing attachment of property, the order of the Court accepting the contention of the defendant is an order which falls under Order 38, rule 6 (2) and from such an order an appeal lies under Order 43, r. (1) (q). 140 Ind. Cas. 95=1932 A.L.J. 228=A.I.R. 1932 All. 269. An order made under the provisions of Order XXXVIII, rule 5, is not a "judgment" within the meaning of clause 13 of the Letters Patent, it being a mere interlocutory order and so no appeal lies from that order. A. I. R. 1925 Rang. 267=4 Bur. L. J. 108=3 Rang. 307=90 Ind. Cas. 995. The Court ought not to admit appeals from orders refusing injunction or attachment except in cases of serious misdirection in law or fact, when special directions might be given for expedition. 61 C. 814=38 C. W. N. 771=A. I. R. 1934 Cal. 694.

**Clause (r).**—An order granting an injunction and an order refusing an injunction are both appealable. An order refusing an application for a temporary injunction until the disposal of the main application for injunction pending the disposal of the suit being an order under Order XXXIX, r. 1, is appealable under Order XLIII, r. 1 (r). A. I. R. 1924 Pat. 713=6 P. L. T. 201=83 Ind. Cas. 48. An order under Order XXXIX, rule 1, issuing injunction though subject to a condition, can be appealed. A.I.R. 1922 All. 441=66 Ind. Cas. 509. An order of Court refusing to attach property for disobedience of an *interim* injunction is covered by Order XXXIX, r. 2 (3) and is open to appeal. A. I. R. 1922 Lah. 347=66 Ind. Cas. 9. No appeal lies from an order ordering notice under Order XXXIX, rule 3. A.I.R. 1924 Mad. 857=20 L.W. 556. An order refusing to discharge an injunction issued under Order 39, rule 2 is appealable. 14 Lah. 330=34 P. L. R. 975=A. I. R. 1933 Lah. 203. An appeal lies from the refusal of a Judge of the original side of the High Court to grant an *interim* injunction, but what the Court of Appeal has to consider is simply whether or not the Judge who dealt with the matter properly exercised the discretion which he undoubtedly possessed. A. I. R. 1934 Cal. 713=152 Ind. Cas. 563; see also 61 C. 814=38 C. W. N. 771=A. I. R. 1934 Cal. 694.

**Clause (s).**—An Order of a Court that a Receiver should be appointed in a case, is an order under Order XL, r. 1 and appealable under this sub-rule. A. I. R. 1923 Lah. 48=72 Ind. Cas. 569; see also A. I. R. 1922 Pat. 577=1 Pat. 625=4 P. L. T. 210=69 Ind. Cas. 929; 13 P. L. T. 525. The mere fact that an appointment of a Receiver is made *ad interim* does not mean that the order is not an order under Order 42, rule 1, C. P. Code and an appeal lies from it under this sub-rule in the same manner as if the appointment had not been *ad interim* but final. A. I. R. 1936 Lah. 107. An Order merely declaring that a Receiver should be appointed is appealable under Order 43, rule 1 (s) even though no body is named as Receiver. 13 Pat. L. T. 525=A. I. R. 1932 Pat. 360; but see A. I. R. 1934 Nag. 64=148 Ind. Cas. 184. An order removing a Receiver is appealable at the instance of the parties to the litigation but the Receiver himself has no right of appeal. 36 C. W. N. 903. An Order refusing to appoint a Receiver being an order under Order XL is appealable. A. I. R. 1926 Cal. 1006=95 Ind. Cas. 632. An order dismissing an objection to the appointment of a Receiver of a property the objector not being a party is appealable. A. I. R. 1924 Nag. 165=78 Ind. Cas. 1031. Where property of a third party is interfered with an officer of the Court like the Receiver he may either apply to the Court for a summary order restraining the Receiver from interfering or he may with Court's permission sue the Receiver for the same relief. Where the party adopts the summary remedy the Order of the Court is an order under Order XL, rule 1 (b) and is appealable. A. I. R. 1923 Mad. 129=16 L. W. 833=69 Ind. Cas. 393. Where a Court passes an order passing the accounts submitted by the Receiver, an appeal lies. A. I. R. 1921 Bom. 427=45 B. 99=59 Ind. Cas. 421. Refusing to remove a Receiver already appointed is different from refusing to appoint a new Receiver. 78 Ind. Cas. 625=A. I. R. 1924 Mad. 614=46 M. L. J.

196=19 L. W. 247. Where a Receiver is appointed in execution of a mortgage decree overruling the objections of a third party, he cannot appeal but he can prefer a revision to the High Court. 45 Ind. Cas. 177. No appeal lies from an order directing a Receiver to pay a sum of money by way of damages. A. I. R. 1925 Rang. 266=4 Bur. L. J. 91=3 Rang. 318=92 Ind. Cas. 631. No appeal lies from an Order for the appointment of a Receiver without actually appointing any one to that office. Rule 1 contemplates an order appointing a Receiver. 18 A. L. J. 212=54 Ind. Cas. 520=44 A. 227. No appeal lies from an order construing an order of appointment as it does not fall under either rule 1 or rule 4 of Order XLI. 5 Pat. L. J. 97=55 Ind. Cas. 15. An Order giving directions to the Receiver to pay a certain sum of money into Court, not followed up by an order of attachment of his property is not appealable. A. I. R. 1922 Mad. 234=65 Ind. Cas. 403. Where a Receiver is appointed in an appeal from interlocutory Order, the only person materially prejudiced thereby would be the person entitled to present possession. Where none of the defendants is entitled to possession, they need not be brought on the record in the appeal. A. I. R. 1924 Cal. 456=24 C. W. N. 86=77 Ind. Cas. 783. A Court of Appeal will not, except in an extreme case, disturb the appointment or selection of a Receiver by the Court below, unless there be some overwhelming objection in front of propriety or choice or some fatal objection in principle. A. I. R. 1924 Lah. 421=69 Ind. Cas. 361. An appeal is competent from an order directing a Receiver to pay into Court amount lost by his negligence. 1931 M. W. N. 830=34 L. W. 533=A. I. R. 1931 Mad. 760.

**Clause (t).**—An appeal lies from an order under Order XLI, rule 19, refusing to set aside an order of dismissal of an appeal, passed *ex parte* though the order of refusal is passed in appeal in the course of insolvency proceedings. A. I. R. 1930 Lah. 112=120 Ind. Cas. 791. The High Court can entertain an appeal from an order refusing to re-hear an appeal dismissed for default, is appealable. But no appeal lies against an order under s. 93 dismissing an application to set aside the dismissal. 25 C. L. J. 163=38 Ind. Cas. 598.

**Clause (u).**—An appeal from an order of remand is maintainable if the point on which the lower Appellate Court determined the case is a preliminary point. A. I. R. 1930 Nag. 295=128 Ind. Cas. 407. A party prejudiced by an order of remand can appeal against such an order. But where a party has himself obtained an order of remand he cannot appeal merely because the ground covered by it is not so wide as that which he himself derived. A. I. R. 1929 Oudh 398=116 Ind. Cas. 55. An order of remand without jurisdiction, if it purports to be one under rule 23 of Order XLI, is appealable. A. I. R. 1927 Cal. 642=31 C. W. N. 878=104 Ind. Cas. 422. The lower Appellate Court accepted an appeal in part and remanded that part of the case for trial on the merits. The remaining case was dismissed. The plaintiff coming up on second appeal regarding this latter portion of this case, held, that the plaintiff was a person aggrieved by an order of remand and had a right of appeal under Order XLIII, r. 1 (a). A. I. R. 1921 Lah. 154=2 Lah. 252=3 Lah. L. J. 426=89 P. L. R. 1921=63 Ind. Cas. 776. The order of remand on a preliminary issue is appealable. A. I. R. 1930 Mad. 1017=(1930) M. W. N. 1021=32 L. W. 843=60 M. L. J. 72=129 Ind. Cas. 47. An Appellate Court can apart from rules 23 and 25 of Order XLI, remand a case for re-trial under s. 151. No appeal lies against such an order. 3 P. L. J. 253=4 P. L. W. 450=43 Ind. Cas. 959; see also 39 M. L. J. 936=13 L. W. 667; 78 Ind. Cas. 408=6 Lah. L. J. 153; 69 Ind. Cas. 826=16 L. W. 515=A. I. R. 1921 Mad. 716; 31 C. L. J. 357=23 C. W. N. 1049=55 Ind. Cas. 95. Rule 1 (u) gives right of appeal against an order under Order XLI, rule 23, but applies only when the trial Court disposes of the suit on a preliminary point. Where the Appellate Court sets aside the trial Court's decree on the ground of non-joinder of a necessary party and remands the case for a fresh trial with the addition of such party, as this is not disposing of the suit on a preliminary point, so neither Order XLI, r. 23 nor Order 43, rule 1 (a), applies. A. I. R. 1925 Rang. 320=4 Bur. L. J. 159=3 Rang. 490=92 Ind. Cas. 368. Where the lower Appellate Court did not say under what provisions of law an order of remand was passed, the High Court held that it had been passed under Order XLI, rule 23 and appeal was allowed. A. I. R. 1925 Cal. 1157=87 Ind. Cas. 575; see also 44 A. 492=20 A. L. J. 321=67 Ind. Cas. 713. An order of remand passed by a special Judge under the provisions of the Bengal Tenancy Act is not appealable. A. I. R. 1923 Cal. 333=37 C. L. J. 314=72 Ind. Cas. 1013. If a case is remanded for retrial not under Order XLI, rule 23, but under inherent powers of Court, an appeal lies



from the remand order not under Order XLIII, r. 1 (u) but under s. 95 read with s. 100 as an appeal from a decree. A. I. R. 1923 Cal. 606=71 Ind. Cas. 453=37 C. L. J. 491=74 Ind. Cas. 1038. Remanding of a case without the exercise of inherent jurisdiction by District Judge is not competent and an appeal lies against it. A. I. R. 1922 All. 254=44 A. 176=19 A. L. J. 971=64 Ind. Cas. 878. Where the Appellate Court decides the main point in a case and remands the case for disposal of remanding issues, the order is not appealable. 12 L. W. 667=60 Ind. Cas. 609. No appeal lies from a general order of remand by the lower Appellate Court on the ground of mishandling of the trial in the First Court. 63 Ind. Cas. 858. Order XLI, rule 23, C. P. Code, does not contemplate a case decided upon the whole evidence and upon all the issues which were raised. The rule has no application to an order of remand on which no appeal lies. 55 Ind. Cas. 484=1 P. L. T. 509. No appeal lies from an order of remand made on an appeal from an order setting aside or refusing to set aside an execution sale as it is final under s. 104 (c). 2 P. W. R. 1919=29 Pat. L. R. 1919=50 Ind. Cas. 610. An order passed in appeal under Order XLI, rule 1 (a), setting aside an order under rule 10 of Order VII and remanding the case for trial on merits is not appealable. 2 Lah. L. J. 587. No appeal lies against an order of remand for fresh decision on merits though an appeal is maintainable on the decree of the Appellate Court reversing the decree of the trial Court. 58 Ind. Cas. 909. Order XLI, rule 23, C. P. Code, does not contemplate a case decided upon the whole evidence and upon all the issues which were raised. The rule has no application to an order of remand on which no appeal lies. 1 P. L. T. 509=55 Ind. Cas. 484.

High Court is bound by the findings of fact in appeal from order under Order XLI, rule 23. A. I. R. 1921 Oudh 214=8 O. L. J. 624=65 Ind. Cas. 376; see also 48 Ind. Cas. 379=109 P. R. 1918=23 P. L. R. 1919. The lower Appellate Court made an order of remand under Order XLI, r. 23, remanding the case to the original Court, for the decision of remaining questions arising in the case. An appeal was preferred to the High Court: *Held*, appellant coming in appeal under Order XLIII, rule 1 (u), could not question findings of fact. A. I. R. 1922 Lah. 97=2 Lah. 25=36 P. L. R. 1921=58 P. L. R. 1921=59 Ind. Cas. 715. An order of remand not falling within Order XLI, r. 23, is not appealable under Order XLIII. A. I. R. 1922 Mad. 112=45 M. 449=68 Ind. Cas. 869; see also A. I. R. 1923 Oudh 177=26 O. C. 10=10 O. L. J. 36=73 Ind. Cas. 591; A. I. R. 1927 Cal. 850=47 C. L. J. 69=55 C. 219=103 Ind. Cas. 864; 104 Ind. Cas. 331; A. I. R. 1927 All. 496=101 Ind. Cas. 687. An appeal does not lie on a remand order not passed on appeal from a decree as it is not an order under Order XLI, rule 23. A. I. R. 1926 Lah. 141=89 Ind. Cas. 384. No appeal lies from an order of remand when the order itself is made in an appeal preferred under any other clause of that rule. 111 Ind. Cas. 789. Where a case is disposed of by the trial Court on one issue only leaving other issues undisposed of, an appeal against order of remand is competent. A. I. R. 1934 Lah. 907. Although Order 41, rule 23, might not strictly apply where the Appellate Court has remanded the suit to the first Court for final determination of the suit, an appeal lies to the High Court under Order 43, rule 1 (u), C. P. Code. 38 C. W. N. 1202. An appeal does not lie from an order remitting a certain issue to the trial Court under Order 41 rule 25, C. P. Code. 4 A. W. R. 1120; see also A. I. R. 1933 Cal. 496=37 C. W. N. 195=145 Ind. Cas. 183; 10 O. W. N. 664=A. I. R. 1933 Oudh 350; A. I. R. 1931 Mad. 1=60 M. L. J. 713. Where an order dismissing an application to set aside an *ex parte* decree is set aside and the Court of first instance is directed to proceed with the suit the order is not an order of "remand" within the meaning of Order 43, rule 1 (u) and the order of the Appellate Court is not appealable. 53 A. 519. No distinction seems to be recognized in Order 43, rule 1 (u) between a partial and a total remand of the case. 146 Ind. Cas. 939=A. I. R. 1933 Lah. 615. Where an appeal is directed against the order of remand it should be filed as a miscellaneous appeal under Order 43, rule 1 (u) and a Court-fee of rupees two is payable in Oudh. A. I. R. 1933 Oudh 191=144 Ind. Cas. 967=10 O. W. N. 143. An order passed by the District Judge setting aside the rejection of a plaint is not appealable order within this clause. A. I. R. 1934 Pesh. 88. For the purposes of the competency of an appeal the Court has to see what the lower Court purported to do actually did and not what the lower Court should have done. Where the lower Appellate Court remands the case under Order 41, rule 23, Civil Procedure Code, its order is appealable under Order 43, rule 1 (u). A. I. R. 1937 Lah. 454.

Clause (v).—*Vide* 17 A. 112; 15 B. 155=18 I. A. 6.

**Clause (w).—**The right of appeal conferred by Order XLIII, r. 1 (w), is subject to the conditions of Order XLVII, r. 7. A. I. R. 1935 All. 552=47 A. 881=23 A. L. J. 534=88 Ind. Cas. 653 ; 37 C. W. N. 705=A. I. R. 1933 Cal. 727 ; see also A. I. R. 1925 Oudh 266=11 O. L. J. 682=28 O. C. 4=84 Ind. Cas. 515 ; 8 Q. W. N. 1267 ; A. I. R. 1934 Lah. 617=148 Ind. Cas. 1126 ; A. I. R. 1931 All. 329 ; A. I. R. 1936 Oudh 409=1936 O. W. N. 836=165 Ind. Cas. 19. Right of appeal given by clause (w) against the acceptance of review is restricted by Order XLVII, r. 7. A. I. R. 1929 Lah. 26=116 Ind. Cas. 221 ; see also 31 M. L. J. 827=5 L. W. 472=38 Ind. Cas. 373 ; 15 A. L. J. 505=41 Ind. Cas. 386 ; A. I. R. 1921 Cal. 66=25 C. W. N. 884. An appeal lies on an order granting a review only on one of the grounds set out in Order XLVII, r. 7. 103 Ind. Cas. 377=A. I. R. 1927 Mad. 641=50 M. 891=52 M. L. J. 682=26 L. W. 277=39 M. L. T. 11 ; 35 Bom. L. R. 280=144 Ind. Cas. 728=A. I. R. 1933 Bom. 183. Right of appeal under this sub-rule being subject to conditions under Order XLVII, rule 7, appeal not coming under this rule cannot be maintained. 42 A. 626=18 A. L. J. 838=60 Ind. Cas. 81 ; see also 30 C. L. J. 738=52 Ind. Cas. 29 ; see also 47 Ind. Cas. 850 ; 45 C. 60=21 C. W. N. 1076=26 C. L. J. 187=42 Ind. Cas. 484 ; A. I. R. 1929 Nag. 73=12 N. L. J. 13=25 N. L. R. 104=116 Ind. Cas. 645 ; but see A. I. R. 1926 Bom. 121=27 Bom. L. R. 1446=94 Ind. Cas. 591. Clause (w) has to be read along with Order XLVII, rule 7. The two provisions of the Code are not mutually inconsistent, but are really complementary of each other. Both rules read together do not give an unlimited right of appeal. Order XLVII, r. 7, should be held to control and restrict the earlier rule. A. I. R. 1927 Lah. 435=8 Lah. 817=29 P. L. R. 81=107 Ind. Cas. 596 ; see also A. I. R. 1930 All. 126=122 Ind. Cas. 184. Order granting review for "other sufficient reason" under Order 47, rule 1, cannot be questioned in appeal under Order 47, rules 4 and 7. A. I. R. 1935 Rang. 501. No appeal lies from an order refusing to restore an application for review when the application to restore has been heard on merits. A. I. R. 1925 All. 57=47 A. 1=80 Ind. Cas. 649. No appeal lies from an order refusing to grant review. 113 Ind. Cas. 92. An order granting a review of a judgment, itself not appealable, is appealable, subject to Order XLVII, r. 7. An order granting a review for sufficient grounds is not appealable. 1 P. L. J. 193=35 Ind. Cas. 15. An appeal against an order granting a review can only be entertained on one of the grounds set forth in Order XLVII, rule 7. A. I. R. 1929 Rang. 105=7 Rang. 187=118 Ind. Cas. 120 ; see also A. I. R. 1925 Oudh 266=11 O. L. J. 682=28 O. C. 4=84 Ind. Cas. 515. An appeal does not lie from an order refusing to restore an application for review when the application to restore has been heard on merits. A. I. R. 1925 All. 57=47 A. 1=80 Ind. Cas. 649. An appeal does not lie from an order of the lower Appellate Court rejecting an application for review of an appeal dismissed for default and a memorandum of cross-examinations allowed *ex parte*. 53 Ind. Cas. 901. No second appeal lies against an order granting a review. 64 Ind. Cas. 568.

**2. [S. 590.]** The rules of Order XLI shali apply, so far as may be, to appeals from orders.  
Procedure.

*N. B.*—For local amendments in Allahabad, Madras and Oudh.—*Vide infra*.

**Notes.**—A. I. R. 1930 Sind 252=25 S. L. R. 63=130 Ind. Cas. 554.

## ORDER XLIV.

### *Pauper Appeals.*

**1. [S. 592.]** Any person entitled to prefer an appeal, who is unable to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject in all matters, including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable :

Provided that the Court shall reject the application unless, upon a perusal thereof and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust.

Procedure on application for admission of appeal.

*N. B.*—For local amendment in Allahabad,—*Vide infra.*

**Scope.**—Court is not bound to here respondent before leave to appeal in *forma pauperis* is granted. A. I. R. 1932 Mad. 523=63 M. L. J. 28. Issue of notice to interested parties is not necessary to decide whether application should be rejected. A. I. R. 1933 Mad. 658=65 M. L. J. 372. Where Appellate Court has issued notice, it has no jurisdiction to dismiss application summarily. A. I. R. 1932 All. 925; see also A. I. R. 1933 All. 11=54 All. 394. Mere fact that order refusing application was brief does not constitute material irregularity. A. I. R. 1932 All. 712=1932 A. L. J. 860. Admission of application for permission to appeal in *forma pauperis* is not final disposal of application A. I. R. 1933 Lah. 256=34 P. L. R. 516. Proviso applies even after application is admitted and notice to respondent is ordered. A. I. R. 1932 Lah. 654=33 P. L. R. 1077. Proviso is mandatory. *Ibid.* Appellate Court, even after application has been admitted and notice on the opposite party has been served considers whether the conditions in the proviso are satisfied. 133 Ind. Cas. 125 (Lah); 1934 A. L. J. 827=A. I. R. 1934 All. 424; A. I. R. 1934 All. 1004 (F. B.)=1934 A. L. J. 931. Before leave to appeal as pauper is granted it is incumbent upon pauper appellant to satisfy Court that judgment is erroneous. A. I. R. 1933 Mad. 519=56 M. 323; but see 53 M. 245. Allowing appellant to appeal in *forma pauperis* does not preclude respondent from showing at later date that the appeal is without substance. A. I. R. 1932 Mad. 523. Court-fee on appeal is to be calculated as on date of presentation and not of payment. A. I. R. 1932 Oudh 343=9 O. W. N. 855. Court after application under Order 44, rule 1, is still competent to consider if conditions in the proviso to Order 44, rule 1, are satisfied. A. I. R. 1931 Pat. 183 (F. B.)=12 P. L. T. 156. No distinction exists between rejection and grant of application for revision. A. I. R. 1931 Rang. 131. Where notice ordered in the absence of respondent, he is not precluded from arguing that decree was not contrary to law. A. I. R. 1934 Lah. 73. Order is revisable if the order is passed without hearing Government pleader. A. I. R. 1924 All. 424. Where notice has been given issued upon an application under Order 44, rule 1, to the opposite party and the Government Advocate, it is still open to the Court under the proviso to that Rule to reject the application, unless upon a perusal thereof, and of the judgment and decree appealed from, it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust. A. I. R. 1937 Oudh 222. A Court cannot reject an application to appeal in *forma pauperis* under the proviso to Order 44, rule 1, after issuing notices to Government pleader and to the respondent. A. I. R. 1937 Oudh 2. Where leave to appeal in *forma pauperis* is refused, Court can grant time for payment of Court-fee. A. I. R. 1937 Mad. 161. There is no reason why every ground should be dismissed in an order rejecting an application to file appeal in *forma pauperis*. A. I. R. 1935 Pesh. 22=154 Ind. Cas. 943. Order 44, rule 1, C. P. Code, applies to appeals sought to be preferred in *forma pauperis* from decrees of Courts in the Agency tracts, although there is no corresponding provisions in the Agency Rules. 58 M. 298=153 Ind. Cas. 476=40 L. W. 862=A. I. R. 1935 Mad. 51=68 M. L. J. 51. Where the valuation of the appeal is beyond the jurisdiction of single Judge of a High Court, he has no jurisdiction to dismiss an application for leave to appeal in *forma pauperis* on the ground that the appeal is barred by limitation. 157 Ind. Cas. 347=1935 A. L. J. 681=A. I. R. 1935 All. 620 (F. B.). An application for leave to appeal in *forma pauperis* may be disposed of in chambers in a summary manner without hearing the applicant and without giving time to the applicant for payment of the deficient Court-fee. 42 L. W. 831=69 M. L. J. 781=1935 M. W. N. 1262. Where application for leave to appeal as pauper is not accompanied by decree and judgment, by rejection, of the application the whole matter falls through and there is no longer any appeal pending before the Court. 157 Ind. Cas. 347=1935 A. L. J. 681=A. I. R. 1935 All. 620 (F. B.) On an application for leave to appeal as a pauper under Order 44, rule 1, according to procedure of the Madras High Court, notice should not go as a matter of routine to the respondent. 163 Ind. Cas. 755=A. I. R. 1936 Mad. 661. It is not open to the Court to reject an application to appeal in *forma pauperis* under the proviso to Order 44, rule 1, after notices were issued to the Government Advocate and the respondents. 165 Ind. Cas. 276=1936 Q. W. N. 875. This rule does not apply to appeals to Privy Council and the High Courts have no power to grant leave to appeal to Privy Council in *forma pauperis*. 161 Ind. Cas. 192=A. I. R. 1936 Pesh. 36. A person can file a petition to appeal in *forma pauperis* only against a decree as a whole, and not against any order which is not a decree and which

does not dispose of a case finally. A. I. R. 1936 Lah. 426=163 Ind. Cas. 366=38 P. L. R. 1119. It is quite true that the respondent has no right to be heard on application for leave to appeal in *forma pauperis* under Order 44, rule 1, C. P. Code. 163 Ind. Cas. 741=1936 M. W. N. 1027=A. I. R. 1936 Mad. 843. Appellate Court should not interfere with discretion exercised by Court in rejecting application for leave to file memo of objections in *forma pauperis* whether or not there may be right of appeal, as the matter is proper subject for the exercise of discretion. A. I. R. 1926 Mad. 656=50 M. L. J. 426=23 L. W. 511=94 Ind. Cas. 45. Leave to appeal in *forma pauperis* should be granted where decree was altered in material particulars by successor of Judge deciding suit. A. I. R. 1930 Pat. 142=147 Ind. Cas. 187. Court need not arrive at definite and final conclusion that decree appealed against is contrary to law, or erroneous or unjust, before allowing pauper appeal. A. I. R. 1931 Mad. 198=31 L. W. 76=58 M. L. J. 195=53 M. 245=122 Ind. Cas. 337. Where appellant in a pauper appeal enters into agreement under which third person obtains interest in subject-matter of appeal, application must be dismissed. 122 Ind. Cas. 831. It is not necessary to state reasons for rejection and trial is not vitiated thereby. A. I. R. 1930 Nag. 53=120 Ind. Cas. 413. Even when leave to appeal in *forma pauperis* is granted it can be interfered with where there is reason to believe that it falls within proviso to this rule. A. I. R. 1930 Nag. 28=12 N. L. J. 92=121 Ind. Cas. 61; see also 133 Ind. Cas. 124. If particular case is considered to be fit for granting the leave, the granting of the leave involves the consequence, if not expressly at least, by necessary implication that *prima facie*, that case is fit to be placed outside the purview of Order XLI, r. 10. A. I. R. 1930 Nag. 28=12 N. L. J. 92=121 Ind. Cas. 61. Respondent is entitled to show that the provisions of proviso to Order XLIV, rule 1, are not complied with even after the explanation has been *ex parte*. A. I. R. 1929 Lah. 514=114 Ind. Cas. 325; see also A. I. R. 1929 Pat. 27=7 Pat. 825=10 P. L. T. 46=114 Ind. Cas. 210. Provisions of Order XLIV, rule 1, proviso are mandatory and leave to appeal in *forma pauperis* cannot be granted unless the Court has reason to think that decree is contrary to law or otherwise erroneous. A. I. R. 1929 Lah. 539=114 Ind. Cas. 80; 109 Ind. Cas. 391; 54 Ind. Cas. 814=4 Pat. 67=A. I. R. 1925 Pat. 442. Appeal in *forma pauperis* should be admitted only when correctness or reasonableness of the decision of the lower Court is doubted. A. I. R. 1925 Mad. 1178=49 M. L. J. 353=87 Ind. Cas. 660. Record of evidence cannot be referred under this rule and the attention of the Court must be confined to the judgment and decree appealed against. A. I. R. 1925 Rang. 249=88 Ind. Cas. 988. Application to appeal as pauper should not be admitted if the decree appealed from is not erroneous or unjust even if the applicant is really a pauper. A. I. R. 1925 Lah. 391=7 Lah. L. J. 214=89 Ind. Cas. 292; 38 M. L. J. 146=54 Ind. Cas. 761. Rule 1 has no application unless the applicant is a pauper. A. I. R. 1924 Lah. 536=6 Lah. L. J. 205=80 Ind. Cas. 649. Decision in case of appeal in *forma pauperis* as to correctness of the judgment ought to be arrived at before the notice to the parties is issued and the question cannot be raised again afterwards. A. I. R. 1924 Pat. 791=2 Pat. L. R. 153=8 P. L. T. 119; see also A. I. R. 1929 Pat. 31=7 Pat. 827=10 P. L. T. 387. Question as regards the correctness of decree cannot be gone into after notice to the Government and respondent have been issued. A. I. R. 1928 Pat. 118=6 Pat. 687=109 Ind. Cas. 645. Leave to appeal in *forma pauperis* to the Privy Council cannot be granted by the High Court. 42 M. 32=35 M. L. J. 258=24 M. L. T. 207=8 L. W. 463=47 Ind. Cas. 646; see also 44 Ind. Cas. 731=3 P. L. J. 179. Proper course to apply for leave to appeal as a pauper is to apply to a Bench of two Judges where subject-matter is of the value of Rs. 10,000 or upwards. 3 O. L. J. 694=38 Ind. Cas. 541. Where Court-fee is paid after application to appeal in *forma pauperis* is rejected, appeal being presented together with application, it is a proper case for the application of s. 5, Limitation Act. 9 P. L. T. 613=115 Ind. Cas. 678; see also 65 Ind. Cas. 741=A. I. R. 1922 Lah. 225=3 Lah. 35=26 P. W. R. 1922; 38 Ind. Cas. 617=31 M. L. J. 269=40 M. 637. A separate order directing payment of Court-fee must be passed while dismissing application for leave to appeal in *forma pauperis* under rule 1 or an enquiry into pauperism. A. I. R. 1926 Oudh 13=9 Ind. Cas. 371. Where there is a *bona fide* mistake as to the Court-fee which the applicant is unable to pay, he may be given time to make up the deficiency, also permission to appeal as a pauper should be granted and time extended for the same. A. I. R. 1928. All. 499=26 A. L. J. 847=111 Ind. Cas. 655; A. I. R. 1935 Pesh. 22=154 Ind. Cas. 943. Appeal is deemed to be presented on the day on which the pauper application is presented even if the Court-fee is paid before the end of the enquiry.

9 Bur. L. T. 69=32 Ind. Cas. 630. There must be some material, either upon the application or upon the judgment and decree from which the Court could reasonably form the opinion that the case falls within the proviso. 9 Rang. 92=132 Ind. Cas. 707=A. I. R. 1931 Rang. 131. In considering whether a person is a "pauper" the subject-matter of the suit is to be excluded. 67 M. L. J. 581=152 Ind. Cas. 135=A. I. R. 1934 Mad. 653. An appeal under Order 41, rule 1, should not be admitted until the Judge is satisfied that the decree of the Court appealed against is unjust or contrary to law. 71 M. L. J. 497=A. I. R. 1936 Mad. 842.

**Revision**—Order refusing leave to appeal as pauper is open to revision but there can be no interference on merits of order. A. I. R. 1930 Nag. 53=120 Ind. Cas. 413; see also A. I. R. 1926 Oudh 204=91 Ind. Cas. 96. Dismissal of an application for leave to appeal in *forma pauperis* does not amount to dismissal of appeal. Hence if the Court refuses to allow Court-fees to be paid on the memo of appeal, it refuses to exercise its jurisdiction. 40 A 381=16 A. L. J. 309=45 Ind. Cas. 29. The High Court can, after rejecting a petition for revision against an order of the District Judge rejecting an application to appeal as pauper extend the time fixed by the District Judge for paying the requisite Court-fees, even though such time has already expired and the appeal has been dismissed. 38 P. L. R. 374=A. I. R. 1936 Lah. 909.

2. [S 593.] The inquiry into the pauperism of the applicant may be made either by the Appellate Court or under Inquiry into pauperism. the orders of the Appellate Court by the Court from whose decision the appeal is preferred :

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees cause to direct such inquiry.

**Notes.**—If assets are not set out without most good faith Appellate Court can reject application for leave to appeal in *forma pauperis ab initio*. A. I. R. 1930 Pat. 368=11 P. L. T. 567=123 Ind. Cas. 398.

## ORDER XLV.

### *Appeals to the King in Council.*

1. [S. 594.] In this Order, unless there is something repugnant in the subject or context, the expression "decree" shall "Decree" defined. include a final order.

**Notes.**—Where review application to the High Court against its own judgment was successful and application for leave to appeal to the Privy Council in *forma pauperis* was made, no order on the latter application is necessary. But where the order of review was set aside the Privy Council's original application for leave to appeal was still alive. A. I. R. 1924 Lah. 225=77 Ind. Cas. 869.

2. [S. 598.] Whoever desires to appeal Application to Court whose decree complained of. to His Majesty in Council shall apply by petition to the Court whose decree is complained of.

**Notes.**—Case for granting leave to appeal to the Privy Council is not properly presented where appeal was dismissed for default in furnishing the list of papers to be printed in the paper-book. A. I. R. 1921 Pat. 83=2 P. L. T. 112=60 Ind. Cas. 285.

3. [S. 600.] (1) Every petition shall state the grounds of appeal and Certificate as to value or fit- pray for a certificate either that, as regards ness. amount or value and nature, the case fulfils the requirements of section 110, or that it is otherwise a fit one for appeal to His Majesty in Council.

(2) Upon receipt of such petition, the Court shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted.

*N. B.*—For local amendments in Bombay and C. P.—*Vide infra.*

**Notes.**—Certificate must contain the grounds upon which it is granted or that the discretion under s. 109 was exercised. A. I. R. 1921 P. C. 25=48 I. A. 31=44 M. 293=19 A. L. J. 161=23 Bom L. R. 718=33 C. L. J. 277=25 C. W. N. 630=40 M. L. J. 229=60 Ind. Cas. 85. In a redemption suit involving no question of principle and value of claim being less than Rs. 10,000 a certificate cannot be granted there being no exceptional circumstances to justify it. A. I. R. 1929 Oudh 243=6 O. W. N. 211=116 Ind. Cas. 208. An order suspending a vakil is a disciplinary matter and not a judgment; hence no leave to appeal to the Privy Council can be granted. A. I. R. 1922 Mad 440=16 L. W. 328=43 M. L. J. 382=69 Ind. Cas. 290.

4. [*New.*] For the purposes of precuniary valuation, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated; but suits decided by separate judgments shall not be consolidated notwithstanding that they involve substantially the same questions for determination.

**Notes.**—Judgment means judgment appealed against. A. I. R. 1932 Mad. 125=61 M. L. J. 692. Discretion is to be in applicant's favour. A. I. R. 1932 Mad. 125=55 M. 125. Court-fee value is the least market value. A. I. R. 1931 Mad. 125. Separate judgment may be treated as one. 61 M. L. J. 692. As regards what is not consolidation. *Vide* A. I. R. 1937 Pesh. 61. Consolidation of appeals results in one appeal and parties must be treated as parties in one suit. A. I. R. 1923 Pat. 215=70 Ind. Cas. 782. Object of consolidation under rule 4 is to make good the defect of pecuniary valuation and not a defect of any other kind. A. I. R. 1923 Nag. 198=69 Ind. Cas. 525. Consolidation under Order XLV, rule 4, is allowed for the purpose of valuation for leave to appeal to the Privy Council only when the suits in question involve substantially the same question in issue and have been decided by one and the same judgment. 73 Ind. Cas. 217=41 M. L. J. 424=A. I. R. 1923 Mad. 602. Where judgments were separate but one was delivered with reference to the other so far as the point to be raised in Privy Council was concerned, it was held that the suits were decided by the same judgment within the meaning of Order XLV, rule 4. A. I. R. 1927 Bom. 19=50 B. 753=28 Bom. L. R. 1437=100 Ind. Cas. 143. Suits disposed of by separate judgments by the High Court cannot be consolidated even if they were dealt with by the judgment in lower Court; consolidation can be ordered only under rule 4. A. I. R. 1921 Pat. 97=2 P. L. T. 157=6 P. L. J. 97=60 Ind. Cas. 517. Consolidation of appeals to the Privy Council under Order XLV, r. 4, is not limited merely for the purpose of security for costs and suing of expenses. 3 P. L. J. 446=45 Ind. Cas. 551. Where there were two suits in original Courts and two appeals therefrom but were disposed of in one judgment, setting aside the decree of the lower Court, leave to appeal to the Privy Council should be granted even though the value of the subject-matter is below Rs. 10,000 and though no question of law was involved. A. I. R. 1921 All. 270=43 A. 223=59 Ind. Cas. 791. In a case to which Order 45, rule 4, does not in terms apply as to when the appeals arise out of one and the same suit and not out of two separate suits, the High Court has no inherent power for consolidating appeals to the Privy Council for the purpose of security for costs. 1936 A. L. J. 1025=A. I. R. 1936 All. 832. There is no provision of law authorising one application for leave to appeal in two separate suits and appeals. 140 Ind. Cas. 70=33 P. L. R. 455=A. I. R. 1932 Lah. 441.

5. [*New.*] In the event of any dispute arising between the parties as to the amount or value of the subject-matter of the suit or value of the subject-matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made.

**Notes.**—Court of first instance must itself make the enquiry and not remit to some other officer where reference is made to it under Order XLVI, r. 5. 43 C.

225=34 Ind. Cas. 203. From enquiry as regards the value of the subject-matter of the suit is in the discretion of the Court. A. I. R. 1925 Cal. 414=82 Ind. Cas. 744. There can be no reference for a report at defendant's instance where plaintiff under-values his suit and defendant acquiesces. A. I. R. 1927 Cal. 418=45 C. L. J. 225=101 Ind. Cas. 901; see also 42 B. 609=46 Ind. Cas. 4=20 Bom. L. R. 418.

6. [S. 601.] Where such certificate is refused, the petition shall be dismissed.

7. [S. 602.] (1) Where the certificate is granted, the applicant shall, within \*[ninety days or such further period, not exceeding sixty days, as the Court may upon cause shown allow], from the date of the decree complained of, or within six weeks from the date of the grant of the certificate, whichever is the later date,—

(a) furnish security† [in cash or in Government securities] for the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

(1) formal documents directed to be excluded by any order of His Majesty in Council in force for the time being;

(2) papers which the parties agree to exclude;

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included; and

(4) such other documents as the High Court may direct to be excluded;

+[Provided that the Court at the time of granting the certificate may, after hearing any opposite party who appears, order on the ground of special hardship that some other form of security may be furnished:]

Provided further, that no adjournment shall be granted to an opposite party to contest the nature of such security.†

(2) Where the applicant prefers to print in India the copy of the record, except as aforesaid, he shall also within the time mentioned in sub-rule (1), deposit the amount required to defray the expense of printing such copy.

N. B.—For additional rules in Bombay and C. P.—*Vide infra*.

Notes.—Security has got to be furnished in respect of each appeal though consolidated. 4 Pat. L. J. 198=50 Ind. Cas. 511. High Court has power to demand security in cases where special leave is granted by the Privy Council under s. 112, C. P. Code. A. I. R. 1925 Oudh 99=11 O. L. J. 195=76 Ind. Cas. 335. Rule 7 refers to the granting of certificate and not to the actual issue of document; and application to furnish security in other form than cash or Government securities is not maintainable if made after the granting of a certificate. A. I. R. 1925 Mad. 449=48 M. 559=48 M. L. J. 134=21 L. W. 147=86 Ind. Cas. 201; see also 66 Ind. Cas. 548=11 L. B. R. 213=A. I. R. 1921 L. B. 55. Rule regarding time limit within which security under Order XLV, rule 7, should be furnished is rigid and time cannot be extended. A. I. R. 1929 Pat. 431=123 Ind. Cas. 769. Time for furnishing security cannot be extended beyond the period given in s. 3 (1) of Act XXVI of 1920. A. I. R. 1924 Mad. 44=18 L. W. 29=74 Ind. Cas. 703; see also 26 A. L. J. 433=119 Ind. Cas. 574; see also 65 Ind. Cas. 249=44 A. 216=20 A. L. J. 13=A. I. R. 1922 All. 43. High Court can extend period of six weeks from the date of the grant of certificate. A. I. R. 1927 Pat. 330=105 Ind. Cas. 585. Time can be extended by the High Court for cogent reason only. 6 O. L. J. 149=50 Ind. Cas. 907; see also 49 Ind. Cas. 892=4 P. L. J. 521. Time can be extended upto the 150th day from the date of the decree but Court has no power to extend the period of six weeks from the grant of certificate. A. I. R. 1923 Oudh 50=25 O. C. 254=78 Ind. Cas. 937; A. I. R. 1927 Pat. 332=8 P. L. T. 779=103 Ind. Cas. 213. Due diligence must be shown by the applicant in order to entitle him

\* Substituted by Act 26 of 1920.

† Inserted by Act 26 of 1920.

to extension of time. That a loan could not be got is no sufficient reason. A. I. R. 1921 L. B. 28=11 L. B. R. 108=65 Ind. Cas. 450. Deposit out of time is not one to the satisfaction of Court. Periods for security and deposit are identical and cannot exceed either a period of 150 days from the date of the decree or six weeks from the date of the certificate whichever is longer. 84 Ind. Cas. 535=A. I. R. 1923 All. 572. Where a decree is modified on review, modified decree is also a decree. A. I. R. 1924 Lah. 82=4 Lah. 185=6 Lah. L. J. 41=75 Ind. Cas. 520. After amendment of Code by Act 26 of 1920, time beyond six weeks cannot be extended by the High Court. A. I. R. 1927 Rang. 20=4 Rang. 265=5 Bur. L. J. 187=98 Ind. Cas. 417. Time may be extended for cogent reasons. A. I. R. 1926 Rang. 44=4 Bur. L. J. 3=94 Ind. Cas. 590. Court is entitled to apply the proviso to Order XLV, rule 7, only if the application is made at the time of the granting of the certificate. A. I. R. 1927 Pat. 431=123 Ind. Cas. 769. Application for attachment by the decree-holder if money deposited for costs of the Privy Council by the judgment-debtor, is grossly improper and is an offence to the Court. A. I. R. 1929 All. 794=119 Ind. Cas. 5. Court's power to allow security in some form applies only at the time of granting certificate. Offer of immovable property as a security after certificate has been granted is not admissible. A. I. R. 1926 Rang. 44=4 Bur. L. J. 3=94 Ind. Cas. 590. The Court has no jurisdiction to extend the time for furnishing security. A. I. R. 1932 Oudh 249; see also A. I. R. 1932 Mad. 434.

The application by the decree-holder seeking to attach surplus money deposited in the Court for the purpose of costs of the Privy Council by the judgment-debtor without stating any figures to suggest that there was any likelihood of there being any surplus, is absolutely without substance and even if it contains necessary figures, it is premature. A. I. R. 1929 All. 794=119 Ind. Cas. 5. By offering of a property as security, proprietary interest of security is not extinguished. It merely becomes first charge in the property. Subject to the first charge of the security, depositor can dispose of it. Such interest is not exempt under Transfer of Property Act, s 6 or s. 65 C. P. Code. A. I. R. 1930 All. 225=(1930) A. L. J. 402=52 A. 619 (F. B.)=125 Ind. Cas. 477. The High Court has no power to grant an extension of time beyond that fixed by Order 45, rule 7, C. P. Code for furnishing security. 39 C. W. N. 651. An application by an appellant for extension of time for furnishing security should be dealt with by a Division Bench of the High Court and not by the Registrar. *Ibid.* The High Court has no power to extend the time for the furnishing of security beyond the period allowed by Order 45, rule 7. A. I. R. 1935 Lah. 733=159 Ind. Cas. 232. In order to avoid a conflict between Order 45, rule 7 and s. 148, C. P. Code, it must be held that Order 45, rule 7 must prevail. 1933 A. L. J. 207=55 A. 432=143 Ind. Cas. 559=A. I. R. 1933 All. 241 (F. B.). Where applicant was asked to furnish security for costs of the respondent and also to deposit the translation and printing charges, the deposit of costs only and not the translation and printing charges is valid. 1933 A. L. J. 207=55 A. 434=143 Ind. Cas. 559=A. I. R. 1933 All. 241 (F. B.). The Court has no jurisdiction to extend the time beyond 150 days from the date of decree or order appealed against as the language of Privy Council Rules, r. 9 was never intended to sanction the allowance of any further period. 1933 A. L. J. 207=55 A. 432=143 Ind. Cas. 559=A. I. R. 1933 All. 241 (F. B.); A. I. R. 1931 Bom. 278=33 Bom. L. R. 487; A. I. R. 1932 Mad 484.

8. [S. 603.] Where such security has been furnished and deposit made

Admission of appeal and to the satisfaction of the Court, the Court shall—  
procedure thereon.

- (a) declare the appeal admitted,
- (b) give notice thereof to the respondent,
- (c) transmit to his Majesty in Council under the seal of the Court a correct copy of the said record, except as aforesaid, and
- (d) give to either party one or more authenticated copies of any of the papers in the suit on his applying therefor and paying the reasonable expenses incurred in preparing them.

**Notes.**—If respondent knew of admission, failure to give notice to the respondent of admission of an appeal to the Privy Council is not sufficient ground for rehearing. 22 Bom. L. R. 550=59 Ind. Cas. 7.



9. [S. 604.] At any time before the admission of the appeal the Court may, upon cause shown, revoke the acceptance of any such security, and make further directions thereon.

**Notes**—Rule 10 and not rule 9 is application for enhancement of amount of security for costs after admission of appeal. 49 Ind. Cas. 893.

\*[9A. Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court :

Provided that notices under sub-rule (2) of rule 3 and under rule 8 shall be given by affixing the same in some conspicuous place in the Court-house of the Judge of the District in which the suit was originally brought, and by publication in such newspapers as the Court may direct.]

*N.B.*—For local amendment in Rangoon.—*Vide infra.*

10. [S. 605.] Where at any time after the admission of an appeal but before the transmission of the copy of the record, except as aforesaid, to His Majesty in Council, such security appears inadequate,

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid,

the Court may, order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment.

11. [S. 606.] Where the appellant fails to comply with such order, the proceedings shall be stayed,

and the appeal shall not proceed without an order in this behalf of His Majesty in Council,

and in the meantime execution of the decree appealed from shall not be stayed.

12. [S. 607.] When the copy of the record, except as aforesaid, has been transmitted to His Majesty in Council the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7.

13. [S. 608]. (1) Notwithstanding the grant of a certificate for the admission of any appeal, the decree appealed from shall be unconditionally executed, unless the Court otherwise directs.

(2) The Court may, if it thinks fit, on special cause shown by any party interested in the suit, or otherwise appearing to the Court,—

(a) impound any movable property in dispute or any part thereof, or

(b) allow the decree appealed from to be executed, taking such security from the respondent as the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or

(c) stay the execution of the decree appealed from, taking such security from the appellant as the Court thinks fit for the due performance of the decree appealed from, or of any order which His Majesty in Council may make on the appeal, or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, as it thinks fit, by the appointment of a receiver or otherwise.

**Notes**—High Court can amend its own decree even after time to appeal to Privy Council is granted. A. I. R. 1929 Lah. 427=30 P. L. R. 258. Where leave to appeal to Privy Council has been granted, application to stay proceedings should not be allowed when delay is likely to be prejudicial to the plaintiff. A. I. R. 1928 Bom. 159=30 Bom. L. R. 126. Where an appeal has been admitted to the Privy Council but the decree has been executed respondent can also be directed to furnish security. A. I. R. 1926 B 425=50 B. 453. Stay of execution can be ordered even before grant of certificate under s. 151. 82 Ind. Cas. 739. Execution of High Court's decree cannot be stayed by the Subordinate Judge. 42 Ind. Cas. 835. Where stay of execution has been granted pending appeal to the Privy Council security must be directed to be furnished within a definite period of time and the Court can give such directions as it thinks necessary. 24 C. W. N. 265=57 Ind. Cas. 382. Execution of High Court's decree cannot be stayed by the Subordinate Judge. Such an order of Subordinate Judge staying execution is subject to revision. 3 P. L. W. 222=3 P. L. J. 42=42 Ind. Cas. 835. Receiver to an estate which is a subject-matter of appeal to the Privy Council can be appointed by the High Court. 4 P. L. J. 482=52 Ind. Cas. 407. Where preliminary decree has been appealed from to the Privy Council stay of proceedings in lower Court for final decree cannot be allowed. 18 A. L. J. 142=42 A. 170=54 Ind. Cas. 561. Where appeal to the Privy Council has been admitted but the decree of the High Court has been executed and the decree-holder afterwards brings in Revenue Court a suit to eject defendant, the proceedings are not execution proceedings and hence not under Order XLV, r. 13. 64 Ind. Cas. 152 (All) Where an *ex parte* decree in a mortgage-suit was set aside by the High Court and was sent for re-hearing, an appeal was preferred from such an order to the Privy Council, High Court can both under rules 13 and s. 151 order stay of hearing pending hearing of appeal to the Privy Council A. I. R. 1931 Cal. 79=34 C. W. N. 631=129 Ind. Cas. 833 High Court has inherent power to stay proceedings. 59 C. L. J. 440=38 C. W. N. 795=A. I. R. 1934 Cal. 223; see also A. I. R. 1934 All. 585=1934 A. L. J. 1191=150 Ind. Cas. 446.

14. [S. 609.] (1) Where at any time during the pendency of the appeal Increase of security found the security furnished by either party appears inadequate, the Court may, on the application of the other party, require further security.

(2) In default of such further security being furnished as required by the Court,—

(a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security;

(b) if the original security was furnished by the respondent, the Court, shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears inadequate was furnished, or give such direction respecting the subject-matter of the appeal as it thinks fit.

15. [S. 610.] (1) Whoever desires to obtain execution of any order of Procedure to enforce orders of His Majesty in Council shall apply by petition, King in Council. accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to His Majesty was preferred.

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the execution of the same; and the Court to which the said order is so transmitted shall execute it accordingly, in the manner and according to the provisions applicable to the execution of its original decrees.

(3) When any monies expressed to be payable in British currency are payable in India under such order, the amount so payable shall be estimated according to the rate of exchange for the time being fixed at the date of the making of the order\* for the adjustment of financial transactions between the Imperial and the Indian Governments.

† [(4) Unless His Majesty in Council is pleased otherwise to direct, no order of His Majesty in Council shall be inoperative on the ground that no notice has been served on or given to the legal representative of any deceased opposite party or deceased respondent in a case, where such opposite party or respondent did not appear either at the hearing in the Court whose decree was complained of or at any proceedings subsequent to the decree of that Court, but such order shall have the same force and effect as if it had been made before the death took place.]

**Local Amendment in Burma.**—In rule 15 for “in India” substitute “in Burma” and for “Indian” substitute “Burman”—*Vide* G. B. Order of 1937.

*N. B.*—For local amendment in Allahabad.—*Vide infra*.

**Notes.**—Court acting under Order 45, rule 15, cannot consider or discuss the effect of His Majesty's order in Council. Any order contrary to this is *ultra vires*. A. I. R. 1930 Lah. 674=31 P. L. R. 182. Rule 15 does not apply to proceedings for restitution. A. I. R. 1927 Pat. 208=6 Pat. 252=102 Ind. Cas. 614. Application for execution is liable to be dismissed if provisions of rule 15 are not complied with. 78 Ind. Cas. 766=5 P. L. T. 45. Execution cannot be postponed on ground that application for review is made to Privy Council. A. I. R. 1931 Pat. 203=12 P. L. T. 145. Separate transmission of an order to every person interested in execution is inconvenient though not impossible. 75 Ind. Cas. 219; 55 M. 856. Where their Lordships of the Privy Council direct that the costs incurred by the successful appellant in the Judicial Commissioner's Court, should be paid by the respondent, such costs include the printing charges and other expenses incurred by the appellant in the Judicial Commissioner's Court for presentation of the appeal to the Privy Council and the appellant is also entitled to the costs of the execution. A. I. R. 1937 Pesh. 3. In order that execution might follow in terms of the judgment of the Board, opponent can have the order of High Court with a certified copy, where party with order in Council refuses to lodge the order. A. I. R. 1926 P. C. 31=5 Pat. 461=53 I. A. 89=(1926) M. W. N. 492=30 C. W. N. 938=28 Bom L. R. 1260=51 M. L. J. 586=94 Ind. Cas. 813. Certified copy is not the only evidence of an order in Council. (1917) M. W. N. 487=33 M. L. J. 303=41 Ind. Cas. 629. High Court transmitting to the first Court order of His Majesty in Council for execution can direct to pay out of the money in taking sufficient security from the decree-holder. A. I. R. 1922 Oudh 34=9 O. L. J. 5=66 Ind. Cas. 982. Decree-holder obtaining permission under Order XL, r. 15, can under Order XXI, r. 15, execute the Privy Council decree on behalf of all the decree-holders though some are dead at the time of the Privy Council. 1 P. L. T. 426=58 Ind. Cas. 212. Application for execution of an order passed in appeal by the Privy Council from the Calcutta High Court an appeal from a Subordinate Court in Bihar lies to the High Court of Calcutta and not to the High Court at Patna. 2 Pat. L. J. 684=1918 Pat. 49=4 P. L. W. 133. Where the mortgagees were entitled to relief under s. 144 but the Privy Council deliberately excluded such relief from the order, and left them to seek remedy under s. 144, High Court and so the Subordinate Court is in order in transmitting the order of His Majesty to the lower Court concerned. A. I. R. 1930 Lah. 961=129 Ind. Cas. 204. The provisions of Order 45, rule 15, C. P. Code, are mandatory. 160 Ind. Cas. 814=1936 O. W. N. 262=A. I. R. 1936 Oudh 185.

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\* The words “by the Secretary of State for India in Council with the concurrence of the Lords Commissioner's of His Majesty's Treasury” after this have been omitted by G. I. Order of 1937 as well as G. B. Order of 1937.

† Added by Act 26 of 1920.

16. [S. 611.] The order made by the Court which executes the order of His Majesty in Council, relating to such execution, shall be appealable in the same manner and subject to the same rules as the orders of such Court relating to the execution of its own decrees.

\*[17. (2) Where a certificate has been given under section 205 (1) of the Government of India Act, 1935, the provisions of this order shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council and references in this order to His Majesty in Council and to any order of His Majesty in Council shall be construed as references to the Federal Court and the rules of the Federal Court :—  
Provided that,—

(a) rule 3 of this order shall have effect as if at the end of sub-rule (1) thereof there were inserted the words “apart from any question of law as to the interpretation of the Government of India Act, 1935, or any order in Council made thereunder” ;

(b) where the only ground of appeal stated in the petition is that any question of law as to the interpretation of the Government of India Act, 1935, or any order in Council made thereunder has been wrongly decided, the petition need not pray for such a certificate as is mentioned in rule 3, and the like proceedings shall be had thereon as if such a certificate had been given except that no security shall be required for the costs of the respondent.]

*N. B.*—This rule is in force only in British India and does not apply to British Burma.

## ORDER XLVI.

### *Reference.*

1. [S. 617] Where, before or on the hearing of a suit or on appeal in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the case and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.

*Notes*—Reference is allowed only in cases of suits or appeals which are not subject to appeal. A. I. R. 1917 Mad. 1179=54 M. L. J. 66=107 Ind. Cas. 649 ; 37 Ind. Cas. 221 ; A. I. R. 1933 Lah. 402 ; A. I. R. 1931 Pat. 253. Reference to High Court is permissible only when lower Court entertains reasonable doubts. A. I. R. 1933 Lah. 402=34 P. L. R. 544. But Subordinate Courts are not relieved of deciding difficult questions. A. I. R. 1933 All. 597. Subordinate Court cannot compare soundness of views on question of law taken by High Court to which it is subordinate with the views of other High Courts. 1930 M. W. N. 955=A. I. R. 1931 Mad. 71 ; 48 A. 188 (F. B.)=A. I. R. 1926 All. 69. This Order has no application to miscellaneous proceedings. 29 C. W. N. 511. Question on sanction-application cannot be referred to. 1 Rang. 220=75 Ind. Cas. 519. Inquiry before a Rent-collector is not a suit. 84 Ind. Cas. 543=29 C. W. N. 521. The difference between appeal and reference is that reference by a Subordinate Court to a Superior Court while appellant is a party to the suit to the Appellate Court. 47 A. 513. Collector executing a decree transferred to him under s. 48 cannot make a reference under Order XLVI, rule 1. 54 Ind. Cas. 564=22 O. C. 319=2 U. P. L. R. (1907) 21. Order of reference by the lower Court under rule 1, can be questioned by the High Court under r. 5. A. I. R. 1923 Bom. 30=30 Bom. L. R. 1527. Where the plaint was returned by Sub-Judge for presentation to the Munsiff who declined for not having

\* This rule has been added by G. I. Order of 1937.

jurisdiction to entertain it, High Court can under s. 151 pass order as it thinks necessary in the interest of justice, even though the orders passed were very late. 85 Ind. Cas. 703=A. I. R. 1925 Oudh 461=12 O. L. J. 189=28 O. C. 330. A reference under Order 46, rule 1 of the C. P. Code can only be made in a suit or appeal and not in proceedings under s. 93 of the Bengal Tenancy Act which are in the nature of an application. A. I. R. 1934 Cal. 566=38 C. W. N. 499=151 Ind. Cas. 721.

2. [S. 618.] The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the point referred ;

Court may pass decree contingent upon decision of High Court. .  
but no decree or order shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

3. [S. 619.] The High Court, after hearing the parties if they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy of its judgment, under the signature of the Registrar, to the Court by which the reference was made ; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

4. [S. 620.] The costs (if any) consequent on a reference for the decision of the High Court shall be costs in the case.

5. [S. 621.] Where a case is referred to the High Court under rule 1, the High Court may return the case for amendment, and may alter, cancel or set aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose, and make such order as it thinks fit.

Notes.—High Court acts while hearing a reference to the Court of Appeal quite as much as when it hears application for Court of revision. 25 C. W. N. 80=32 C. L. J. 433=48 C. 766.

6. [S. 646A] (1) Where at any time before judgment a Court in which a suit has been instituted doubts whether the suit is cognizable by a Court of Small Causes or is not so cognizable, it may submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit.

(2) On receiving the record and statement, the High Court may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit.

Notes.—Where a plaint was returned by Munsiff to the Small Cause Court which was again returned to the Munsiff's Court as being cognizable by it, Subordinate Court ought to have referred the matter to the High Court under Order XLVI or if he had no doubt he should have sent the record to the District Judge for necessary action under r. 7. 21 C. W. N. 784=27 C. L. J. 96=41 Ind. Cas. 929.

7. [S. 646B.] (1) Where it appears to a District Court that a Court subordinate thereto has, by reason of erroneously holding a suit to be cognizable by a Court of Small Causes or not to be so cognizable, failed to exercise a jurisdiction vested in it by law, or exercised a jurisdiction not so vested, the

Power to District Court to submit for revision proceedings had under mistake as to jurisdiction in small causes.

District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous.

(2) On receiving the record and statement the High Court may make such order in the case as it thinks fit.

(3) With respect to any proceedings subsequent to decree in any case submitted to the High Court under this rule, the High Court may make such order as in the circumstances appears to it to be just and proper.

(4) A Court subordinate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this rule.

*N. B.*—For local amendments in Allahabad, Bombay and Oudh.—*Vide infra*.

**Notes.**—Where plaint is returned by two Courts the remedy of the applicant is to make an application to the District Judge under the provisions of this rule. A. I. R. 1933 Nag. 221=145 Ind. Cas. 261; see also 17 N. L. J. 169=A. I. R. 1934 Nag. 257.

## ORDER XLVII.

### *Review.*

1. [S. 623.] (1) Any person considering Application for review of judgment. himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

**Scope.**—Review can only be granted on grounds set out in order 47. A. I. R. 1934 Pat. 229. Consent decree cannot be set aside on ground of fraud under order 47. 144 Ind. Cas. 82. Revenue Court has no power of review. A. I. R. 1932 All. 293=54 A. 646 (F. B.). Jurisdiction to entertain an application depends upon circumstances when application is made. 33 Bom. L. R. 378=A. I. R. 1931 Bom. 232. Order under section 35, Provincial Insolvency Act, can be reviewed if conditions laid down by Order 47, rule 1, are existent. A. I. R. 1933 Mad 631 (F. B.)=65 M. L. J. 173; see A. I. R. 1932 Mad. 63=61 M. L. J. 719. When decree under partition suit is alleged to be incorrect, review under rule 1 may be made. A. I. R. 1931 Pat. 296=12 P. L. T. 466. Application to set aside an *ex parte* order is not an application for review. A. I. R. 1933 Mad. 345=37 M. L. W. 720. Court cannot grant leave to file application for review in *forma pauperis*. A. I. R. 1930 Rang. 280=8 Rang. 423. Review of a consent decree under order 47 is not competent on the ground that it was obtained by fraud. A. I. R. 1929 Cal. 470=33 C. W. N. 883=124 Ind. Cas. 525. Interlocutory orders made in chambers is subject to review under s. 151, if it is necessary in the interest of justice. A. I. R. 1930 Bom. 294=32 Bom. L. R. 665=125 Ind. Cas. 690. Events happening after the decree has been passed cannot be made grounds of review. A. I. R. 1922 Mad. 227=15 L. W. 593=43 M. L. J. 33=70 Ind. Cas. 741=31 M. L. T. 473. S. 144 and Order XLVII, have appli-

cation to cases for review of a decree in any appeal under the Letters Patent. A. I. R. 1927 Bom. 232=29 Bom. L. R. 371=101 Ind. Cas. 765. Orders dismissing an objection for default cannot be appealed from. Remedy in such cases is by appeal to s. 151 or Order XLVII. A. I. R. 1929 All. 123=26 A. L. J. 1395=112 Ind. Cas. 380. Application for review after the period of limitation allowed for alternative remedies is not necessarily incompetent. A. I. R. 1929 Sind 38=115 Ind. Cas. 314. Application for review should be granted where the Court having dismissed the suit in presence of pleader for plaintiff passed another order on plaint dismissing suit for default of appearance after pleader had left the Court. A. I. R. 1929 Sind 38=115 Ind. Cas. 314. Where a plaintiff gets a decree for specific performance but afterwards finds that defendant cannot give him a good title, his proper remedy is by way of review or to file a separate suit for setting aside the decree. A. I. R. 1923 Bom 26=46 B 990=24 Bom. L. R. 495=67 Ind. Cas. 766. Where the whole system of calculation adopted by the Court was challenged in plaintiff's application and there was no mere allegation of an arithmetical or clerical mistake, held that although Court purported to act under s. 152, it must be considered to have acted under Order XLVII. A. I. R. 1921 Lah. 250=3 Lah. L. J. 341=66 Ind. Cas. 992.

**Grounds for review.**—It is a good ground for review that evidence on a certain point was shut out owing to a misconception on the part of the pleader and therefore an issue was found against the party. A. I. R. 1931 Sind 3=130 Ind. Cas. 545. Erroneous view of evidence or law is no ground for review. Also grounds good for appeal would not support application for review. A. I. R. 1930 Cal. 701=34 C. W. N. 695=129 Ind. Cas. 355. The words "for any other sufficient reason" mean a reason sufficient on grounds at least analogous to those specified immediately previous to discovery of new and important matter or mistake or error apparent on the face of the record. A deliberate order passed by a Bench of the High Court with a view to obtain a just decision of the dispute between the parties does not constitute a reason for review analogous to discovery of fresh evidence or a manifest mistake on the record and therefore no review lies. A. I. R. 1930 Oudh 392=7 O. W. N. 741=126 Ind. Cas. 677. Where judgment does not conclude the question whether the decree may be executed against partners individually and when the decree as it stands can be executed only against property of the firm, the judgment may be reviewed. A. I. R. 1926 Lah. 236=92 Ind. Cas. 898. Where decree is amended without giving party affected thereby opportunity to show cause against it amendment is wrong. It is open to judgment-debtor to apply to original Court for review of its order. A. I. R. 1926 Lah. 384=24 A. L. J. 266=48 A. 281=94 Ind. Cas. 877. Parties agreeing to abide by decision in another suit, decree was passed in accordance with decision in that suit. But decision in the other suit was reversed in appeal. Such reversal is good ground for review of decree. A. I. R. 1927 Rang. 189=5 Rang. 251=103 Ind. Cas. 258. Where a suit is dismissed for default though parties were not directed to be present on that particular date, an application for review of the order dismissing the suit filed after more than two months would lie. A. I. R. 1928 Rang. 177=6 Rang. 254=111 Ind. Cas. 80. Where the Court passes an *ex parte* order for issue of writ of delivery of possession of property, Court can review its own order. A. I. R. 1925 Cal. 1023=41 C. L. J. 319=88 Ind. Cas. 921. Where the High Court by its decree ordered possession and *mesne* profits to the plaintiff but the executing Court finding that there was a compromise between the same parties as regards certain suit items, which was not brought to the notice of the High Court, modified the decree; held that the lower Court had no jurisdiction to make the order it passed and the proper remedy of the aggrieved party was to apply for review or other legal proceeding. A. I. R. 1928 Cal. 804=115 Ind. Cas. 591. Summary rejection of an appeal as time-barred without fixing date for hearing the appellant forms a good ground for review. A. I. R. 1925 Oudh 543=2 O. W. N. 678=90 Ind. Cas. 115. Where the question was as to the amount of *mesne* profits to be awarded to plaintiff and Court dismissed the claim as there was no evidence on the point, and where in a petition for review of the decision, it was contended that the burden of proving the value of the notes was on the opposite party and that Court made an error of law, held that there was not any mistake or error apparent on the face of the record within the meaning of rule 1. A. I. R. 1925 Pat. 368=6 P. L. T. 40=86 Ind. Cas. 143.

A remand order made on second appeal is, unless a review of it be obtained within the prescribed time, conclusively determination of the points of law involved

in it ; and the correctness of the law laid down upon a remand cannot be questioned in a subsequent second appeal ; the policy of the legislature as indicated in the Civil Procedure Code of 1938 is in favour of finality of orders of remand. Nor is the fact of the Courts adopting a different view of the law after an order has been made in general, a good ground for allowing a review of such an order after the time for a review has elapsed. A. I. R. 1923 Cal. 385=72 Ind. Cas. 588. Dismissal for default under Order IX, rule 8, is good ground for review. 9 L. W. 311=50 Ind. Cas. 327=37 M. L. J. 59. That if second opportunity be given applicant would satisfy Court that its first order was wrong is no good reason for review. 57 Ind. Cas. 145. Where counsel erroneously abandoned evidence but considered its admissibility, review did not lie. A. I. R. 1926 Oudh 644=35 Ind. Cas. 752.

The Commissioner has no power to "review" under s. 151, or Order XLVII, r. 1. He may on proper grounds re-open the inquiry into any of the items. Until his report is made he decides nothing final and conclusive. But he must have proper grounds for re-opening enquiry into any item, grounds similar to the provisions of rule 1, that rule being the best grounds in a matter of this kind. If he re-opens the enquiry on the grounds which are not proper the party aggrieved can object only by means of exceptions to this report. A. I. R. 1924 Bom. 231=25 Bom. L. R. 280=47 B. 593=82 Ind. Cas. 593. The mere fact that a Judge has not in terms referred to certain of the evidence in favour of the one party or the other is not a sufficient reason for granting a review. A. I. R. 1924 Pat. 258=2 Pat. 765=82 Ind. Cas. 502. S. 114, C. P. Code, has to be read with Order 47, rule 1, which prescribes the grounds upon which an application for review may be made ; and unless the case can be shown to be within the terms of this rule, a review ought not to be granted. 151 Ind. Cas. 41=11 O. W. N. 1084=1934 A. L. J. 918=36 P. L. R. 305=39 C. W. N. 1=60 C. L. J. 267=35 Bom. L. R. 1179=67 M. L. J. 608 (P. C.)=A. I. R. 1934 P. C. 213. Where there is no failure to apply the apposite law no review is competent. 148 Ind. Cas. 718=A. I. R. 1934 Nag. 111. Where the mistake though apparent is only of a clerical nature and does not affect the actual decision of the case is no ground for review. *Ibid.* The negligence on the part of a party or his agent is not any sufficient reason analogous to those mentioned in Order 47, rule 1 (1). A. I. R. 1934 Nag. 143=150 Ind. Cas. 44.

The phrase "any other sufficient reason" means any other sufficient cause similar or analogous to those categorically set forth in Order 47, rule 1. 154 Ind. Cas. 1102=1935 O. W. N. 446=A. I. R. 1935 Oudh 405. Under Order 47, rule 1, it is not enough that the applicant did not know the existence of the new matter, but he must also show that such matter would prove his case conclusively. 156 Ind. Cas. 733=A. I. R. 1935 Rang. 184. The grounds on which a review is competent are different from those on which an appeal under clause 10 of the Letters Patent (Lahore) will lie. A. I. R. 1935 Lah. 330=37 P. J. R. 708=157 Ind. Cas. 23=16 Lah. 602. Persons who are never parties to the suit or appeal need not file a review. A. I. R. 1935 Rang. 364=159 Ind. Cas. 186. The Court has no jurisdiction to grant a review on a reconsideration of the case on exactly the same materials. 37 P. L. R. 387. Where the decision of the Judge, which is sought to be reviewed, is based on an obvious misapprehension of the nature of attachment it is sufficient reason for review. A. I. R. 1936 Lah. 486=163 Ind. Cas. 374. The mere fact that the party seeking a review desires to have a sifting of the evidence is clearly not a sufficient reason for review. 19 N. L. J. 276. A review of a consent decree on the ground that it was obtained by fraud or mistake, cannot be had, and the consent decree can be set aside only by means of separate suit. 164 Ind. Cas. 785=A. I. R. 1936 Rang. 389. Review may be granted on the discovery of new evidence by the counsel. A. I. R. 1936 Lah. 650 ; but see 19 N. L. J. 276. It is doubtful whether an erroneous admission of fact made by counsel can be considered to be a good ground for review. 161 Ind. Cas. 444=A. I. R. 1936 Lah. 48. Subsequent reversal of view of law is no ground for granting review. A. I. R. 1936 Sind 34=161 Ind. Cas. 324. Where the Court rejects a plaint as not stamped with the requisite Court-fee, for failure to pay the necessary Court-fee after the plaintiff was granted time therefor again and again, the order cannot be reviewed by the Court. 59 M. 975=163 Ind. Cas. 96=1936 M. W. N. 538=43 L. W. 494=A. I. R. 1936 Mad. 503=70 M. L. J. 491 ; but see A. I. R. 1936 Pat. 30=17 Pat. L. T. 766=162 Ind. Cas. 992.

Where evidence on a point is shut out owing to misconception of pleader, it is a ground for review. A. I. R. 1931 Sind 3=25 S. L. R. 242. Faulty logic and error



of law is no ground for review. A. I. R. 1932 Pat. 275=11 Pat. 519. Omission to consider important facts on record is ground for review. A. I. R. 1932 Nag. 177=28 N. L. R. 221. Discovery of new argument based on fact or law is no ground for review. A. I. R. 1933 Mad. 290; 57 Ind. Cas. 147; 63 Ind. Cas. 344. Where due to mistake of everybody a revision filed and dismissed from an appealable order it is a ground of review. A. I. R. 1933 Lah. 476=14 Lah. 453=34 P. L. R. 470. Review may be granted when evidence was overlooked by excusable misfortune. A. I. R. 1933 Sind. 110. Court is competent to review its wrongly made order. 48 Ind. Cas. 129. The ground for review under rule 1, must be something which existed at the date of the decree. 70 Ind. Cas. 741=43 M. L. J. 33; 73 Ind. Cas. 4; 89 Ind. Cas. 216; 13 O. L. J. 507; 31 C. W. N. 822. Erroneous view of evidence or of law is no ground for review. 34 C. W. N. 696; see also 33 Bom. L. R. 617; A. I. R. 1930 Oudh 392; A. I. R. 1929 Nag. 251=12 N. L. J. 148; A. I. R. 1928 Nag. 305=11 N. L. J. 184; 112 Ind. Cas. 27; 107 Ind. Cas. 908; A. I. R. 1925 Nag. 384=87 Ind. Cas. 1029; 78 Ind. Cas. 997=19 S. L. R. 30. Overlooking substantial rights and taking too strict views of title of suit and its prayer is good ground for review. A. I. R. 1930 Rang. 162. Subsequent decision of superior Court of binding authority on the question of law does not make prior judgment passed on a different view of law liable to be reviewed. A. I. R. 1930 Mad. 579. Fraud practised upon Court or party discovered after order or decree is new and important matter. 33 C. W. N. 572; see also 64 Ind. Cas. 259; 48 A. 160=83 Ind. Cas. 946. Failure to consider bar of limitation is sufficient to justify Court in granting application for review. A. I. R. 1929 Nag. 185; A. I. R. 1928 Lah. 919. Where judgment is delivered without notice to parties it is good ground for review. A. I. R. 1929 Rang. 70=6 Rang. 794. Subsequent legislation is no ground for review. A. I. R. 1928 Bom. 308=52 B. 434. No review is justified except as mentioned in rule 1. 50 M. 67=A. I. R. 1926 Mad. 980.

**New evidence.**—Review on ground of discovery of new and important matter can be granted when such matter was in existence at the date of the decree. A. I. R. 1933 Mad. 485; see also A. I. R. 1933 Pat. 63; 64 Ind. Cas. 324; 23 C. W. N. 242. Fresh documentary evidence cannot be admitted in review unless sufficient reasons are given for non-production at time of trial. A. I. R. 1933 Oudh 328. The word "evidence" includes oral evidence also. A. I. R. 1928 Nag. 279. The evidence newly discovered must be at least such as is presumably to be believed, and if believed would be conclusive. A. I. R. 1929 All. 545; see also 38 Ind. Cas. 142. Review on ground of discovery of fresh evidence cannot be supported in absence of proof that applicant could not have got it earlier. 29 Bom. L. R. 371=A. I. R. 1927 Bom. 232. Review cannot be admitted where new evidence does not comply with requirements of rule. 85 Ind. Cas. 180; see also 75 Ind. Cas. 91; A. I. R. 1927 Mad. 641=50 M. 891; A. I. R. 1930 Oudh 392; A. I. R. 1930 Pat. 63. Discovery of new and important evidence on a question of fact is no ground for review of decree of the second Appellate Court. 31 Bom. L. R. 436=A. I. R. 1929 Bom. 225; see 21 A. L. J. 377=45 A. 458=73 Ind. Cas. 1016. Grant of review on the ground of new evidence must be made with greatest caution. 45 C. 564=21 C. W. N. 1076; see also 40 Ind. Cas. 79; 35 Ind. Cas. 342; 38 A. 218=14 A. L. J. 20=32 Ind. Cas. 622. Where appeal has been summarily dismissed, petition for review on ground of discovery of new evidence should be dismissed if review is sought by defendants who preferred appeal. 21 C. W. N. 430=24 C. L. J. 517=36 Ind. Cas. 460. High Court has no power to review order for dismissal under Order XLI, rule 11, on the ground of discovery of new and important evidence. A. I. R. 1922 Cal. 165=27 C. W. N. 918=36 C. L. J. 76=70 Ind. Cas. 408. Discovery of new and important evidence on a question of fact is no ground for review of the decree of the second Appellate Court. A. I. R. 1929 Bom. 225=31 Bom. L. R. 436=118 Ind. Cas. 255. Interference in revision is not competent simply because the Court has not said in so many words that the new matter is important. A. I. R. 1927 Mad. 641=52 M. L. J. 682=26 L. W. 277=50 M. 891=103 Ind. Cas. 377.

Omission to produce evidence owing to wrong advice of counsel is not sufficient ground for review. 5 O. L. J. 695=48 Ind. Cas. 918. In case of re-trial on ground of further evidence, further evidence should apparently be conclusive. A. I. R. 1918 P. C. 184. Review may be obtained where judgment is tainted by fraud. *Ibid.* Party cannot be allowed in review to raise case not raised at the trial. A. I. R. 1925 All. 552=47 A. 881=23 A. L. J. 534=88 Ind. Cas. 653. Question of jurisdiction of a Court to entertain application for review depends on the state of facts when the

application was made, A. I. R. 1931 Bom. 232=33 Bom. L. R. 378=132 Ind. Cas. 446. Review of judgment referred to in Art. 162 of the Limitation Act is the review of judgment mentioned in rule 1. A. I. R. 1929 Rang. 229=7 Rang. 201=118 Ind. Cas. 615. Court has jurisdiction to extend time upon application for extension. A. I. R. 1925 Pat. 452=90 Ind. Cas. 79.

Within his knowledge.—*Vide* 75 Ind. Cas. 91.

**Mistake or error.**—Decision on wrong authority is not mistake apparent on face of record. A. I. R. 1933 Lah. 223=38 P. L. R. 254. The error must be on the face of the record. A. I. R. 1933 Mad. 631 (F. B.)=65 M. L. J. 173 ; see also A. I. R. 1931 Mad. 608. An error apparent on face of the record "means that one can find in the judgment or a document, actually incorporated thereto, some legal proposition which is the basis of the judgment and which one can say is erroneous." Further an error of law to be apparent on the face of it must relate to some proposition of law which is well settled and beyond controversy so far as the Court which delivered the judgment is concerned and on which the judgment rests. A. I. R. 1929 Mad. 209=1928 M. W. N. 911 ; see also A. I. R. 1929 Rang. 70=6 Rang. 794 ; A. I. R. 1930 Lah. 37=11 Lah. 158 ; A. I. R. 1929 Lah. 424=30 P. L. R. 593 ; 76 Ind. Cas. 312=46 M. 955=45 M. L. J. 309. Mere mistake or error of law is not a sufficient reason. Such error or mistake must be apparent on the face of the record. 21 C. W. N. 1109 ; A. I. R. 1927 Rang. 20 ; 88 Ind. Cas. 112 ; A. I. R. 1929 Nag. 58 ; A. I. R. 1927 Mad. 998 ; A. I. R. 1928 Rang. 12 ; A. I. R. 1927 Nag. 252 ; 87 Ind. Cas. 125 ; 75 Ind. Cas. 177=5 P. L. T. 52. Change effected by later decisions in the construction of law on a subject is included in "error apparent on the face of the record". 29 C. W. N. 148. Clerical mistake is not sufficient. A. I. R. 1934 Nag. 111. Mere failure to raise point of law is no good reason for granting review. A. I. R. 1922 Pat. 119=5 P. L. J. 344=57 Ind. Cas. 11. Where a compromise is signed under a mistake, the discovery of the mistake is important matter. A. I. R. 1922 Mad. 445=16 L. W. 440=43 M. L. J. 280=31 M. L. T. 138=70 Ind. Cas. 425. Review must be granted of decree by Court without jurisdiction. 21 C. W. N. 1109=27 C. L. J. 594=41 Ind. Cas. 276. Where the decree contains an erroneous discretion to pay decretal amount to wrong person, it is not error apparent on the face of the record. A. I. R. 1924 Nag. 190=75 Ind. Cas. 829. Where Court passes personal decree where it ought not to have done so, and the same is found out by the party aggrieved only when it is sought to be executed, his remedy is not by way of amendment but by way of review. A. I. R. 1924 Mad. 225=18 L. W. 876=76 Ind. Cas. 786. Where judgment fails to notice the provision of s. 21, Civil Procedure Code, review can be entertained. A. I. R. 1929 Nag. 73=12 N. L. J. 13=116 Ind. Cas. 645. Decision of a case merely on the ground that the defendants had not proved their title without considering whether plaintiff had proved his title was error apparent on the face of the record. A. I. R. 1925 Oudh 329=12 O. L. J. 30=86 Ind. Cas. 29. Where decree against A is passed in suit brought by R on admission by A's general agent but *mukhtyarnama* did not confer any such power on agent, remedy open to A is by separate suit but not by review. A. I. R. 1928 Oudh 418=4 Luck. 70=5 O. W. N. 812=113 Ind. Cas. 483. Where the mistake though apparent is only of a clerical nature and does not affect the actual decision of the case it is no ground for review. 148 Ind. Cas. 718=A. I. R. 1934 Nag. 111. The meaning of "an error apparent on the face of the record" is an error which can be seen by a mere perusal of the record without reference to any other matter. A. I. R. 1935 Rang. 32=13 Rang. 220=154 Ind. Cas. 590.

**Other sufficient cause.**—Other sufficient cause means something *ejusdem generis* with or analogous to what precedes. A. I. R. 1928 Mad. 694=55 M. L. J. 330 ; see also A. I. R. 1929 Cal. 470=33 C. W. N. 883 ; 113 Ind. Cas. 887 ; 108 Ind. Cas. 750 ; A. I. R. 1928 Rang. 31=5 Rang. 675 ; 31 C. W. N. 822 ; A. I. R. 1927 Nag. 368 ; A. I. R. 1927 Mad. 355=52 M. L. J. 123 ; 92 Ind. Cas. 1013 ; 50 M. L. J. 493=A. I. R. 1926 Mad. 764 ; 90 Ind. Cas. 610=49 B. 839=27 Bom. L. R. 1150 ; 47 A. 361=23 A. L. J. 56=86 Ind. Cas. 168 ; 39 C. L. J. 247 ; 51 C. 70 ; 26 C. W. N. 697=49 I. A. 144=24 Bom. L. R. 1238 P. C. ; A. I. R. 1933 Lah. 596=13 Lah. 546 ; A. I. R. 1932 Pat. 275=13 P. L. T. 384. When the case of *pardanashin* lady is neglected by her agent it does not constitute "sufficient reason" for review. 42 Ind. Cas. 970. Review of decree on happening of events afterwards is not proper. 111 P. W. R. 1918=48 Ind. Cas. 137. Where the Court made a statement in its judgment that pleader made an important admission but the admission was not

in fact made the proper remedy is to ask the Judge for review of his judgment immediately. A. I. R. 1925 Mad. 1031=22 L. W. 234=49 M. L. J. 671=90 Ind. Cas. 775. Words "or for any substantial cause" in sub-rule 1 (b) do not give Court jurisdiction to entertain application for recording further evidence on grounds which would enable application to be entertained under Order 47, rule 1. A. I. R. 1924 Bom. 227=47 B. 674=25 Bom. L. R. 310=84 Ind. Cas. 74. Court granted a review on the ground that the plaintiffs were deprived of their right to rebut certain evidence : *Held* that, that would be a "sufficient reason" within rule 1, sub-rule 1. A. I. R. 1925 Oudh 266=11 O. L. J. 682=28 O. C. 4=84 Ind. Cas. 515. Failure of Court and pleaders to notice, provision of law applying to case is good ground for review. 30 C. L. J. 250=52 Ind. Cas. 29. Court can review order regarding costs only if strong case is made out. 63 Ind. Cas. 768=3 Pat. L. T. 67=6 Pat. L. J. 284=A. I. R. 1922 Pat. 1. That an order appealed from has been set aside by the Court passing it on review is no ground to review order passed in appeal. A. I. R. 1926 Lah. 655=96 Ind. Cas. 832.

**Procedure.**—Notice to other party must be given. (1930) M. W. N. 166 ; 116 Ind. Cas. 714 ; A. I. R. 1933 Pat. 643. Review can be granted on a particular point or the whole case may be reopened. 31 C. W. N. 1034=53 C. 856. Application for review must be filed before appeal is lodged. 36 C. W. N. 40 ; 28 C. W. N. 277 P. C. As regards three stages of review, 55 M. 171=A. I. R. 1932 Mad. 669. The effect of granting rule for review is not to reverse but simply to hold in suspense the judgment. A. I. R. 1924 Bom. 310=48 B. 210=26 Bom. L. R. 103=79 Ind. Cas. 753. Director of Company being "aggrieved person" within Order XLVII, r. 1, can apply for review though he was not party to original proceedings. A. I. R. 1929 Nag. 185=116 Ind. Cas. 427. Application for ascertainment of *mesne* profits dismissed on account of non-payment of Court-fee can be restored under s. 151, but not by way of review. A. I. R. 1926 Pat. 218=7 P. L. J. 313=5 Pat. 361 (F. B.)=93 Ind. Cas. 939. Where order was made by Registrar in insolvency ; an application for review must be made to him. A. I. R. 1924 Cal. 83=27 C. W. N. 916=80 Ind. Cas. 840. Where the power under Order XLVII, rule 1, is granted by the Code itself it is not necessary to invoke the inherent powers of the Court. A. I. R. 1924 Cal. 1054=28 C. W. N. 928=84 Ind. Cas. 278. It is open to the Appellate Court to examine the ground upon which the review was admitted and if the ground for the review does not come within the words of rule 1, then the Appellate Court is competent to hold that the review was improperly admitted. A. I. R. 1926 Cal. 217=30 C. W. N. 584=87 Ind. Cas. 770. An order passed at a stage of the case before the plaint is registered, can be reviewed without notice to the other party. A. I. R. 1922 Cal. 234=26 C. W. N. 391=70 Ind. Cas. 43. Where remedy open under Order 9, party in default will not be allowed to avoid law of limitation by applying for review. 3 Pat. L. W. 66=1 Pat. L. J. 547=38 Ind. Cas. 53. It is illegal for inferior Court to review judgment of superior Court. 50 Ind. Cas. 910. Under Order XLVII, rule 1, a party has a right to apply for review of judgment to the Court that has decided the case before an appeal has been preferred. The grounds on which such an application may be made are specially set forth in rule 1. 28 C. W. N. 277 (P. C.)=50 I. A. 183=2 Pat. 676 (P.C.). Where application for review is preferred before filing appeal, Court should decide the application on the merits notwithstanding the fact that an appeal has subsequently been filed. 65 Ind. Cas. 125. But where appeal to High Court has been dismissed under rule 11, Order XLI, lower Court cannot entertain or proceed with application for review. 63 Ind. Cas. 910=46 B. 1=23 Bom. L. R. 597. Application under this rule can be changed to one under rule 13, Order IX. A. I. R. 1922 Pat. 376=1 Pat. 48=62 Ind. Cas. 927=3 Pat. L. T. 29. Review petition filed too late may not be granted. L. R. 1A. 113 (Rev.). Review petition filed after appeal may be entertained, if the appeal be withdrawn before decision of review application. 43A. 288=19 A. L. J. 24=61 Ind. Cas. 334. The Court which can review its judgment is the Court which has pronounced it and not the appellate Court before which the appeal is pending. 147 Ind. Cas. 339=A. I. R. 1934 All. 175.

**Power of Court.**—Former Court can still entertain application to set aside its previous order. A. I. R. 1933 All. 783 (F. B.). An *ex parte* order issued without hearing opposite party cannot operate as *res judicata* and can be reviewed by the successor of the Judge who made it. A. I. R. 1929 Sind 110=116 Ind. Cas. 101. Where a Judge passes order for payment of Court-fees, his successor cannot vary order or refuses to hear opponent. A. I. R. 1926 Rang. 89=5 Bur. L. J. 9=95 Ind.

Cas. 541. Time for review cannot be extended unless sufficient cause is shown. A. I. R. 1931 All. 218=1931 A. L. J. 103=130 Ind. Cas. 839. The right of review is entirely different from that given by s. 234 of the Succession Act or s. 50 of the Probate and Administration Act. The powers of review can be exercised by Court dealing with a contentious matter in proceedings for the grant of letters of administration. A. I. R. 1925 Rang. 314=3 Rang. 261=91 Ind. Cas. 509. If the review comes before another Judge, the mere fact that that second Judge might disagree with his predecessor does not appear to be sufficient reason for granting a review. In order to succeed in review before a Judge other than the Judge who passed the order sought to be reviewed, it is necessary that there is good reason for supposing that the Judge who passed the order complained of could have been persuaded that it was wrong. A. I. R. 1922 U. B. R. 16=4 U. B. R. 27=64 Ind. Cas. 895.

**Bar to Review.**—It is a condition precedent for filing an application for review that no appeal has been preferred. Review cannot be refused because appeal was filed subsequently. A. I. R. 1929 All. 375=119 Ind. Cas. 561; see also A. I. R. 1935 Nag. 174=31 N. L. R. 418=157 I. C. 366. Withdrawal of appeal, where review petition was filed pending the appeal, before hearing of review application does not make that application for review competent. 132 Ind. Cas. 446=33 Bom. L. R. 378=A. I. R. 1931 Bom. 232. Where appeal is preferred and dismissed appellant cannot be said to have not preferred appeal, and no application for review of an order summarily dismissing appeal lies. A. I. R. 1929 Bom. 225=31 Bom. L. R. 426=118 Ind. Cas. 255. Where application for restoration was made and dismissed as time-barred, subsequent application for review cannot be entertained. A. I. R. 1925 Lah. 517=86 Ind. Cas. 616. There is no necessity for review while an appeal from the original decree is pending. But if a review is made and allowed the decree to be appealed against is the reviewed decree. A. I. R. 1926 Oudh 55=90 Ind. Cas. 119. Should review application succeed appeal must abate. 44 C. 1011=41 Ind. Cas. 497; see also 57 Ind. Cas. 785; 18 A. L. J. 135=54 Ind. Cas. 764=42 A. 317; 50 Ind. Cas. 329=15 N. L. R. 65. Review is not allowed if appeal is preferred against. 35 Ind. Cas. 867. Where a party presents a cross-objection in appeal, application for review by him is not maintainable. 35 Ind. Cas. 529. Where application for review is filed after an appeal is filed by the opposite party, the Court should decline to proceed with application until hearing of appeal and should direct the applicant to obtain the relief by filing cross-objections. 3 O. W. N. 968=99 Ind. Cas. 271. The word "party" in Order 47, rule 1 (2), is properly used in the context. It presupposes that the person to whom it refers is a party to decree. 159 Ind. Cas. 186=A. I. R. 1935 Rang. 364.

**Revision.**—The order rejecting review after hearing parties does not attract the application of s. 115. A. I. R. 1926 Cal. 773=30 C. W. N. 570=53 C. 679=96 Ind. Cas. 705. Interference in revision is not competent simply because the Court has not said in so many words that the new matter is important. A. I. R. 1927 Mad. 641=52 M. L. J. 682=103 Ind. Cas. 377=50 M. 891=(1927) M. W. N. 806. Though revising powers are wider under s. 25, Small Cause Courts Act than under s. 115 every order should not be interfered with in revision. A. I. R. 1928 Mad. 56=104 Ind. Cas. 746. Where lower Appellate Court postpones consideration of review application, applicant's only remedy to correct the order is in revision. A. I. R. 1929 All. 375=119 Ind. Cas. 561. Word "evidence" in rule 1, includes oral evidence also. Court should hold an enquiry for deciding whether applicant could or could not with due diligence have discovered evidence at the stage of original trial. Failure to make enquiry amounts to material irregularity to justify revision. A. I. R. 1928 Nag. 279=108 Ind. Cas. 439.

2. [S. 624.] An application for review of a decree or order of a Court, not being a High Court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge, who passed the decree or made the order sought to be reviewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub-rule (2), proviso (a), be disposed of by his successor.

**Notes.**—Rule 2 applies when another Judge entertains review. A. I. R. 1924 Pat. 809=75 Ind. Cas. 91. Rule 2 applies where Judge merely signs decree without writing or delivering judgment though his predecessor had granted application for review which was set aside. 20 C. W. N. 391=32 Ind. Cas. 101. Judge when transferred to another Court cannot grant review. A. I. R. 1925 All. 804=47 A. 751=23 A. L. J. 674=89 Ind. Cas. 295. Review application on ground of accidental omission may lie before succeeding Judge. A. I. R. 1936 Mad. 1083; but see A. I. R. 1937 Cal. 425.

**Form of applications for review.** 3. [S. 625.] The provisions as to the form of preferring appeals shall apply, *mutatis mutandis*, to applications for review.

**Notes.**—The objection that the review application is not accompanied by copy of decree or that Court-fee is insufficient are invalid pleas in revision against order granting review. A. I. R. 1925 All. 777=93 Ind. Cas. 996.

4. [S. 626.] (1) Where it appears to the Court that there is not sufficient ground for a review, it shall reject the application.

(2) Where the Court is of opinion that the application for review should be granted it shall grant the same :

Provided that—

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the decree or order, a review of which is applied for ; and,

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made, without strict proof of such allegation.

**Notes.**—Orders of Order XLVII, rule 4, are discretionary with Court. 115 P. R. 1916=38 Ind. Cas. 769. Proof of discovery of new matter must be established beyond all doubt before review can be granted. 38 Ind. Cas. 403=2 U. B. R. (1916) 126. Strict proof imports correctness and not sufficiency of evidence. High Court can satisfy itself as to sufficiency or propriety of evidence before lower Court. 20 Bom. L. R. 431=42 B. 295=20 Bom. L. R. 431=46 Ind. Cas. 14. Appeal lies from decree modified in review. A. I. R. 1931 Cal. 323=34 C. W. N. 1002=131 Ind. Cas. 258. Appellate Court cannot question grounds on which review was granted. Appeal against order granting review must comply with Order XLVII, rule 7. 31 M. L. J. 509=(1916) 2 M. W. N. 278=4 L. W. 408=36 Ind. Cas. 437. Appeal against order granting application for review must comply with provisions of Order XLVII, r. 7. 42 A. 628=18 A. L. J. 838=2 U. P. L. R. All. 283=60 Ind. Cas. 81. Once order for review is granted it cannot be dismissed. A. I. R. 1923 Oudh 93=9 O. L. J. 531=26 O. C. 24=74 Ind. Cas. 214. Appellate Court will have no fresh consideration of evidence admitted by lower Court in review. 64 Ind. Cas. 219. Order refusing review is not revisable. A. I. R. 1923 Oudh. 153=9 O. L. J. 623=74 Ind. Cas. 351. It is irregular procedure where review is granted merely on ground that certain ruling of High Court was not known to Court. A. I. R. 1931 All. 91=L. R. 11 A. 362 (Rev.). Revision does not lie from order granting review due to misconception of law. A. I. R. 1928 All. 392=50 A. 801=26 A. L. J. 477=113 Ind. Cas. 171. Order rejecting review is not subject to revision. A. I. R. 1925 Oudh. 594=12 O. L. J. 443=88 Ind. Cas. 582. Applicant must prove beyond all doubt that new matter was not known to him. A. I. R. 1925 Mad. 578=21 L. W. 276=87 Ind. Cas. 391. Where Appellate Court grants review without inquiring into importance of old sale-deed relating to land and then remands case with right of rebuttal, remand is justified. A. I. R. 1925 All. 552=47 A. 881=23 A. L. J. 534=88 Ind. Cas. 653. Appeal lies from decree reviewed as it amounts to new decree. A. I. R. 1928 Cal. 418=107 Ind. Cas. 751. Failure to produce new evidence must be accounted for, before review can be granted. A. I. R. 1928 Mad. 56=104 Ind. Cas. 746. No second appeal lies from small cause decree passed on review but a second appeal lies against order granting review. A. I. R. 1921 Lah. 24=50 Ind. Cas. 259. Other

party applying for review on basis of discovery of new document must prove ignorance of existence of document, and exercise of due diligence in attempt to produce it. 37 Ind. Cas. 399. Review application for addition of costs, of improvement to price of redemption settled by suit is not correct remedy. Application under Transfer of Property Act, s. 51, should be made. A. I. R. 1928 Nag 144=109 Ind. Cas. 95. Order granting review is appealable. A. I. R. 1924 Pat. 250=3 Pat. 134=5 Pat. L. T. 52=75 Ind. Cas. 177. *Ex parte* order on review reversing summary dismissal of appeal is held valid. A. I. R. 1925 Cal. 114=51 C. 943. Appellate Court can grant review at party's instance with right of rebuttal to other party. Party may pay cost when through negligence additional evidence is not produced though production has been granted. A. I. R. 1925 Mad. 181=48 M. L. J. 32=20 L. W. 840=85 Ind. Cas. 385. Application for review provided new evidence not known to plaintiff at time of judgment, has come to his knowledge may be made after 90 days. Strict proof means, conviction of Court beyond doubt. 27 C. L. J. 540=35 Ind. Cas. 651. A revision against an order refusing a review is not incompetent. A. I. R. 1934 All. 971=1934 A. L. J. 937 Where review is sought on the ground of discovery of new matter or evidence there should be strict proof of such allegation. 11 O. W. N. 249=18 R. D. 150. "Strict proof" means formal proof. Where the applicant for review supports his application with an affidavit the requirement as to "strict proof" is satisfied and review should be granted. A. I. R. 1933 Mad. 217=145 Ind. Cas. 766.

5. [S. 627.] Where the Judge or Judges, or any one of the Judges, who passed the decree or made the order, a review of which is applied for, continues or continue Application for review in Court consisting of two or more Judges. attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

*N. B.*—For local amendment in Bombay.—*Vide infra*.

Notes.—Original relations of parties exist where on review original relations of parties are not altered. A. I. R. 1931 Cal. 323=34 C. W. N. 1002=131 Ind. Cas. 258. Judges deciding original case can alone grant review on it. A. I. R. 1922 P. C. 112=3 Lah. 127=16 L. W. 37=26 C. W. N. 697=3 Pat. L. T. 435=43 M. L. J. 332=49 I. A. 144=24 Bom. L. R. 1286=36 C. L. J. 456=72 Ind. Cas. 566; see also A. I. R. 1928 Cal. 654=47 C. L. J. 623. Application made to a Court cannot be transferred by it to lower Court, but successor in office can hear it. A. I. R. 1930 All. 785=128 Ind. Cas. 771. Application for review made to Bench of two Judges, must be decided by single Judge when other is absent. A. I. R. 1927 Rang. 20=4 Rang. 265=5 Bur. L. J. 187. Order 47, rule 5, would apply to the case of a Court consisting of more than one Judge. 141 Ind. Cas. 392=34 P. L. R. 229=A. I. R. 1933 Lah. 130. This rule provides that if on account of the absence of the Judge for a period of six months after the filing of the application the application cannot be heard by the Judge it cannot be heard by another Judge of the Court. 145 Ind. Cas. 810=14 Pat. L. T. 234=A. I. R. 1933 Pat. 433.

6. [S. 628.] (1) Where the application for a review is heard by more than one Judge and the Court is equally divided, Application where rejected. the application shall be rejected.

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

7. [S. 629.] (1) An order of the Court rejecting the application shall not be appealable; but an order granting an application may be objected to on the ground that the application was—

- (a) in contravention of the provisions of rule 2,
- (b) in contravention of the provisions of rule 4, or
- (c) after the expiration of the period of limitation prescribed therefor and without sufficient cause.

Such objection may be taken at once by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under sub-rule (2) unless notice of the application has been served on the opposite party.

*N. B.*—For local amendment in Madras.—*Vide infra.*

**Notes.**—Appellate Court cannot criticise evidence upon which review is granted. Court deciding application is alone competent to do it. A. I. R. 1930 Cal. 424=34 C. W. N. 265=127 Ind. Cas. 71. Appeal if admitted on grounds other than those provided by Order XLVII, rule 7, is without jurisdiction and can be set aside in revision. A. I. R. 1929 Rang. 105=7 Rang. 187=118 Ind. Cas. 120; see also 32 C. W. N. 693=117 Ind. Cas. 849; A. I. R. 1928 Lah. 608=9 Lah. 298=29 P. L. R. 403=112 Ind. Cas. 518; A. I. R. 1928 Lah. 755=112 Ind. Cas. 46; A. I. R. 1927 Lah. 435=8 Lah. 617=29 P. L. R. 81=107 Ind. Cas. 596. Appeal against review order lies only under three specified conditions. A. I. R. 1927 Bom. 592=29 Bom. L. R. 1355=107 Ind. Cas. 50; A. I. R. 1927 Mad. 261=106 Ind. Cas. 172=(1927) M. W. N. 411. Appeal from order granting review will only lie under conditions of Order XLVII, r. 7. A. I. R. 1927 Mad. 641=52 M. L. J. 682=26 L. W. 277=50 M. 891=1927 M. W. N. 805=103 Ind. Cas. 377; but see A. I. R. 1926 Bom. 121=27 Bom. L. R. 1446=94 Ind. Cas. 591; A. I. R. 1929 Nag. 73=12 N. L. J. 13=25 N. L. R. 104=116 Ind. Cas. 645. Order XLIII, rule 1(w), gives right of appeal, whereas Order XLVII, r. 7, lays down conditions therefor. Latter overrules former. A. I. R. 1927 Lah. 435=8 Lah. 617=29 P. L. R. 81=107 Ind. Cas. 596; see also A. I. R. 1929 Lah. 26=116 Ind. Cas. 221; A. I. R. 1933 Bom. 183=35 Bom. L. R. 280; A. I. R. 1933 All. 778; A. I. R. 1925 Cal. 259=90 Ind. Cas. 504; A. I. R. 1926 Oudh 17=90 Ind. Cas. 332; A. I. R. 1934 Cal. 617=148 Ind. Cas. 1126; A. I. R. 1925 All. 395=86 Ind. Cas. 917; A. I. R. 1932 Nag. 177=28 N. L. R. 221; 16 R. D. 424; A. I. R. 1925 Oudh 266=11 O. L. J. 682; 28 O. C. 4=84 Ind. Cas. 515; 83 Ind. Cas. 548=A. I. R. 1924 Mad. 602=46 M. L. J. 463=19 L. W. 649=34 M. L. J. 224=(1924) M. W. N. 355; 25 C. W. N. 884=66 Ind. Cas. 909=A. I. R. 1921 Cal. 66; 31 M. L. J. 509=4 L. W. 408=36 Ind. Cas. 437; 38 Ind. Cas. 373=31 M. L. J. 827=5 L. W. 472. Rule 7 provides all possible grounds on which order granting application for review can be challenged. 3 Lah. L. J. 572=A. I. R. 1921 Lah. 395; see also 55 Ind. Cas. 444=38 M. L. J. 924=(1920) M. W. N. 228=11 L. W. 217; see also 15 A. L. J. 899=40 A. 68=43 Ind. Cas. 490. Order granting review for error clear on record is unappealable. A. I. R. 1929 Bom. 183=31 Bom. L. R. 137=116 Ind. Cas. 227. Under clause (e) if extension of time is justifiable can alone be considered. A. I. R. 1929 Lah. 26=116 Ind. Cas. 221. Order on review, if not confined to application, is without jurisdiction and can be set aside in appeal. A. I. R. 1928 Cal. 73=105 Ind. Cas. 4. Non-appearance by applicant on day fixed for review does not entail dismissal. A. I. R. 1927 Rang. 204=5 Rang. 121=102 Ind. Cas. 706. Order of refusal to restore application for review dismissed for default is unappealable. A. I. R. 1927 Rang. 204=5 Rang. 121=102 Ind. Cas. 706. Appeal will lie only for non-compliance of provisions of rule 2 or rule 4 and not for non-compliance of any other ground. A. I. R. 1926 All. 492=94 Ind. Cas. 78. Appellate order upholding grant of review is not revisable. A. I. R. 1925 Oudh 223=11 O. L. J. 700=87 Ind. Cas. 204. Refusal to grant review for reasons in rule 1 can be interfered with in appeal. Review cannot be turned into rehearing. A. I. R. 1926 Cal. 217=30 C. W. N. 584=87 Ind. Cas. 770. Order granting review for sufficient reasons need not be interfered in appeal. 53 Ind. Cas. 44. In appeal from decree admission of inadmissible evidence in review can be challenged. 23 C. W. N. 242=50 Ind. Cas. 119. Where Appellate Court on review takes view contrary to that taken by it first and subsequently grants review, appeal under Order XLVII, rule 7, does not lie. 115 P. R. 1916=38

Ind. Cas. 769. Order refusing restoration of application for review dismissed for default is not appealable. A. I. R. 1925 Cal. 430=81 Ind. Cas. 1017. Order refusing to grant review is not revisable under s. 115, C. P. Code. A. I. R. 1924 Bom. 344=26 Bom. L. R. 284=80 Ind. Cas. 267. Order granting review on other sufficient reason is unappealable under Order XLVII, rule 7. In presence of right of appeal no revision lies. 48 P. W. R. 1916=32 Ind. Cas. 860. An order under rule 4 granting an application for review can be appealed against, but only on the grounds mentioned in Order 47, rule 7 (1). 35 P. L. R. 467=A. I. R. 1934 Lah. 575. No appeal can be entertained from the order refusing review even in proceedings in insolvency. A. I. R. 1935 Pat. 177. There is no appeal under the law when an applicant has applied within 90 days of the order sought to be reviewed, except on the grounds mentioned in (a) and (b), Order 47, rule 7 (1) 18 R. D. 586. When a review is granted an appeal is permissible only on the specified grounds and they are if the order contravenes the provisions of rule 2 or rule 4 of Order 47, or if the application for review is barred by limitation. 162 Ind. Cas. 932=A. I. R. 1936 Pat. 310=17 Pat. L. T. 766. Order 43, rule 1 (w) should be read subject to the provisions of Order 47, rule 7. 146 Ind. Cas. 530=37 C. W. N. 705=A. I. R. 1933 Cal. 727; see also 141 Ind. Cas. 188=34 P. L. R. 88=A. I. R. 1933 Lah. 169; A. I. R. 1931 All. 329; 8 O. W. N. 1267.

8. [S. 630.] When an application for review is granted, a note thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing as it thinks fit.

*N. B.*—For local amendments in Allahabad, Bombay and Oudh.—*Vide infra*.

**Notes.**—In review whole case can be reconsidered. 20 C. W. N. 1165=27 C. L. J. 326=34 Ind. Cas. 592. Decree on review makes original decree null and void. Party aggrieved must appeal against decree after review. A. I. R. 1923 Cal. 113=36 C. L. J. 484=73 Ind. Cas. 34. Rule 8 shows that it is open to the Court either to re-hear the case or to make such order in regard to the re-hearing as it thinks fit. 157 Ind. Cas. 1084=A. I. R. 1935 All. 435.

9. [S. 629, last para] No application to review an order made on an application for a review or a decree or order passed or made on a review shall be entertained.

*N. B.*—For insertion of new rules in Allahabad, Oudh and Sind.—*Vide infra*.

**Notes.**—Second or third review application on the same grounds is not maintainable. A. I. R. 1927 Lah. 200=8 Lah. 54=102 Ind. Cas. 523. Order dismissing application for review is unappealable. A. I. R. 1927 Lah. 809=26 P. L. R. 237=105 Ind. Cas. 724.

## ORDER XLVIII.

### *Miscellaneous.*

1. [S. 93.] (1) Every process issued under this Code shall be served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

Costs of service.

(2) The Court-fee chargeable for such service shall be paid within a time to be fixed before the process is issued.

*N. B.*—For local amendments in Allahabad, C. P., Calcutta and Oudh—*Vide infra*.

**Notes.**—This rule does not apply as between Government and party. A. I. R. 1927 Pat. 318=8 Pat. L. T. 756=102 Ind. Cas. 791. Court must fix time for payment of process-fee at once. A. I. R. 1924 Nag. 298=79 Ind. Cas. 123. Rule does not require payment of process-fee at once. A. I. R. 1924 Nag. 271=20 N. L. R. 13=78 Ind. Cas. 996.



**2. [S. 94.]** All orders, notices and other documents required by this Code to be given to or served on any person shall be served in the manner provided for the service of summons.

Orders and notices how served.

**Notes.**—Procedure regarding service of notice specified in s. 80 is mandatory. Order 48, rule 2, is controlled by s. 80. 35 C. W. N. 161. Order 48, rule 2, should be read subject to the special procedure as to service of notice contained in s. 80, C. P. Code. 58 C. 850=35 C. W. N. 161=A. I. R. 1931 Cal. 503.

**3. [S. 644]** The forms given in the appendices, with such variation as the circumstances of each case may require, shall be used for the purposes therein mentioned.

Use of forms in appendices.

*N. B.*—For additional rule in Oudh.—*Vide infra*.

## ORDER XLIX.

### *Chartered High Courts.*

**1. [S. 636.]** Notice to produce documents, summonses to witnesses, and every other judicial process, issued, in the exercise of original civil jurisdiction of the High Court, and of its matrimonial, testamentary and intestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs.

Who may serve processes of High Courts.

**Notes.**—Person especially authorised by client is no proper person to serve summons. A. I. R. 1926 Cal. 977=30 C. W. N. 734=95 Ind. Cas. 375.

**2. [New.]** Nothing in this schedule shall be deemed to limit or otherwise affect any rules in force at the commencement of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court.

Saving in respect of Chartered High Courts.

**Amendment in British Burma.**—For “a Chartered High Court” read “the High Court” in British Burma.—*Vide* G. B. Order of 1937.

**Notes.**—Order XLI, rule 31 and Order XX and rules there-under do not apply to Chartered High Courts. A. I. R. 1929 All. 403=1929 A. L. J. 713=116 Ind. Cas. 23.

**3. [S. 638.]** The following rules shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction, namely :—

Application of rules.

- (1) rule 10 and rule 11, clauses (b) and (c) of Order VII ;
  - (2) rule 3 of Order X ;
  - (3) rule 2 of Order XVI ;
  - (4) rules 5, 6, 8, 9, 10, 11, 13, 14, 15 and 16 (so far as relates to the manner of taking evidence) of Order XVIII.
  - (5) rules 1 to 8 of Order XX ; and
  - (6) rule 7 of Order XXXIII (so far as relates to the making of a memorandum) ;
- and rule 35 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction.

**Amendment in British Burma.**—“For any Chartered High Court” and for “any such High Court” substitute “the High Court” in British Burma.—*Vide* G. B. Order of 1937.

*N. B.*—For local amendments in Bombay and Rangoon.—*Vide infra*.

**Notes.**—Provision in Code as to security for costs applies to appeals from original side. A. I. R. 1925 Mad. 1132=21 L. W. 662=87 Ind. Cas. 346.

## ORDER L.

*Provincial Small Cause Courts.*

1. [*New*] The provisions hereinafter specified shall not extend to Courts constituted under the Provincial Small Causes Court Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say—

- (a) so much of this schedule as relates to—
- (i) suits excepted from the cognizance of a Court of Small Causes or the execution of decrees in such suits;
  - (ii) the execution of decrees against immovable property or the interest of a partner in partnership property;
  - (iii) the settlement of issues; and
- (b) the following rules and orders,—
- Order II, rule 1 (frame of suit);
  - Order X, rule 3 (record of examination of parties);
  - Order XV, except so much of rule 4 as provides for the pronouncement at once of judgment;
  - Order XVIII, rules 5 to 12 (evidence);
  - Orders XLI to XLV (appeals);
  - Order XLVII, rules 2, 3, 5, 6, 7 (review);
  - Order LI.

**Amendment in British Burma**—This order is not in force in British Burma.—*Vide* G. B. Order of 1937.

**Notes.**—Small Cause Court can attach property before judgment under Order XXXVIII, r. 5. A. I. R. 1925 Mad 589=48 M. L. J. 406=1925 M. W. N. 169=48 M. 488=22 L. W. 103=87 Ind. Cas. 399; see also A. I. R. 1924 Cal. 193=28 C. W. N. 16=80 Ind. Cas. 300. Order XX applies to Provincial Small Cause Courts. A. I. R. 1928 All. 688=110 Ind. Cas. 818. If case involves many intricate questions, point must be indicated by Small Cause Court to enable production of evidence. 59 Ind. Cas. 703.

## ORDER LI.

*Presidency Small Cause Courts.*

1. [*New*.] Save as provided in rules 22 and 23 of Order V, rules 4 and 7 of Order XXI, and rule 4 of Order XXVI, and by the Presidency Small Cause Courts Act, 1882, this schedule shall not extend to any suit or proceeding in any Court of Small Causes established in the towns of Calcutta, Madras and Bombay.

*N. B.*—For additional orders in Allahabad, Bombay, Oudh, Sind and Rangoon,—*Vide infra*.

—

**APPENDIX A.****PLEADINGS.****(1) TITLES OF SUITS.**

IN THE COURT OF

A. B. ( <i>add description and residence</i> )	...	...	...	<i>Plaintiff,</i>
				<i>against</i>
C. D. ( <i>add description and residence</i> )	...	...	...	<i>Defendant</i>

**(2) DESCRIPTION OF PARTIES IN PARTICULAR CASES.**

The Secretary of State for India in Council.

The Advocate General of

The Collector of

The State of

The A. B. Company, Limited having its registered office at

A. B., a public officer of the C. D. Company.

A. B. (*add description and residence*), on behalf of himself and all other creditors of C. D. late of (*add description and residence*).A. B. (*add description and residence*), on behalf of himself and all other holders of debentures issued by the Company, Limited.

The official Receiver,

A. B., a minor (*add description and residence*), by C. D. [or by the Court of Wards], his next friend.A. B. (*add description and residence*), a person of unsound mind [or of weak mind], by C. D., his next friend.

A. B., a firm carrying on business in partnership at

A. B. (*add description and residence*), by his constituted attorney C. D. (*add description and residence*).A. B. (*add description and residence*), Shebait of Thakur.A. B. (*add description and residence*), executor of C. D., deceased.A. B. (*add description and residence*), heir of C. D., deceased.**(3) PLAINTS.**

No. 1.

**MONEY LENT.***(Title.)*

A. B., the above-named plaintiff, states as follows :—

1. On the                      day of                      19                      , he lent the defendant                      rupees repayable on the                      day of                      day of

2. The defendant has not paid the same, except                      rupees paid on the                      day of                      19                      .

[If the plaintiff claims exemption from any law of limitation, says :—]

3. The plaintiff was a minor [or insane] from the                      day of                      till the                      day of                      .

4. [*Facts showing when the cause of action arose and that the Court has jurisdiction.*]

5. The value of the subject-matter of the suit for the purpose of jurisdiction is rupees and for the purpose of court-fees is rupees.

6. The plaintiff claims rupees, with interest at per cent. from the day of 19 .

—  
No. 2.

MONEY OVERPAID.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. On the day of 19 , the plaintiff agreed to buy and the defendant agreed to sell bars of silver at annas per tola of fine silver.

2. The plaintiff procured the said bars to be assayed by *E. F.*, who was paid by the defendant for such assay, and *E. F.* declared each of the bars to contain 1,500 tolas of fine silver, and the plaintiff accordingly paid the defendant rupees.

3. Each of the said bars contained only 1,200 tolas of fine silver, of which fact the plaintiff was ignorant when he made the payment.

4 The defendant has not repaid the sum so overpaid.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

—  
No. 3.

GOODS SOLD AT A FIXED PRICE AND DELIVERED.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. On the day of 19 , *E. F.* sold and delivered to the defendant [one hundred barrels of flour, or the goods mentioned in the schedule hereto annexed, or sundry goods].

2. The defendant promised to pay rupees for the said goods on delivery [or on the day of , some day before the plaint was filed.]

3. He has not paid the same.

4. *E. F.* died on the day of 19 . By his last Will he appointed his brother, the plaintiff, his executor.

[*As in paras. 4 and 5 of Form No 1.*]

7. The plaintiff as executor of *E. F.* claims [*Relief claimed.*]

—  
No. 4.

GOODS SOLD AT A REASONABLE PRICE AND DELIVERED.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. On the day of 19 , plaintiff sold and delivered to the defendant [*sundry articles of house-furniture*] but no express agreement was made as to the price.

2. The goods were reasonably worth rupees.

3. The defendant has not paid the money.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

—  
No. 5.

GOODS MADE AT DEFENDANT'S REQUEST, AND NOT ACCEPTED.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. On the day of 19 , *E. F.* agreed with the plain-

tiff that the plaintiff should make for him [*six tables and fifty chairs*] and that *E. F.* should pay for the goods on delivery rupees.

2. The plaintiff made the goods, and on the            day of            19   .  
offered to deliver them to *E. F.*, and has ever since been ready and willing so to do.

3. *E. F.* has not accepted the goods or paid for them.

[*As in paras, 4 and 5 of Form No. 1, and Relief claimed.*]

No. 6.

#### DEFICIENCY UPON A RE-SALE [GOODS SOLD AT AUCTION.]

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. On the            day of            19   , the plaintiff put up at auction sundry [*goods*], subject to the condition that all goods not paid for and removed by the purchaser within [*ten days*] after the sale should be re-sold by auction on his account, of which condition the defendant had notice.

2. The defendant purchased [*one crate of crockery*] at the auction at the price of            rupees.

3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [*ten days*] after.

4. The defendant did not take away the goods purchased by him, nor pay for them within [*ten days*] after the sale, nor afterwards.

5. On the            day of            19   , the plaintiff re-sold the [*crate of crockery*], on account of the defendant, by public auction, for            rupees.

6. The expenses attendant upon such re-sale amounted to            rupees.

7. The defendant has not paid the deficiency thus arising, amounting to            rupees.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

No. 7.

#### SERVICES AT A REASONABLE RATE.

(Title.)

*A. B.*, above-named plaintiff, states as follows :—

1. Between the            day of            19   , and the            day of            19   , at            , plaintiff [*executed sundry drawings, designs and diagrams*] for the defendant, at his request ; but no express agreement was made as to the sum to be paid for such services.

2. The services were reasonably worth            rupees.

3. The defendant has not paid the money.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

No. 8.

#### SERVICES AND MATERIALS AT A REASONABLE COST.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. On the            day of            19   , at            , the plaintiff built a house [known as No.            ' in            ], and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.

2. The work done and materials supplied were reasonably worth            rupees.

3. The defendant has not paid the money.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

No. 9.

#### USE AND OCCUPATION.

(Title.)

*A. B.*, the above-named plaintiff executor of the Will of *X. Y.*, deceased, states as follows :—

1. That the defendant occupied the [house No.            Street], by permission of the said *X. Y.*, from the            day of            19   , until            19   , until

the                      day of                      19   , and no agreement was made as to payment for the use of the said premises.

2. That the use of the said premises for the said period was reasonably worth rupees.
3. The defendant has not paid the money.  
[As in paras 4 and 5 of Form No. 1.]
6. The plaintiff as executor of X. Y. [Relief claimed.]

---

No. 10.

ON AN AWARD.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the                      day of                      19   , the plaintiff and defendant, having a difference between them concerning [a demand of the plaintiff for the price of ten barrels of oil which the defendant refused to pay], agreed in writing to submit the difference to the arbitration of E. F. and G. H., and the original document is annexed hereto.

2. On the                      day of                      19   , the arbitrators awarded that the defendant should [pay the plaintiff                      rupees].

3. The defendant has not paid the money.  
[As in paras 4 and 5 of Form No. 1, and Relief claimed.]

---

No. 11.

ON A FOREIGN JUDGMENT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the                      day of                      19   , at                      , in the State [or Kingdom] of                      , the                      Court of that State [or Kingdom], in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff                      rupees, with interest from the said date.

2. The defendant has not paid the money.  
[As in paras 4 and 5 of Form No. 1, and Relief claimed.]

---

No. 12.

AGAINST SURETY FOR PAYMENT OF RENT.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the                      day of                      19   , E. F. hired from the plaintiff for the term of                      years, the [house No.                      ,                      Street], at the annual rent of                      rupees, payable [monthly].

2. The defendant agreed, in consideration of the letting of the premises to E. F. to guarantee the punctual payment of the rent.

3. The rent for the month of                      19   , amounting to                      rupees, has not been paid.

[If, by the terms of the agreement, notice is required to be given to the surety, add :—]

4. On the                      day of                      19   , the plaintiff gave notice to the defendant of the non-payment of the rent, and demanded payment thereof.

5. The defendant has not paid the same.  
[As in paras, 4 and 5 of Form No. 1, and Relief claimed.]

---

No 13.

BREACH OF AGREEMENT TO PURCHASE LAND.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the                      day of                      19   , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed.

[Or, on the                      day of                      19   , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty bighas of land in the village of                      for                      rupees.]

2. On the       day of       19       , the plaintiff, being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant], tendered to the defendant a sufficient instrument of transfer of the same [or, was ready and willing, and is still ready and willing, and offered to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money.

[As in paras 4 and 5 of Form No. 1, and Relief claimed].

Note :—For local amendment in Calcutta, *videi infra*.

NO. 14.  
NOT DELIVERING GOODS SOLD.  
(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the       day of       19       , the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the       day of       19       , and that the plaintiff should pay therefor       rupees on delivery.

2. On the [said] day the plaintiff was ready and willing, and offered to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods and the plaintiff has been deprived of the profits which would have accrued to him from such delivery.

[As in paras 4 and 5 of Form No. 1, and Relief claimed.]

NO. 15.  
WRONGFUL DISMISSAL.  
(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the       day of       19       , the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [an accountant, or in the capacity of foreman, or as the case may be], and that the defendant should employ the plaintiff as such for the term of [one year] and pay him for his services       rupees [monthly].

2. On the       day of       19       , the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

3. On the       day of       19       , the defendant wrongfully discharged the plaintiff, and refused to permit him to serve as aforesaid, or to pay him for his services.

[As in paras 4 and 5 of Form No. 1, and Relief claimed.]

NO. 16.  
BREACH OF CONTRACT TO SERVE.  
(Title.)

A. B., the above-named plaintiff, states as follows :—

1. On the       day of       19       , the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of       rupees, and that the defendant should serve the plaintiff as [an artist] for the term of [one year].

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the       day of       19       , offered so to do].

3. The defendant [entered upon] the service of the plaintiff on the above-mentioned day, but afterwards on the       day of       19       , he refused to serve the plaintiff as aforesaid.

[As in paras 4 and 5 of Form No. 1, and Relief claimed].

## No. 17.

## AGAINST A BUILDER FOR DEFECTIVE WORKMANSHIP.

(Title).

*A. B.*, the above-named plaintiff, states as follows :—

1. On the       day of       19       , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed. [*Or state the tenor of the contract*].

2. [The plaintiff duly performed all the conditions of the agreement on his part.]

3. The defendant [built the house referred to in the agreement in a bad and unworkmanlike manner].

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

## No. 18.

## ON A BOND FOR THE FIDELITY OF A CLERK.

(Title).

*A. B.*, the above-named plaintiff, states as follows :—

1. On the       day of       19       , the plaintiff took *E. F.* into his employment as a clerk.

2. In consideration thereof, on the       day of       19       , the defendant agreed with the plaintiff that if *E. F.* should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all monies, evidences of debt or other property received by him for the use of the plaintiff the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof not exceeding       rupees.

[*Or, 2.* In consideration thereof, the defendant by his bond of the same date bound himself to pay the plaintiff the penal sum of       rupees, subject to the condition that if *E. F.* should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all monies, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void.]

[*Or, 2.* In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed.]

3. Between the       day of       19       , and the       day of       19       , *E. F.* received money and other property, amounting to the value of       rupees, for the use of the plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

## No. 19.

## BY TENANT AGAINST LANDLORDS, WITH SPECIAL DAMAGE.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. On the       day of       19       , the defendant, by a registered instrument, let to the plaintiff [the house No.       ,       Street] for the term of       years, contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2. All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. On the       day of       19       , during the said term, *E. F.*, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend       rupees in moving, and lost the custom of *G. H.*, and *I. J.*, by such removal].

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]



## No. 20.

## ON AN AGREEMENT OF INDEMNITY.

(Title),

*A. B.*, the above-named plaintiff, states as follows :—

1. On the       day of       19       , the plaintiff and defendant, being partners in trade under the style of *A. B. and C. D.*, dissolved the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm.

2. The plaintiff duly performed all the conditions of the agreement on his part.

3. On the       day of       19       , [a judgment was recovered against the plaintiff and defendant by *E. F.*, in the High Court of Judicature at       upon a debt due from the firm to *E. F.*, and on the       day of       19       ,] the plaintiff paid       rupees [in satisfaction of the same].

4. The defendant has not paid the same to the plaintiff.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

## No. 21.

## PROCURING PROPERTY BY FRAUD.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. On the       day of       19       , the defendant for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant was solvent, and worth rupees       over all his liabilities].

2. The plaintiff was thereby induced to sell [and deliver] to the defendant, [dry goods] of the value of       rupees.

3. The said representations were false [*or state the particular falsehoods*] and were then known by the defendant to be so.

4. The defendant has not paid for the good. [*Or if the goods were not delivered*] The plaintiff, in preparing and shipping the goods and procuring their restoration, expended       rupees.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

## No. 22.

## FRAUDULENTLY PROCURING CREDIT TO BE GIVEN TO ANOTHER PERSON.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. On the       day       ,       19       ,       the defendant represented to the plaintiff, that *E. F.* was solvent and in good credit, and worth rupees over all his liabilities [*or that E. F. then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit.*]

2. The plaintiff was thereby induced to sell to *E. F.* [rice] of the value of rupees [on       months' credit].

3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff [*or to deceive and injure the plaintiff*].

4. *E. F.* [did not pay for the said goods at the expiration of the credit aforesaid, *or* ] has not paid for the said rice, and the plaintiff has wholly lost the same.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

## No. 23.

## POLLUTING THE WATER UNDER THE PLAINTIFF'S LAND.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called       and situate in       and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water

therein, and to have certain springs and streams of water which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2. On the            day of            19           , the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which flowed into the well.

3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

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#### No. 24.

#### CARRYING ON A NOXIOUS MANUFACTURE.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain lands called           , situate in

2. Ever since            the day of            19           , the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands and corrupted the air, and settled on the surface of the lands.

3. Thereby the trees, hedge, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and the cattle and live-stock of the plaintiff on the lands became unhealthy, and many of them were poisoned and died.

4. The plaintiff was unable to graze the lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep and farming-stock therefrom, and has been prevented from having so beneficial and healthy a use and occupation of the lands as he otherwise would have had.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

---

#### No. 25.

#### OBSTRUCTING A RIGHT OF WAY.

*A. B.*, the above-named plaintiff, states as follows :—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of [a house in the village of           ].

2. He was entitled to a right of way from the [house] over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants [with vehicles, *or* on foot] at all times of the year.

3. On the            day of            19           , defendant wrongfully obstructed the said way, so that the plaintiff could not pass [with vehicles, *or* on foot, *or* in any manner] along the way [and has ever since wrongfully obstructed the same].

4. (*State special damage, if any.*)

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

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#### No. 26.

#### OBSTRUCTING A HIGHWAY.

(Title.)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from            to            so as to obstruct it.

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones [or into the said trench] and broke his arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

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## No. 27.

## DIVERTING A WATER-COURSE.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. The plaintiff is, and at the time hereinafter mentioned was, possessed of a mill situated on a [stream] known as the \_\_\_\_\_, in the village of \_\_\_\_\_, district of \_\_\_\_\_.

2. By reason of such possession the plaintiff was entitled to the flow of the stream for working the mill.

3. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the defendant, by cutting the bank of the stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than \_\_\_\_\_ sacks per day, whereas, before the said diversion of water, he was able to grind \_\_\_\_\_ sacks per day.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

## No. 28.

## OBSTRUCTING A RIGHT TO USE WATER FOR IRRIGATION.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. Plaintiff is, and was at the time hereinafter mentioned, possessed of certain land situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

## No. 29.

## INJURIES CAUSED BY NEGLIGENCE ON A RAILROAD.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the defendants were common carriers of passengers by railway between \_\_\_\_\_ and \_\_\_\_\_.

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at \_\_\_\_\_ [or near the station of \_\_\_\_\_ or between the stations of \_\_\_\_\_ and \_\_\_\_\_] a collision occurred on the said railway caused by the negligence and unskillfulness of the defendants' servants, whereby the plaintiff was much injured [having his leg broken, his head cut, etc., and state the special damage, if any, as] and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as [a salesman].

[*As in paras 4 and 5 of Form No. 1, and Relief claimed.*]

[or thus :—2. On that day the defendants by their servants so negligently and unskillfully drove and managed an engine and a train of carriages attached thereto upon and along the defendants' railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, etc., as in para 3.]

## No. 30.

## INJURIES CAUSED BY NEGLIGENT DRIVING.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. The plaintiff is a shoemaker, carrying on business at \_\_\_\_\_.

The defendant is a merchant of \_\_\_\_\_.

2. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff was walking southward along Chowringhee, in the City of Calcutta, at about 3 o'clock in the afternoon.

He was obliged to cross Middleton Street, which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot pavement on the further side thereof, a carriage of the defendant's drawn by two horses under the charge and control of the defendant's servants, was negligently, suddenly and without any warning turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in suffering, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profits.

*[As in paras 4 and 5 of Form No. 1, and Relief claimed.]*

### No. 31.

#### FOR MALICIOUS PROSECUTION.

*(Title.)*

*A. B.*, the above-named plaintiff, states as follows :—

1. On the            day of            19   , the defendant obtained a warrant of arrest from

[a Magistrate of the said city *or as the case may be*] on a charge of, and the plaintiff was arrested thereon, and imprisoned for            days *or* hours, and gave bail in the sum of            rupees to obtain his release].

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the            day of            19   , the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to do business with him; *or* in consequence of the said arrest, the plaintiff lost his situation as clerk to one *E. F.*; *or* in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

*[As in paras 4 and 5 of Form No. 1, and Relief claimed.]*

### No. 32.

#### MOVABLES WRONGFULLY DETAINED.

*(Title.)*

*A. B.*, the above-named plaintiff, states as follows :—

1. On the            day of            19   , plaintiff owned [*or state facts showing a right to the possession*] the goods mentioned in the schedule hereto annexed [*or describe the goods*] the estimated value of which is            rupees.

2. From that day until the commencement of this suit the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit, on the            day of            19   , the plaintiff demanded the same from the defendant, but he refused to deliver them.

*[As in paras 4 and 5 of Form No. 1.]*

6. The plaintiff claims :—

(1) delivery of the said goods, *or*            rupees, in case delivery cannot be had;

(2)            rupees compensation for the detention thereof.

## No. 33.

## AGAINST A FRAUDULENT PURCHASER AND HIS TRANSFEREE WITH NOTICE.

(Title)

*A. B.*, the above-named plaintiff, states as follows :—

1. On the            day of            19            , the defendant *C. D.*, for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth            rupees over all his liabilities].

2. The plaintiff was thereby induced to sell and deliver to *C. D.* [one hundred boxes of tea] the estimated value of which is            rupees.

3. The said representations were false and were then known by *C. D.*, to be so [or at the time of making the said representations, *C. D.* was insolvent, and knew himself to be so]

4. *C. D.* afterwards transferred the said goods to the defendant *E. F.* without consideration [or who had notice of the falsity of the representation].

*[As in paras 4 and 5 of Form No. 1]*

7. The plaintiff claims :—

(1) delivery of the said goods, or            rupees, in case delivery            cannot be had ;

(2)            rupees compensation for the detention thereof.

## No. 34.

## RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. On the            day of            19            , the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant, situated at            , contained [ten bighas].

2. The plaintiff was thereby induced to purchase the same at the price of            rupees in the belief that the said representation was true, and signed an agreement of which the original is hereto annexed. But the land has not been transferred to him.

3. On the            day of            19            , the plaintiff paid the defendant            rupees as part of the purchase-money.

4. That the said piece of ground contained in fact only [five bighas.]

*[As in paras 4 and 5 of Form No. 1.]*

7. The plaintiff claims :—

(1)            rupees, with interest from the            day of

19            ,

(2) that the said agreement be delivered up and cancelled.

## No. 35.

## AN INJUNCTION RESTRAINING WASTE.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. The plaintiff is the absolute owner of [describe the property].

2. The defendant is in possession of the same under a lease from the plaintiff.

3. The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff.

*[As in paras 4 and 5 of Form No. 1.]*

6. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

*[Pecuniary compensation may also be claimed.]*

## No. 36.

## INJUNCTION RESTRAINING NUISANCE.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. Plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of [the house No.            ,            Street, Calcutta.]

2. The defendant is, and at all the said times was, the absolute owner of [a plot of ground in the same street ]

3. On the day of 19 the defendant erected upon his said plot a slaughter-house, and still maintains the same : and from that day until the present time has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff.]

[4. In consequence the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.]

[As in paras 4 and 5 of Form No. 1.]

7. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

-----  
No. 37.

PUBLIC NUISANCE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. The defendant has wrongly heaped up earth and stones on a public road known as Street at so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

2. The plaintiff has obtained the consent in writing of the Advocate General [or of the Collector or other officer appointed in this behalf] to the institution of this suit.

[As in paras 4 and 5 of Form No. 1.]

5. The plaintiff claims :—

(1) a declaration that the defendant is not entitled to obstruct the passage of the public along the said public road :

(2) an injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

-----  
No. 38.

INJUNCTION AGAINST THE DIVERSION OF A WATER-COURSE.

(Title.)

A. B., the above-named plaintiff, states as follows :—

[As in Form No. 27.]

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

-----  
No. 39.

RESTORATION OF MOVABLE PROPERTY THREATENED WITH DESTRUCTION,  
AND FOR AN INJUNCTION.

(Title.)

A. B., the above-named plaintiff, states as follows :—

1. Plaintiff is, and at all times hereinafter mentioned was, the owner of [a portrait of his grand-father which was executed by an eminent painter] and of which no duplicate exists [or state any fact: showing that the property is of a kind that cannot be replaced by money].

2. On the day of 19, he deposited the same for safe-keeping with the defendant.

3. On the day of 19, he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, cut or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting.]

[As in paras 4 and 5 of Form No. 1.]

## 8. The plaintiff claims.—

- (1) that the defendant be restrained by injunction from disposing of, injuring or concealing the said [painting] ;  
 (2) that he be compelled to deliver the same to the plaintiff.

## No. 40.

## INTERPLEADER.

## (Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. Before the date of the claims hereinafter mentioned *G. H.* deposited with the plaintiff [*describe the property*] for [safe-keeping].  
 2. The defendant *C. D.* claims the same [under an alleged assignment thereof to him from *G. H.*]  
 3. The defendant *E. F.* also claims the same [under an order of *G. H.* transferring the same to him].  
 4. The plaintiff is ignorant of the respective rights of the defendants.  
 5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct.  
 6. The suit is not brought by collusion with either of the defendants.

[*As in paras 4 and 5 of Form No. 1.*]

## 9. The plaintiff claims :—

- (1) that the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto ;  
 (2) that they be required to interplead together concerning their claims to the said property ;  
 [(3) that some person be authorized to receive the said property pending such litigation ;]  
 (4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto.

## No. 41.

ADMINISTRATION BY CREDITOR ON BEHALF OF HIMSELF AND  
ALL OTHER CREDITORS.

## (Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. *E. F.*, late of \_\_\_\_\_, was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of \_\_\_\_\_  
 [*here insert nature of debt and security if any*].

2. *E. F.* died on or about the \_\_\_\_\_ day of \_\_\_\_\_.

By his last Will dated the \_\_\_\_\_ day of \_\_\_\_\_  
 he appointed *C. D.* his executor [*or* devised his state in trust, etc., *or* died intestate, as the case may be].

3. The Will was proved by *C. D.* [*or* letters of administration were granted, etc.]

4. The defendant has possessed himself of the movable [and immovable, *or* the proceeds of the immovable] property of *E. F.*, and has not paid the plaintiff his debt.  
 [*As in paras 4 and 5 of Form No. 1.*]

7. The plaintiff claims that an account may be taken of the movable [and immovable] property of *E. F.* deceased and that the same may be administered under the decree of the Court.

## No. 42.

## ADMINISTRATION BY SPECIFIC LEGATEE.

## (Title.)

[*Alter Form No. 41 thus*].—

[*Omit paragraph 1 and commence paragraph 2*] *E. F.*, late of \_\_\_\_\_  
 died on or about the \_\_\_\_\_ day of \_\_\_\_\_

By his last Will, dated the \_\_\_\_\_ day of \_\_\_\_\_  
 he appointed *C. D.* his executor, and bequeathed to the plaintiff [*here state the specific legacy*].

*For paragraph 4 substitute—*

The defendant is in possession of the movable property of *E. F.* and, amongst other things, of the said [*here name the subject of the specific bequest*].

*For the commencement of paragraph 7 substitute—*

The plaintiff claims that the defendant may be ordered of *E. F.*, and, amongst other things, of the said [*here name the subject of the specific bequest*].

## No. 43.

## ADMINISTRATION BY PECUNIARY LEGATEE.

(Title.)

[Alter Form No. 41 thus]—

[Omit paragraph 1 and substitute for paragraph 2] *E. F.*, late of \_\_\_\_\_, died on or about the \_\_\_\_\_ day of \_\_\_\_\_. By his last Will dated the \_\_\_\_\_ day of \_\_\_\_\_, he appointed *C. D.*, his executor, and bequeathed to the plaintiff a legacy of \_\_\_\_\_ rupees.

*In paragraph 4 substitute "legacy" for "debt".*

Another Form.

(Title.)

*E. F.*, the above-named plaintiff, states as follows :—

1. *A. B.* of *K* in the \_\_\_\_\_ died on the \_\_\_\_\_ day of \_\_\_\_\_.

By his last Will, dated the \_\_\_\_\_ day of \_\_\_\_\_, he appointed the defendant and *M. N.* [who died in the testator's lifetime] his executors, and bequeathed his property whether movable or immovable, to his executors in trust to pay the rents and income thereof to the plaintiff for his life; and after his decease, and in default of his having a son who should attain twenty-one, or a daughter who should attain that age or marry, upon trust as to his immovable property for the person who would be the testator's heir-at-law, and as to his movable property for the persons who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The Will was proved by the defendant on the \_\_\_\_\_ day of \_\_\_\_\_. The plaintiff has not been married.

3. The testator was at his death entitled to movable and immovable property; the defendant entered into the receipt of the rents of the immovable property and got in the movable property; he has sold some part of the immovable property.

[As in paras 4 and 5 of Form No. 1.]

6. The plaintiff claims :—

(1) to have the movable and immovable property of *A. B.* administered in this Court and for that purpose to have all proper directions given and accounts taken;

(2) such further or other relief as the nature of the case may require.

## No. 44

## EXECUTION OF TRUSTS.

(Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. He is one of the trustees under an instrument of settlement bearing date on or about the \_\_\_\_\_ day of \_\_\_\_\_ made upon the marriage of *E. F.* and *G. H.*, the father and mother of the defendant [or an instrument of transfer of the estate and effects of *E. F.* for the benefit of *C. D.*, the defendant, and the other creditors of *E. F.*]

2. *A. B.* has taken upon himself the burden of the said trust, and is in possession of [or of the proceeds of] the movable and immovable property transferred by the said instrument.

*C. D.* claims to be entitled to a beneficial interest under the instrument.

[As in paras 4 and 5 of Form No. 1.]



6. The plaintiff is desirous to account for all the rents and profits of the said immovable property [and the proceeds of the sale of the said, *or* of part of the said, immovable property, or movable, *or* the proceeds of the sale of, *or* of part of, the said movable property, *or* the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the Court will take the accounts of the said trust, and also that the whole of the said trust estate may be administered in the Court for the benefit of *C. D.*, the defendant, and all other persons who may be interested in such administration, in the presence of *C. D.* and such other person so interested as the Court may direct or that *C. D.* may show good cause to the contrary.

[*N. B.—Where the suit is by a beneficiary, the plaint may be modelled, mutatis mutandis, on the plaint by a legatee.*]

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NO. 45.

## FORECLOSURE OR SALE.

(Title).

*A. B.*, the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagee of lands belonging to the defendant.
2. The following are the particulars of the mortgage :—
  - (a) (date) ;
  - (b) (names of mortgagor and mortgagee) ;
  - (c) (sum secured) ;
  - (d) (rate of interest) ;
  - (e) (property subject to mortgage) ;
  - (f) (amount now due) ;
  - (g) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).
3. The plaintiff took possession of the mortgaged property on the \_\_\_\_\_ day of \_\_\_\_\_ and is ready to account as mortgagee in possession from that time.

[*As in paras 4 and 5 of Form No. 1.*]

6. The plaintiff claims :—

- (1) payment, or in default [sale *or*] foreclosure [and possession] ;

[*Where Order 34, rule 6, applies.*]

- (2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for a decree for the balance.

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NO. 46

## REDEMPTION.

(Title).

*A. B.*, the above-named plaintiff, states as follows :—

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.
2. The following are the particulars of the mortgage :—

- (a) (date) ;
- (b) (names of mortgagor and mortgagee) ;
- (c) (sum secured) ;
- (d) (rate of interest) ;
- (e) (property subject to mortgage) ;
- (f) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims).

[*If the defendant is mortgagee in possession, add.*]

3. The defendant has taken possession [or has received the rents] of the mortgaged property.

[*As in paras 4 and 5 of Form No. 1.*]

6. The plaintiff claims to redeem the said property, and to have the same reconveyed to him [and to have possession thereof].

Note :—For local amendment in Rangoon *vide infra*.

## No. 47.

## SPECIFIC PERFORMANCE (No. 1).

## (Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. By an agreement dated the \_\_\_\_\_ day of \_\_\_\_\_ and signed by the defendant, he contracted to buy of [or sell to] the plaintiff certain immovable property therein described and referred to for the sum of \_\_\_\_\_ rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so

3. The plaintiff has been and still is ready and willing specifically to perform the agreement on his part of which the defendant has had notice.

[As in paras 4 and 5 of Form No. 1.]

6. The plaintiff claims that the Court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said property [or to accept a transfer and possession of the said property] and to pay the costs of the suit.

## No. 48.

## SPECIFIC PERFORMANCE (No. 2).

## (Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff and defendant enter into an agreement, in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immovable property described in the agreement.

2. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff tendered \_\_\_\_\_ rupees to the defendant, and demanded a transfer of the said property by a sufficient instrument.

3. On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, the plaintiff again demanded such transfer. [Or the defendant refused to transfer the same to the plaintiff].

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready and willing to pay the purchase-money of the said property to the defendant.

[As in paras 4 and 5 of Form No. 1.]

8. The plaintiff claims—

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [following the terms of the agreement.]

(2) \_\_\_\_\_ rupees compensation for withholding the same.

## No. 49.

## PARTNERSHIP.

## (Title.)

*A. B.*, the above-named plaintiff, states as follows :—

1. He and *C. D.*, the defendant, have been for \_\_\_\_\_ years [or months] past carrying on business together under articles of partnership in writing [or under a deed or under a verbal agreement].

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners [or the defendant has committed the following breaches of the partnership articles :—

(1)

(2)

(3)

]

[As in paras 4 and 5 of Form No. 1.]

5. The plaintiff claims—  
 (1) dissolution of the partnership ;  
 (2) that accounts be taken ;  
 (3) that a receiver be appointed ;

(N. B.—In suits for the winding-up of any partnership, omit the claim for dissolution, and instead insert a paragraph stating the facts of the partnership having been dissolved.)

#### (4) WRITTEN STATEMENTS.

##### *General defences.*

Denial. The defendant denies that (*set out facts*).

The defendant does not admit that (*set out facts*).

The defendant admits that but says that

Protest. The defendant denies that he is a partner in the defendant firm of

The defendant denies that he made the contract alleged or any contract with the plaintiff.

The defendant denies that he contracted with the plaintiff as alleged or at all.

The defendant admits assets but not the plaintiff's claim.

The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.

The suit is barred by article or article of the second schedule to the \* Indian Limitation Act, 1877.†

Limitation. The Court has no jurisdiction to hear the suit on the ground that (*set forth the grounds*).

Jurisdiction. On the day of a diamond ring was delivered by the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.

Insolvency. The defendant has been adjudged an insolvent.

The plaintiff before the institution of the suit was adjudged an insolvent and the right to sue vested in the receiver.

Minority. The defendant was a minor at the time of making the alleged contract.

The defendant as to the whole claim (*or as to Rs.* part of the money claimed, *or as the case may be*) has paid into Court Rs. and says that this sum is enough to satisfy the plaintiff's claim (*or the part aforesaid*).

Performance remitted. The performance of the promise alleged was remitted on the (*date*).

Rescission. The contract was rescinded by agreement between the plaintiff and defendant.

*Res judicata.* The plaintiff's claim is barred by the decree in suit (*give the reference*).

The plaintiff is estopped from denying the truth of (*inserts statement as to which estoppel is claimed*) because here state the facts relied on as creating the estoppel).

Ground of defence subsequent to institution of suit. Since the institution of the suit, that is to say, on the day of (*set out facts*).

#### No. 1.

##### • DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED.

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.

\* See now the Indian Limitation Act, 1908 (IX of 1908).

† XV of 1877.

3. The price was not Rs.

[or]

4. }  
5. } Except as to Rs.  
6. }

same as } 1  
2.  
3.

7. The defendant [or A. B. the defendant's agent] satisfied the claim by payment before suit to the plaintiff [or to C. D., the plaintiff's agent] on the day of 19 .

8. The defendant satisfied the claim by payment after suit to the plaintiff on the day of 19 .

#### No. 2.

#### DEFENCE IN SUITS ON BONDS.

1. The bond is not the defendant's bond.
2. The defendant made payment to the plaintiff on the day according to the condition of the bond.
3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.

#### No. 3.

#### DEFENCE IN SUITS ON GUARANTEES.

1. The principal satisfied the claim by payment before suit.
2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

#### No 4.

#### DEFENCE IN ANY SUIT FOR DERT.

1. As to Rs. 200 of the money claimed the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.  
Particulars are as follows :—

					Rs.
1907, January, 25th.	...	...	...	...	150
„ February 1st.	...	...	...	...	50
Total					200

2. As to the whole [or as to Rs. part of the money claimed] the defendant made tender before suit of Rs. and has paid the same into Court.

#### No. 5.

#### DEFENCE ON SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING.

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage and that it was under the charge or control of the defendant's servants. The carriage belonged to of Street, Calcutta, livery stable-keepers employed by the defendant to supply him with carriages and horses ; and the person under whose charge and control the said carriage was, was the servant of the said
2. The defendant does not admit that the said carriage was turned out of the Middleton Street, either negligently, suddenly or without warning, or at a rapid or dangerous pace.
3. The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.
4. The defendant does not admit the statements contained in the third paragraph of the plaint.

#### No. 6.

#### DEFENCE IN ALL SUITS FOR WRONGS.

1. Denial of the several acts [or matters] complained of.

## No 7.

## DEFENCE IN SUITS FOR DETENTION OF GOODS.

1. The goods were not the property of the plaintiff.
2. The goods were detained for a lien to which the defendant was entitled.

Particulars are as follows :—

1907, May 3rd. To carriage of the goods claimed from Delhi to Calcutta :—  
45 maunds at Rs. 2 per maund ... .. Rs. 90.

## No. 8

## DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT.

1. The plaintiff is not the author [*assignee, etc.*]
2. The book was not registered.
3. The defendant did not infringe.

## No. 9.

## DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK.

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

## No. 10.

## DEFENCES IN SUITS RELATING TO NUISANCES.

1. The plaintiff's lights are not ancient [*or deny his other alleged prescriptive rights*].
2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.
3. The defendant denies that he or his servants pollute the water [*or do what is complained of*].

[*If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of the claim, i.e., whether by prescription, grant or what.*]

4. The plaintiff has been guilty of laches of which the following are particulars :—

1870. Plaintiff's mill began to work.

1871. Plaintiff came into possession.

1883. First complaint.

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence and says that the acts complained of, have not produced any damage to the plaintiff. [*If other grounds are relied on, they must be stated, e.g., limitation as to the past damage.*]

## No. 11.

## DEFENCE TO SUIT FOR FORECLOSURE.

1. The defendant did not execute the mortgage.
2. The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied*).
3. The suit is barred by article \_\_\_\_\_ of the second schedule to the \* Indian Limitation Act, 1877.
4. The following payments have been made, viz :—

Rs.  
(Insert date)———, . . . . 1,000

(Insert date)———, . . . . 500

5. The plaintiff took possession on the \_\_\_\_\_ of \_\_\_\_\_, and has received the rents ever since.
6. That plaintiff released the debt on the \_\_\_\_\_ of \_\_\_\_\_.
7. The defendant transferred all his interest to A. B. by a document, dated \_\_\_\_\_.

## No. 12.

## DEFENCE TO SUIT FOR REDEMPTION.

1. The plaintiff's right to redeem is barred by article \_\_\_\_\_ of the second schedule to the \* Indian Limitation Act, 1877.

\* XV of 1877. See now the Indian Limitation Act, 1908 (IX of 1908).

2. The plaintiff transferred all interest in the property to *A. B.*
  3. The defendant, by a document dated the \_\_\_\_\_ day of \_\_\_\_\_ transferred all his interest in the mortgage-debt and property comprised in the mortgage to *A. B.*
  4. The defendant never took possession of the mortgaged property, or received the rents thereof.
- (If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits.)*

## No. 13.

## DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE.

1. The defendant did not enter into the agreement.
2. *A. B.* was not the agent of the defendant *(if alleged by plaintiff)*.
3. The plaintiff has not performed the following conditions—*(Conditions)*.
4. The defendant did not—*(alleged acts of part performance)*.
5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matter—*(State why)*.
6. The agreement is uncertain in the following respects—*(State them)*,
7. *(or)* The plaintiff has been guilty of delay.
8. *(or)* The plaintiff has been guilty of fraud *(or misrepresentation)*.
9. *(or)* The agreement is unfair.
10. *(or)* The agreement was entered into by mistake.
11. The following are particulars of (7), (8), (9), (10) *(or as the case may be)*.
12. The agreement was rescinded under Conditions of sale. No. 11 *(or by mutual agreement)*.

*(In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on e.g., the Indian Limitation Act, accord and satisfaction, release fraud, etc.)*

## No. 14.

## DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATTEE.

1. *A. B.*'s Will contained a charge of debts; he died insolvent; he was entitled at his death to some immovable property which the defendant sold and which produced the net sum of Rs. \_\_\_\_\_ and the testator had some movable property which the defendant got in, and which produced the net sum of Rs. \_\_\_\_\_
2. The defendant applied the whole of the said sums and the sum of Rs. \_\_\_\_\_ which the defendant received from rents of the immovable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.
3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.
4. The defendant submits that the plaintiff ought to pay the costs of this suit.

## No 15.

## PROBATE OF WILL IN SOLEMN FORM.

1. The said Will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 *[or of the Hindu Wills Act, 1870]*.
2. The deceased at the time the said Will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.
3. The execution of the said Will and codicil was obtained by the undue influence of the plaintiff, [and others acting with him whose names are at present unknown to the defendant].
4. The execution of the said Will and codicil was obtained by the fraud of the plaintiff, such fraud so far as is within the defendant's present knowledge, being *[State the nature of the fraud]*.

5. The deceased at the time of the execution of the said Will and codicil did not know and approve of the contents thereof [or of the contents of the residuary clause in the said Will, *as the case may be.*]

6. The deceased made his true last Will, dated the 1st January, 1873, and thereby appointed the defendant sole executor thereof.

The defendant claims :—

(1) that the Court will pronounce against the said Will and codicil propounded by the plaintiff :

(2) that the Court will decree probate of the Will of the deceased dated the 1st January, 1873, in solemn form of law.

— — —  
No. 16.

PARTICULARS. (O. 6, r. 5.)

*Title of suit.*

The following are the particulars of *(here state the matters in respect of which particulars have been ordered)* delivered pursuant to the order of the of .

*(Here set out the particulars ordered in paragraphs if necessary).*

## APPENDIX B.

### PROCESS.

No. 1.

SUMMONS FOR DISPOSAL OF SUIT. (O. 5, rr. 1, 5.)

*(Title.)*

To

*[Name, description and place of residence.]*

WHEREAS

has instituted a suit against you for  
you are hereby summoned to appear in this Court in person or by a pleader duly instructed and able to answer all material questions relating to the suit or who shall be accompanied by some person able to answer all such questions, on the day of 19, at o'clock in the noon, to answer the claim, and as the day fixed for your appearance is appointed for the final disposal of the suit, you must be prepared to produce on that day all the witnesses upon whose evidence and all the documents upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

*Judge.*

NOTICE—1. Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compell the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both,

**Note :—**For local amendments in Bombay, Calcutta and Madras, *vide infra*.

## No. 2.

## SUMMONS FOR SETTLEMENT OF ISSUES. (O. 5, rr. 1, 5.)

To

(Title.)

[Name, description and place of residence.]

WHEREAS

has instituted a suit against you for  
 you are hereby summoned to appear in the Court in person, or by a pleader duly  
 instructed, and able to answer all material questions relating to the suit, or who shall  
 be accompanied by some person able to answer all such questions on the  
 day of 19 , at o'clock in the  
 noon, to answer the claim ; and you are directed to produce on that day all the docu-  
 ments upon which you intend to rely in support of your defence.

Take notice that, in default of your appearance on the day before mentioned,  
 the suit will be heard and determined, in your absence.

GIVEN under my hand and the seal of the Court, this day of  
 19 .

NOTICE.—1. Should you apprehend your witnesses will not attend of their own  
 accord, you can have a summons from this Court to compel the  
 attendance of any witness, and the production of any document that  
 you have a right to call on the witness, to produce, on applying  
 to the Court and on depositing the necessary expenses.

2. If you admit the claim, you should pay the money into Court together  
 with the costs of the suit, to avoid execution of the decree, which  
 may be against your person or property, or both.

Note :—For local amendment in Bombay, *vide infra*.

## No. 3.

## SUMMONS TO APPEAR IN PERSON (O. 5, r. 3.)

(Title.)

TO

[Name, description and place of residence.]

WHEREAS

has instituted a suit against you for  
 you are hereby summoned to appear in this Court in person  
 on the day of 19 , at o'clock in  
 the noon, to answer the claim ; and you are directed to produce  
 on that day all the documents upon which you intend to rely in support of your  
 defence.

Take notice that, in default of your appearance on the day before mentioned, the  
 suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of  
 19 .

Note :—For local amendment in Bombay *vide infra*.

## No 4.

## SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT.

(O. 37, r. 2.)

(Title.)

To

[Name, description and place of residence.]

WHEREAS

has instituted a suit against you under Order XXXVII of  
 the Code of Civil Procedure, 1908, for Rs. balance of principal and in-  
 terest due to him as the of a of which a copy is hereto  
 annexed you are hereby summoned to obtain leave from the Court within ten days  
 from the service hereof to appear and defend the suit, and within such time to cause  
 an appearance to be entered for you. In default whereof the plaintiff will be entitled  
 at any time after the expiration of such ten days to obtain a decree for any sum, not  
 exceeding the sum of Rs.

and the sum of Rs. for costs, "together with such interest, if any from  
 the date of the institution of the suit as the Court may order".\*

\* Inserted by Act 30 of 1926.



**this proceeding.**

The court-fee of \_\_\_\_\_ chargeable in respect to the summons has been realized in this Court in stamps.

Dated 19 \_\_\_\_\_,

*Judge.*

Note :—For local amendment in Allahabad, *vide infra*.

—  
No. 8.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PRISONER.

(O. 5, r. 24.)

(Title.)

To

The Superintendent of the Jail at

Under the provisions of Order V, rule 24, of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is

a prisoner in Jail. You are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

*Judge.*

—  
No. 9.

ORDER FOR TRANSMISSION OF SUMMONS TO BE SERVED ON A PUBLIC SERVANT OR SOLDIER. (O. 5, rr 27, 28.)

(Title.)

To

Under the provisions of Order V, rule 27 (or 28, as the case may be), of the Code of Civil Procedure, 1908, a summons in duplicate is herewith forwarded for service on the defendant who is stated to be serving under you. You

are requested to cause a copy of the said summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you.

*Judge.*

—  
NO. 10.

TO ACCOMPANY RETURNS OF SUMMONS OF ANOTHER COURT. (O. 5, r. 23.)

(Title.)

Read proceeding from the \_\_\_\_\_ forwarding  
for service on \_\_\_\_\_ in Suit No.  
of 19 \_\_\_\_\_ of that Court.

Read Serving Officer's endorsement stating that the  
and proof of the above having been duly taken by me on the oath of \_\_\_\_\_  
and \_\_\_\_\_ it is ordered that the  
be returned to the \_\_\_\_\_ with a copy of this  
proceeding.

*Judge.*

NOTE :—This form will be applicable to process other than summons, the service of which may have to be effected in the same manner.

Note :—For local amendments in Allahabad, Bombay and Calcutta, *vide infra*.

—  
No. 11.

AFFIDAVIT OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE. (O. 5, r. 18.)

(Title.)

The Affidavit of

son of

I

Make oath  
affirm and say as follows:—

(1) I am a process-server of this Court.

(2) On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, I received a summons issued by \_\_\_\_\_  
notice  
the Court of \_\_\_\_\_

in Suit No. \_\_\_\_\_ of 19\_\_\_\_, in the said  
Court, dated the \_\_\_\_\_ 8 day of \_\_\_\_\_ 19\_\_\_\_, for service on \_\_\_\_\_

(3) The said \_\_\_\_\_ was at the time  
personally known to me, and I served the said summons on \_\_\_\_\_ on the  
notice  
\_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, at about \_\_\_\_\_  
o'clock in the \_\_\_\_\_ noon at \_\_\_\_\_ by  
tendering a copy thereof to \_\_\_\_\_ and requiring \_\_\_\_\_ signature to the original  
\_\_\_\_\_ her

summons.

notice

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process,  
and in whose presence.

(b) Signature of process-server.

(3) The said \_\_\_\_\_ or,  
not being personally known to me  
accompanied me to \_\_\_\_\_  
and pointed out to me a person whom he stated to be the said \_\_\_\_\_  
\_\_\_\_\_, and I served the said summons on \_\_\_\_\_ on the  
notice  
\_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, at about \_\_\_\_\_ o'clock in the \_\_\_\_\_  
noon at \_\_\_\_\_ by tendering a copy thereof to \_\_\_\_\_ and requiring \_\_\_\_\_ signature  
\_\_\_\_\_ her

to the original summons.  
notice

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process  
and in whose presence.

(b) Signature of process-server.

(3) The said \_\_\_\_\_ or,  
and the house in which he ordinarily resides  
being personally known to me, I went to the said house, in \_\_\_\_\_ and  
there on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, at about \_\_\_\_\_ o'clock  
in the \_\_\_\_\_ noon, I did not find the said \_\_\_\_\_.

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with  
special reference to Order 5, rules 15 and 17.

(b) Signature of process-server.

(3) One \_\_\_\_\_ or,  
accompanied me to \_\_\_\_\_ and there  
pointed out to me \_\_\_\_\_ which he said was the house in which  
ordinarily resides. I did not find the said \_\_\_\_\_  
there.

(a)

(b)

(a) Enter fully and exactly the manner in which the process was served, with  
special reference to Order 5, rules 15 and 17.

(b) \*Signature of process-server.

or,

*If substituted service has been ordered, state fully and exactly the manner in  
which the summons was served with special reference to the terms or the order for  
substituted service.*

Sworn  
Affirmed by the said  
day of

before me this

19 .

*Empowered under section 139 of the Code of Civil Procedure, 1908, to administer the oath to deponents.*

Note :—For local amendments in Calcutta and Lahore *vide infra*

No. 12.

NOTICE TO DEFENDANT. (O. 9, r. 6.)

(Title.)

To

(Name, description and place of residence.)

WHEREAS this day was fixed for the hearing of the above suit and a summons was issued to you and the plaintiff has appeared in this Court and you did not so appear but from the return of the Nazir it has been proved to the satisfaction of the Court that the said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons ;

Notice is hereby given to you that the hearing of the suit is adjourned this day and that the day of 19 , is now fixed for the hearing of the same ; in default of your appearance on the day last mentioned the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court, this day of 19 .

Note :—For local amendments in Madras, *vide infra*.

*Judge.*

No. 13.

SUMMONS TO WITNESS. (O. 16, rr. 1, 5.)

(Title.)

To

WHEREAS your attendance is required to on behalf of the in the above suit, you are hereby required [personally] to appear before this Court on the day of 19 , at o'clock in the forenoon, and to bring with you [or to send to this Court].

A sum of Rs. , being your travelling and other expenses and subsistence allowance for one day, is herewith sent. If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non-attendance laid down in rule 12 of Order XVI of the Code of Civil Procedure, 1908.

GIVEN under my hand and the seal of the Court, this day of 19 .

*Judge.*

NOTICE.—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.

(2) If you are detained beyond the day aforesaid, a sum of Rs. will be tendered to you for each day's attendance beyond the day specified.

Note :—For local amendment in Madras, *vide infra*.

No. 14.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS.

(O. 16, r. 10)

(Title.)

To

WHEREAS it appears from the examination on oath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law ; and whereas it appears that the evidence of the witness is material, and he absconds and keeps out of the way for the purpose of evading the service of the summons : This proclamation is therefore, under rule 10 of Order XVI of the Code of Civil

Procedure, 1908, issued requiring the attendance of the witness in this Court on the  
 day of 19 , at o'clock in the  
 forenoon, and from day to day until he shall have leave to depart ; and if the witness  
 fails to attend on the day and hour aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of  
 19 .

*Judge.*

-----  
 No. 15.

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS.

(O. 16, r. 10.)

(Title.)

To

WHEREAS it appears from the examination on oath of the serving officer  
 that the summons has been duly served upon the witness, and whereas it appears  
 that the evidence of the witness is material and he was failed to attend in  
 compliance with such summons : This proclamation is, therefore, under rule 10  
 of Order XVI of the Code of Civil Procedure, 1908, issued, requiring the attendance  
 of the witness in this Court on the day of  
 19 , at o'clock in the forenoon, and from day to day until he  
 shall have leave to depart ; and if the witness fails to attend on the day and hour  
 aforesaid he will be dealt with according to law.

GIVEN under my hand and the seal of the Court, this day of 19 .

*Judge.*

-----  
 No. 16.

WARRANT OF ATTACHMENT OF PROPERTY OF WITNESS.

(O. 16, r. 10.)

(Title.)

To

The Bailiff of the Court.

WHEREAS the witness  
 cited by  
 has not, after the expiration of the period limited in the proclamation issued for his  
 attendance, appeared in Court ;  
 You are hereby directed to hold under attachment  
 property belonging to the said witness to the value of and to submit a return,  
 accompanied with an inventory thereof, within days.

GIVEN under my hand and the seal of the Court, this day of  
 19 .

*Judge.*

-----  
 No. 17.

WARRANT OF ARREST OF WITNESS. (O. 16, r. 10.)

(Title.)

To

The Bailiff of the Court.

WHEREAS has been duly served with a summons but has failed to  
 attend [absconds and keeps out of the way for the purpose of avoiding service of a  
 summons] ; You are hereby ordered to arrest and bring the said before  
 the Court.

You are further ordered to return this warrant on or before the day of  
 19 , with an endorsement certifying the day on and the manner  
 in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this day of 19 .

*Judge.*

No. 18.

WARRANT OF COMMITTAL. (O. 16, r. 18.)

(Title.)

To

The Officer-in-charge of the Jail at

WHEREAS the plaintiff (or defendant) in the above-named suit has made application to this Court that security be taken for the appearance of \_\_\_\_\_ to give evidence (or to produce a document), on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, and whereas the Court has called upon the said \_\_\_\_\_ to furnish such security, which he has failed to do; this is to require you to receive, the said \_\_\_\_\_ into your custody in the civil prison and to produce him before this Court at \_\_\_\_\_ on the said day and on such other day or days as may be hereafter ordered.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

Judge.

No. 19.

WARRANT OF COMMITTAL. (O. 16, r. 18.)

(Title.)

To

The Officer-in-charge of the Jail at

WHEREAS \_\_\_\_\_, whose attendance is required before this Court in the above-named case to give evidence (or to produce a document), has been arrested and brought before the Court in custody; and whereas owing to the absence of the plaintiff (or defendant), the said \_\_\_\_\_ cannot give such evidence (or produce such document); and whereas the Court has called upon the said \_\_\_\_\_ to give security for his appearance on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, at which he has failed to do; this is to require you to receive the said \_\_\_\_\_ into your custody in the civil prison and to produce him before this Court at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

Judge.

NOTE :—For local amendment in Allahabad, *vide infra*.

## APPENDIX C.

## DISCOVERY, INSPECTION AND ADMISSION.

No. 1.

ORDER FOR DELIVERY OF INTERROGATORIES. (O. 11, r. 1.)

In the Court of

Civil Suit No.

of \_\_\_\_\_ 19\_\_\_\_.

A.B.

... Plaintiff,

against

C. D., E. F. and G. H.

... Defendants.

Upon hearing \_\_\_\_\_ and upon reading the affidavit of \_\_\_\_\_ filed the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, it is ordered that the \_\_\_\_\_ be at liberty to deliver to the \_\_\_\_\_ interrogatories in writing, and that the said \_\_\_\_\_ do answer the interrogatories as prescribed by Order XI, rule 8, and that the cost of this application be \_\_\_\_\_.

No. 2.

INTERROGATORIES. (O. 11, r. 4.)

(Title as in No. 1, *supra*)

Interrogatories on behalf of the above-named [plaintiff or defendant C. D.] for the examination of the above-named [defendants E. F. and G. H. or plaintiff.]

1. did not, etc,
2. Has not, etc.

etc., etc., etc.,

[The defendant E. F. is required to answer the interrogatories numbered .]

[The defendant G. H. is required to answer the interrogatories numbered.]

---

No. 3.

ANSWER TO INTERROGATORIES. (O. 11, r. 9.)

(Title as in No. 1, supra.)

The answer of the above-named defendant E. F. to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E., F., make oath and say as follows :—

1. { Enter answers to interrogatories in paragraphs numbered.
2. { consecutively.
3. I object to answer the interrogatories numbered on the ground that [state grounds of objection].

---

No. 4.

ORDER FOR AFFIDAVIT AS TO DOCUMENTS (O. 11, r. 12.)

(Title as in No. 1, supra)

Upon hearing that the do within days from the date of this order, answer on affidavit stating which documents are or have been in his possession or power relating to the matter in question in this suit, and that the costs of this application be

---

No. 5.

AFFIDAVIT AS TO DOCUMENTS (O. 11, r. 13.)

(Title as in No. 1, supra)

I the above-named defendant G. D., make oath and say as follows :—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.
2. I object to produce the said documents set forth in the second part of the first schedule hereto [state grounds of objection].
3. I have had but have not now, in my possession or power the documents relating to the matters in question in the suit set forth in the second schedule hereto.
4. The last mentioned documents were last in my possession or power on [state when and what has become of them and in whose possession they now are].

5. According to the best of my knowledge, information and belief I have not now, and never had, in my possession, custody or power or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said first and second schedules hereto.

---

No. 6.

ORDER TO PRODUCE DOCUMENTS FOR INSPECTION.

(O. 11, r. 14.)

(Title as in No. 1, supra.)

Upon hearing day of 19 : It is ordered that the do, at all reasonable times, on reasonable notice, produce at , situate at, the following documents, namely, and that the be at

liberty to inspect and peruse the documents so produced and to make notes of their contents. In the meantime it is ordered that all further proceedings be stayed and that the costs of this application be

---

No. 7.

NOTICE TO PRODUCE DOCUMENTS. (O. 11, r. 16.)

(Title as in No. 1 *supra*.)

Taken notice that the [plaintiff or defendant] requires you to produce for his inspection the following documents referred to in your [plaint or written statements or affidavit dated the                      day of                      19     ].

(Describe documents required.)

X Y, pleader for the

To Z, pleader for the

---

No. 8.

NOTICE TO INSPECT DOCUMENTS. (O. 11, r. 17.)

[Title as in No. 1, *supra*.]

Take notice that you can inspect the documents mentioned in your notice of the day of                      19     , [except the documents numbered                      in that notice] at [insert place of inspection] on Thursday next, the                      instant, between the hours of 12 and 4 o'clock.

Or, that the [plaintiff or defendant] objects to giving you inspection of documents mentioned in your notice of the                      day of                      19     , on the ground that [state the ground] :—

---

No. 9.

NOTICE TO ADMIT DOCUMENTS. (O. 12, r. 3.)

(Title as in No. 1, *supra*.)

Take notice that the plaintiff (or defendant in this suit proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff], his pleader or agent, at                      on                      between the hours of                      ; and the defendant [or plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed or executed, as they purport respectively to have been ; that such as are specified as copies are true copies ; and such documents as are stated to have been served, sent or delivered were so served, sent or delivered respectively, saving all just exceptions to the admissibility of all such documents as evidence in this suit.

G. H., pleader [or agent] for plaintiff [or defendant].

To E. F., pleader [or agent] for defendant [or plaintiff].

[Here describe the documents and especially as to each document whether it is original of a copy.]

---

No. 10.

NOTICE TO ADMIT FACTS. (O. 12, r. 5.)

(Title as in No. 1, *supra*.)

Take a notice that the plaintiff [or defendant] in this suit requires the defendant [or plaintiff] to admit, for the purposes of this suit only, the several facts respectively hereunder specified ; and the defendant [or plaintiff] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this suit.

G. H. pleader [or agent] for plaintiff [or defendant].

To E. F., pleader [or agent] for defendant [or plaintiff].



The facts, the admission of which is required, are—

1. That M. died on the 1st January, 1890.
2. That he died intestate.
3. That N. was his only lawful son.
4. That O. died on the 1st April, 1896.
5. That O. was never married.

#### NO. 11.

#### ADMISSION OF FACTS PURSUANT TO NOTICE. (O. 12, r. 5.)

*(Title as in No. 1, supra).*

The defendant [*or plaintiff*] in this suit, for the purposes of this suit only, hereby, admits the several facts respectively hereunder specified, subject to the qualifications, or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit :

Provided that this admission is made for the purposes of this suit only, and is not an admission to be used against the defendant [*or plaintiff*] on any other occasion or by any one other than the plaintiff [*or defendant, or party requiring the admission*].

E. F., *pleader* [*or agent*] *for defendant* [*or plaintiff*].

To G. H. *pleader* [*or agent*] *for plaintiff* [*or defendant*].

Facts admitted.

Qualifications or limitations, if any, subject to which they are admitted.

- |   |     |   |
|---|-----|---|
| 1. That M. died on the 1st January, 1890. | 1.  |   |
| 2. That he died intestate                 | ... | 2   |
| 3. That N. was his lawful son             | ... | 3. But not that he was his only lawful son.     |
| 4. That O. died                           | ... | 4. But not that he died on the 1st April, 1896. |
| 5. That O. was never married              | ... | 5.  |

#### NO. 12.

#### NOTICE TO PRODUCE (GENERAL FORM). (O. 12, r. 8.)

*(Title as in No. 1, supra)*

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books, papers, letters, copies of letters and other writings and documents in your custody, possession or power, containing any entry, memorandum or minute relating to the matters in question in this suit and particularly.

G. H., *pleader* [*or agent*] *for plaintiff* [*or defendant*].

To E. F., *pleader* [*or agent*] *for defendant* (*or plaintiff*).

### APPENDIX D.

#### DECREES.

##### No 1.

#### DECREE IN ORIGINAL SUIT. (O. 20, rr. 6, 7.)

*(Title.)*

Claim for

This suit coming on this day for final disposal before  
presence of

in the

for the plaintiff and of for the defendant, it is ordered and decreed that  
and that the sum of Rs. be paid by the  
to the on account of the costs of this suit, with interest  
thereon at the rate of per cent. per annum from this date to date of realization.

GIVEN under my hand and the seal of the Court, this day of 19  
Judge.

*Costs of suit.*

Plaintiff			Defendant.		
	Rs.	A. P.		Rs.	A. P.
1. Stamp for plaint ...			Stamp for power ...		
2. Do. for power ...			Do. for petition ...		
3. Do. for exhibits ...			Pleader's fee ...		
4. Pleader's fee on Rs. ...			Subsistence for witnesses ...		
5. Subsistence for witnesses...			Service of process ...		
6. Commissioner's fee ...			Commissioner's fee ...		
7. Service of process ...					
TOTAL ...			TOTAL ...		

NOTE :—For local amendments in Calcutta and Patna, *vide infra*.

## No. 2.

## SIMPLE MONEY DECREE, (Section 34)

(Title.)

Claim for

This suit coming on this day for final disposal before \_\_\_\_\_ in the presence  
of \_\_\_\_\_ for the plaintiff and of \_\_\_\_\_ for the defendant, it is  
ordered that the \_\_\_\_\_ do pay to the \_\_\_\_\_ the sum of Rs.  
with interest thereon at the rate of \_\_\_\_\_ per cent. per annum from \_\_\_\_\_ to  
the date of realization of the said sum and do also pay Rs. \_\_\_\_\_ the costs of  
this suit with interest thereon at the rate of \_\_\_\_\_ per cent. per annum from  
this date to the date of realization.

Given under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_  
Judge.

*Costs of suit.*

Plaintiff.			Defendant.		
	Rs.	A. P.		Rs.	A. P.
1. Stamp for plaint ...			Stamp for power ...		
2. Do. for power ...			Do. for petition ...		
3. Do. for exhibits ...			Pleader's fee ...		
4. Pleader's fee on Rs. ...			Subsistence for witnesses ...		
5. Subsistence for witnesses.			Service of process ...		
6. Commissioner's fee ...			Commissioner's fee ...		
7. Service of process ...					
TOTAL ...			TOTAL ...		

NOTE :—For local amendment in Calcutta, *vide infra*.

## No. 3.

*Preliminary decree for foreclosure.*

Order XXXIV, rule 2.—Where accounts are directed to be taken.

(TITLE.)

This suit coming on this \_\_\_\_\_ day, etc; It is hereby ordered and decreed  
that it be referred to \_\_\_\_\_ as the Commissioner to take the accounts  
following :—

- (i) an account of what is due on this date to the plaintiff for principle and  
interest on his mortgage mentioned in the plaint (such interest to be  
computed at the rate payable on the principal or where no such rate is

fixed, at six per cent. per annum or at such rate as the Court deems reasonable);

(ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received ;

(iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate, at the same rate as is payable on the principle, or, failing both such rates, at nine per cent per annum) ;

(iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or, permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon shall first be adjusted against any sums paid by the plaintiff under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

(i) that the defendant do pay into Court on or before the day of , or any later date up to which time for payment may be extended by the Court, such sum, as the Court shall find due, and the sum of Rs. for the costs of the suit awarded to the plaintiff ;

(ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall if so required, deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff shall be at liberty to apply to the Court for a final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property ; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

## SCHEDULE.

*Description of the mortgaged property.*

No. 3A.

*Preliminary decree for foreclosure.*

(Order XXXIV, rule 2—Where the Court declares the amount due.)

(TITLE.)

This suit coming on this                      day, etc., it is hereby declared that the amount due to the plaintiff on his mortgage mentioned in the plaint calculated up to this day of                      is the sum of Rs.                      for principal the sum of Rs.                      for interest on the said principal, the sum of Rs.                      for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage security, together with interest thereon, and the sum of Rs.                      for the costs of this suit awarded to the plaintiff, making in all the sum of Rs.                      .

2. And it is hereby ordered and decreed as follows :—

(i) that the defendant do pay into Court on or before the                      day of                      or any later date up to which time for                      payment may be extended by the Court of the said sum of Rs.                      :

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for final decree that the defendant shall thenceforth stand absolutely debarred and foreclosed of and from all rights to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the plaintiff quite and peaceable possession of the said property ; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

## SCHEDULE.

*Description of the mortgaged property.*

No. 4.

*Final decree for foreclosure.*

(Order XXXIV, rule 3.)

(TITLE.)

Upon reading the preliminary decree passed in this suit on the                      day of                      and further orders (if any) dated the                      day of                      and the application of the plaintiff dated the                      day of                      for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the defendant or any person on his behalf or any other person entitled to redeem the said mortgage :

It is hereby ordered and decreed that the defendant and all persons claiming through or under him be and they are hereby absolutely debarred and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned ;\* [ and ( *if the defendant be in possession of the said mortgaged property* ) that the defendant shall deliver to the plaintiff quiet and peaceable possession of the said mortgaged property ].

2. And it is hereby further declared that the whole of the liability whatsoever of the defendant up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

No. 5.

*Preliminary decree for sale.*

(Order XXXIV, rule 4.—Where accounts are directed to be taken.)

(TITLE)

This suit coming on this day, etc. ; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following :—

- (i) an account of what is due on this date to the plaintiff for principal and interest on his mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed, at six per cent. per annum or at such rate as the Court deems reasonable) ;
- (ii) an account of the income of the mortgaged property received up to this date by the plaintiff or by any other person by the order or for the use of the plaintiff or which without the wilful default of the plaintiff or such person might have been so received ;
- (iii) an account of all sums of money properly incurred by the plaintiff up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security, together with interest thereon (such interest to be computed at the rate agreed between the parties, or, failing such rate at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum).
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the plaintiff which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the plaintiff under clause (iii), together with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the plaintiff on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of and that upon such report of the Commissioner being received, it shall be confirmed and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

- (i) that the defendant do pay into Court on or before the day of or any later date up to which, time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the plaintiff ;
- (ii) that on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First

Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the defendant, or to such person as he appoints, and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall, if so required deliver up to the defendant quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property ; and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold ; and for the purposes of such sale the plaintiff shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of suit, and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance ; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE

##### *Description of the mortgaged property.*

No. 5A.

*Preliminary decree for sale.*

(Order XXXIV, rule 4.—When the Court declares the amount due).

(TITLE.)

This suit coming on this \_\_\_\_\_ day, etc. ; It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this \_\_\_\_\_ day of \_\_\_\_\_ is the sum of Rs. \_\_\_\_\_ for principal, the sum of Rs. \_\_\_\_\_ for interest on the said principal, the sum of Rs. \_\_\_\_\_ for costs, charges and expenses (other than the costs of the suit) properly incurred by the plaintiff in respect of the mortgage-security, together with interest thereon, and the sum of Rs. \_\_\_\_\_ for the costs of the suit awarded to the plaintiff, making in all the sum of Rs. \_\_\_\_\_

2. And it is hereby ordered and decreed as follows :—

(i) that the defendant do pay into Court on or before the \_\_\_\_\_ day of \_\_\_\_\_ or any later date up to which, time for payment may be extended by the Court, the said sum of Rs. \_\_\_\_\_ ;

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such

documents shall be delivered over to the defendant, or to such persons as he appoints, and the plaintiff shall if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims and shall if so required, deliver up to the defendant quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the plaintiff in respect of such costs of the suit, and such costs, charges and expenses as may be payable under rule 10 together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the plaintiff as aforesaid, the plaintiff shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the defendant for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE.

##### *Description of the Mortgaged Property*

No. 6.

*Final Decree for Sale.*

(Order XXXIV, rule 5.)

(TITLE)

Upon reading the preliminary decree passed in this suit on the  
day of \_\_\_\_\_ and further orders (if any) dated the \_\_\_\_\_ day of \_\_\_\_\_  
and the application of the plaintiff dated the \_\_\_\_\_ day of \_\_\_\_\_  
for a final decree and after hearing the parties and it appearing  
that the payment directed by the said decree and orders has not been made by the  
defendant or any person on his behalf or any other person entitled to redeem the  
mortgage :

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold, and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into the Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the plaintiff for such costs of the suit including the costs of this application and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the defendant or other persons entitled to receive the same.

## No. 7.

*Preliminary decree for redemption where on default of payment by mortgagor a decree for foreclosure is passed.*

(Order XXXIV, rule 7).—Where accounts are directed to be taken.)

(TITLE.)

This suit coming on this                      day, etc., ; It is hereby ordered and decreed  
that it be referred to                      as the Commissioner to take the accounts  
following :—

- (i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed at six per cent. per annum or at such rate as the Court deems reasonable) ;
- (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received ;
- (iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon (such interest to be computed at the rate agreed between the parties or, failing such rate, at the same rate as is payable on the principal, or failing both such rates at nine per cent. per annum ;
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of mortgage-deed.

2. It is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall be adjusted against any sums paid by the defendant under clause (iii), together, with interest thereon, and the balance, if any, shall be added to the mortgage-money or, as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the                      day of                      and that upon such report of the Commissioner being received, it shall be confirmed and countersigned subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

- (i) that the plaintiff do pay into Court on or before the                      day of                      or any latter date up to which time for payment may be extended by the Court such sum as the Court shall find due and the sum of Rs.                      for the costs of the suit awarded to the defendant ;
- (ii) that, on such payment, and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such cost of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and free from all liability whatsoever, arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.



5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant shall be at liberty to apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE.

##### *Description of the mortgaged property.*

#### No. 7A.

##### *Preliminary decree for redemption where on default payment by mortgagor a decree for sale is passed.*

(Order XXXIV. rule 7.—Where accounts are directed to be taken).

#### (TITLE.)

This suit coming on this day, etc.; It is hereby ordered and decreed that it be referred to as the Commissioner to take the accounts following:—

- (i) an account of what is due on this date to the defendant for principal and interest on the mortgage mentioned in the plaint (such interest to be computed at the rate payable on the principal or where no such rate is fixed at six per cent. per annum or at such rate as the Court deems reasonable);
- (ii) an account of the income of the mortgaged property received up to this date by the defendant or by any other person by the order or for the use of the defendant or which without the wilful default of the defendant or such person might have been so received;
- (iii) an account of all sums of money properly incurred by the defendant up to this date for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage-security together with interest thereon (such interest to be computed at the rate agreed between the parties, or failing such rate, at the same rate as is payable on the principal, or, failing both such rates, at nine per cent. per annum);
- (iv) an account of any loss or damage caused to the mortgaged property before this date by any act or omission of the defendant which is destructive of, or permanently injurious to, the property or by his failure to perform any of the duties imposed upon him by any law for the time being in force or by the terms of the mortgage-deed.

2. And it is hereby further ordered and decreed that any amount received under clause (ii) or adjudged due under clause (iv) above, together with interest thereon, shall first be adjusted against any sums paid by the defendant under clause (iii) together with interest thereon, and the balance, if any, shall be added to the mortgage-money, or as the case may be, be debited in reduction of the amount due to the defendant on account of interest on the principal sum adjudged due and thereafter in reduction or discharge of the principal.

3. And it is hereby further ordered that the said Commissioner shall present the account to this Court with all convenient despatch after making all just allowances on or before the day of and that, upon such report of the Commissioner being received, it shall be confirmed, and countersigned, subject to such modification as may be necessary after consideration of such objections as the parties to the suit may make.

4. And it is hereby further ordered and decreed—

- (i) that the plaintiff do pay into Court on or before the day of or any later date up to which time for payment may be extended by the Court, such sum as the Court shall find due and the sum of Rs. for the costs of the suit awarded to the defendant;
- (ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in res-

pect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or to such person as he appoints and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claimed and shall, if so required, deliver up to the plaintiff quiet and peaceable possession of the said property.

5. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property; and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

6. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to the defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

7. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE.

##### *Description of the mortgaged property.*

-----  
No. 7B.

*Preliminary decree for redemption where on default of payment  
by mortgagor a decree for foreclosure is passed.*

(Order XXXIV, rule 7.—Where the Court declares the amount due.)

(TITLE.)

This suit coming on this            day, etc.; it is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this            day of            is the sum of Rs.            for principal, the sum of Rs.            for interest on the said principal, the sum of Rs.            for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs.            for the costs of the suit awarded to the defendant, making in all the sum of Rs.           

2. And it is hereby ordered and decreed as follows :—

(a) that the plaintiff do pay into Court on or before the            day of            or any later date up to which time for payment may be extended by the Court the said sum of Rs.           

(b) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in

respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff, or such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims, and free from all liability whatsoever arising from the mortgage or this suit and shall if so required, deliver up to the plaintiff quiet and peaceable possession of the said property,

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree that the plaintiff shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to the defendant quiet and peaceable possession of the said property; and that the parties shall be at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE.

##### *Description of the mortgage property*

No. 7C.

*Preliminary decree for redemption where on default payment by mortgagor a decree for sale is passed.*

(Order XXXIV, rule 7.—Where the Court declares the amount due.)

(TITLE)

This suit coming on this \_\_\_\_\_ day, etc.; It is hereby declared that the amount due to the defendant on the mortgage mentioned in the plaint calculated up to this \_\_\_\_\_ day of \_\_\_\_\_ is the sum of Rs. \_\_\_\_\_ for principal the sum of Rs. \_\_\_\_\_ for interest on the said principal, the sum of

Rs. \_\_\_\_\_ for costs, charges and expenses (other than the costs of the suit) properly incurred by the defendant in respect of the mortgage-security together with interest thereon, and the sum of Rs. \_\_\_\_\_ for the costs of this suit awarded to the defendant, making in all the sum of Rs. \_\_\_\_\_

2. And it is hereby ordered and decreed as follows :—

(i) that the plaintiff do pay into Court on or before the \_\_\_\_\_ day of \_\_\_\_\_ later date up to which time the payment may be extended by the Court the said sum of Rs. \_\_\_\_\_

(ii) that, on such payment and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the defendant shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the plaintiff, or such person as he appoints, and the defendant shall, if so required, re-convey or re-transfer the said property to the plaintiff free from the said mortgage and clear of and from all incumbrances created by the defendant or any person claiming under him or any person under whom he claims and shall, if so required deliver up to the plaintiff quiet and peaceable possession of the said property.

3. And it is hereby further ordered and decreed that, in default of payment as aforesaid, the defendant may apply to the Court for a final decree for the sale of the mortgaged property, and on such application being made, the mortgaged property or a sufficient part thereof shall be directed to be sold; and for the purposes of such sale the defendant shall produce before the Court or such officer as it appoints all documents in his possession or power relating to the mortgaged property.

4. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under this decree and under any further orders that may be passed in this suit and in payment of any amount which the Court may adjudge due to defendant in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to the same.

5. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for the payment in full of the amount payable to the defendant as aforesaid, the defendant shall be at liberty (where such remedy is open to him under the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against the plaintiff for the amount of the balance; and that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE.

##### *Description of the mortgaged property.*

No. 7D.

*Final decree for foreclosure in a redemption suit on default of payment by mortgagor.*

(Order XXXIV, rule 8.)

(TITLE.)

Upon reading the preliminary decree in this suit on the \_\_\_\_\_ day of \_\_\_\_\_ and further orders (if any) dated the \_\_\_\_\_ day of \_\_\_\_\_ and the application of the defendant dated the \_\_\_\_\_ day of \_\_\_\_\_ for a final decree and after hearing the parties and it appearing that the payment as directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the plaintiff and all persons claiming through or under him be and they are hereby absolutely debared and foreclosed of and from all right of redemption of and in the property in the aforesaid preliminary decree mentioned\* [and (if the plaintiff be in possession of the said mortgaged property) that the plaintiff shall deliver to the defendant quiet and peaceable possession of the said mortgaged property].

2. And it is hereby further declared that the whole of the liability whatsoever of the plaintiff up to this day arising from the said mortgage mentioned in the plaint or from this suit is hereby discharged and extinguished.

No. 7 E.

*Final decree for sale in a redemption suit on default of payment by mortgagor.*

(Order XXXIV, rule 8).

(TITLE.)

Upon reading the preliminary decree passed in this suit on the \_\_\_\_\_ day of \_\_\_\_\_ and further orders (if any) dated the \_\_\_\_\_ day of \_\_\_\_\_ and the application of the defendant dated the \_\_\_\_\_ day of \_\_\_\_\_ for a final decree and after hearing the parties and it appearing that the payment directed by the said decree and orders has not been made by the plaintiff or any person on his behalf or any other person entitled to redeem the mortgage:

It is hereby ordered and decreed that the mortgaged property in the aforesaid preliminary decree mentioned or a sufficient part thereof be sold and that for the purposes of such sale the defendant shall produce before the Court, or such officer as it appoints, all documents in his possession or power relating to the mortgaged property.

\* Words not required to be deleted.

2. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and shall be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to the defendant under the aforesaid preliminary decree and under any further orders that may have been passed in this suit and in payment of any amount which the Court may have adjudged due to the defendant for such costs of this suit including the costs of this application and such costs, charges and expenses as may be payable under rule 10, together with the subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1903, and that the balance, if any, shall be paid to the plaintiff or other persons entitled to receive the same.

No. 7F.

*Final decree in a suit for foreclosure, sale or redemption where the mortgagor pays the amount of the decree.*

(Order XXXIV, rules 3, 5 and 8.)

(TITLE.)

This suit coming on this                      day for further consideration and it appearing that on the                      day of                      the mortgagor or                      , the same being a person entitled to redeem, has paid into Court all amounts due to the mortgagee under the preliminary decree dated the                      day of                      ; It is hereby ordered and decreed that :—

(i) the mortgagee do execute a deed of reconveyance of the property in the aforesaid preliminary decree mentioned in favour of the mortgagor \* [for, as the case may be,                      who has redeemed the property or an acknowledgment of the payment of the amount due in his favour ;

(ii) the mortgagee do bring into Court all documents in his possession and power relating to the mortgaged property in the suit.

And it is hereby further ordered and decreed that, upon, the mortgagee executing the deed of re-conveyance or acknowledgment in the manner aforesaid,—

(i) the said sum of Rs.                      be paid out of Court to the mortgagee ;

(ii) the said deeds and documents brought into the Court be delivered out of Court to the mortgagor \* [or the person making the payment] and the mortgagee do, when so required, concur in registering, at the costs of the mortgagor \* [or other person making the payment], the said deed of reconveyance or the acknowledgment in the office of the Sub-Registrar of                      ; and

(iii) \* [if the mortgagee, plaintiff or defendant, as the case may be, is in possession of the mortgaged property] that the mortgagee do forthwith deliver possession of the mortgaged property in the aforesaid preliminary decree mentioned to the mortgagor\* [or such person as aforesaid who has made the payment.]

No. 8.

*Decree against mortgagor personally for balance after the sale of the mortgaged property.*

(Order XXIV, rules 6 and 8A.)

(TITLE.)

Upon reading the application of the mortgagee (the plaintiff or defendant, as the case may be) and reading the final decree passed in the suit on the                      day of                      and the Court being satisfied that the net proceeds of the sale held under the aforesaid final decree amounted to Rs.                      and have been paid to the applicant out of the Court on the                      day of                      and that the balance now due to him \* under the aforesaid decree is Rs.                     

And whereas it appears to the Court that the said sum is legally recoverable from that mortgagor (plaintiff or defendant, as the case may be) personally ;

\* Words not required to be deleted.

It is hereby ordered and decreed as follows :—

That the mortgagor (plaintiff or defendant, as the case may be) do pay to the mortgagee defendant, or plaintiff as the case may be) the said sum of Rs. with further interest at the rate of six per cent. annum from the day of \_\_\_\_\_ (the date of payment out of Court referred to above) up to the date of realization of the said sum, and the costs of this application.

—  
No. 9.

*Preliminary decree for foreclosure or sale.*

[Plaintiff... .. 1st Mortgagee,  
vs.  
Defendant No. 1.....Mortgagor.  
Defendant No. 2.....2nd Mortgagee ]

(Order XXXIV, rules 2 and 4.)

(TITLE.)

This suit coming on this \_\_\_\_\_ day, etc.; It is hereby declared that the amount due to the plaintiff on the mortgage mentioned in the plaint calculated up to this day of \_\_\_\_\_ is the sum of Rs. \_\_\_\_\_ for principal, the sum of Rs. \_\_\_\_\_ for interest on the said principal, the sum of Rs. \_\_\_\_\_ for costs, charges and expenses (other than the costs of the suit) incurred by the plaintiff in respect of the mortgage security with interest thereon and the sum of Rs. \_\_\_\_\_ for the costs of this suit awarded to the plaintiff, making in all the sum of Rs. \_\_\_\_\_

*(Similar declarations to be introduced with regard to the amount due to defendant No. 2 in respect of his mortgage is the mortgage-money due thereunder has become payable at the date of the suit.)*

2. It is further declared that the plaintiff is entitled to payment of the amount due to him in priority to defendant No. 2 \* [or (if there are several subsequent mortgagees) that the several parties hereto are entitled in the following order to the payment of the sums due to them respectively :—]

3. And it is hereby ordered and decreed as follows :—

(i) (a) that defendants or one of them do pay into Court on or before the day of \_\_\_\_\_ or any later date up to which time for payment has been extended by the Court the said sum of Rs. \_\_\_\_\_ due to the plaintiff : and

(b) that defendant No. 1 do pay into Court on or before the day of \_\_\_\_\_ or any later date up to which time for payment has been extended by the Court the said sum of Rs. \_\_\_\_\_ due to defendant No. 2 ; and

(ii) that, on payment of the sum declared to be due to the plaintiff by defendants or either of them in the manner prescribed in clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount, as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned and all such documents shall be delivered over to the defendant No. \_\_\_\_\_ (who has made the payment), or to such person as he appoints and the plaintiff shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by the plaintiff or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the defendant No. \_\_\_\_\_ who has made the payment) quiet and peaceable possession of the said property.

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\* Words not required to be deleted.

(Similar declarations to be introduced, if defendant No. 1, pays the amount found or declared to be due to defendant No. 2 with such variations as may be necessary having regard to the nature of his mortgage.)

4. And it is hereby further ordered and decreed that in default of payment as aforesaid of the amount due to the plaintiff the plaintiff shall be at liberty to apply to the Court for a final decree—

(i) \**[in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage-deed is foreclosure and not sale]* that the defendants jointly and severally shall thenceforth stand absolutely debarred and foreclosed of and from all rights to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the plaintiff quiet and peaceable possession of the said property ; or

(ii) \**[In the case of any other mortgage]* that the mortgaged property or a sufficient part thereof shall be sold ; and that or the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property ; and

(iii) \**[In the case where a sale is ordered under clause 4 (ii) above]* that the money realised by such sale shall be paid into Court and be duly applied after deduction therefrom of the expenses of the sale) in payment of the amount payable to the plaintiff under this decree and under any further orders that may have been passed in this suit and in payment of the amount which the Court may adjudge due to the plaintiff in respect of such costs, of this suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance if any, shall be applied in payment of the amount due to defendant No. 2 ; and that if any balance be left, it shall be paid to the defendant No. 1, or other persons entitled to receive the same ; and

(iv) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1, for the amounts remaining due to them respectively.

5. And it is hereby further ordered and decreed—

(a) that if defendant No. 2, pays into Court to the credit of this suit the amount adjudged due to the plaintiff, but defendant No. 1 makes default in the payment of the said amount, defendant No. 2 shall be at liberty to apply to the Court to keep the plaintiff's mortgage alive for his benefit and to apply for a final decree *(in the same manner as the plaintiff might have done under clause 4 above)*—

\**[(i) that defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver up to defendant No. 2 quiet and peaceable possession of the said property ; ] or*

\**[(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purpose of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property ; ]*

and (b) (if on the application of defendant No 2 such a final decree for foreclosure is passed), that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgage or from the mortgage of defendant No. 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed\* *(In the case where a sale is ordered under clause 5 above)*—

(i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in

\* Words not required to be deleted.





- (ii) that, on payment of the sum declared due to defendant No. 2 by the plaintiff and defendant No. 1 or either of them in the manner prescribed in clause (i) (a) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of the order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, defendant No. 2 shall bring into Court all documents in his possession or power relating to the mortgaged property in the plaint mentioned, and all such documents shall be delivered over to the plaintiff or defendant No. 1 (whoever has made the payment) or to such person as he appoints and defendant No. 2 shall, if so required, re-convey or re-transfer the said property free from the said mortgage and clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims, and also free from all liability whatsoever arising from the mortgage or this suit and shall, if so required, deliver up to the plaintiff or defendant No. 1 (whoever has made the payment) quiet and peaceable possession of the said property.

*(Similar declarations to be introduced, if defendant No. 1 pays the amount found or declared due to the plaintiff with such variations as may be necessary having regard to the nature of his mortgage.)*

4. And it is hereby further ordered and decreed that, in default of payment as aforesaid, of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court that the suit be dismissed or for a final decree—

- \*. (i) *[in the case of a mortgage by conditional sale or an anomalous mortgage where the only remedy provided for in the mortgage deed is foreclosure and not sale]* that the plaintiff and defendant No. 1 jointly and severally shall henceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required, deliver to the defendant No. 2 quiet and peaceable possession of the said property; or
- (ii)\* *[in the case of any other mortgage]* that the mortgaged property or a sufficient part thereof shall be sold, and that for the purposes of such sale defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property; and
- (iii)\* *[in the case where a sale is ordered under clause 4 (ii) above]* that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) in payment of the amount payable to defendant No. 2 under the decree and any further orders that may be passed in this suit and in payment of the amount which the Court may adjudge due to defendant No. 2, in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under rule 10 together with such subsequent interest as may be payable under rule 11, of order XXXIV of the first Schedule to the Code of Civil Procedure, 1908; and that the balance, if any, shall be applied in payment of the amount due to the plaintiff and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same; and
- (iv) that, if the money realised by such sale shall not be sufficient for payment in full of the amounts due to defendant No. 2 and the plaintiff, defendant No. 2 or the plaintiff or both of them, as the case may be, shall be at liberty (when such remedy is open under the terms of their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amounts remaining due to them respectively.
5. And it is hereby further ordered and decreed,—
- (a) that, if the plaintiff pays into Court to the credit of this suit the amount adjudged due to defendant No. 2 but defendant No. 1 makes default in the payment of the said amount, the plaintiff shall be at liberty to apply to the Court to keep defendant No. 2's mortgages alive for his

benefit and to apply for a final decree (*in the same manner as the defendant No. 2 might have done under clause 4 above*)—

- \* [(i) that defendant No. 1 shall thenceforth stand absolutely debarred and foreclosed of and from all right to redeem the mortgaged property described in the Schedule annexed hereto and shall, if so required deliver up to the plaintiff quite and peaceable possession of the said property ;] or
- \*[(ii) that the mortgaged property or a sufficient part thereof be sold and that for the purposes of such sale the plaintiff shall produce before the Court or such officer as it appoints, all documents in his possession or power relating to the mortgaged property ;]
- and (b) (if on the application of defendant No 2 such a final decree for foreclosure is passed) that the whole of the liability of defendant No. 1 arising from the plaintiff's mortgagor or from the mortgage of defendant No 2 or from this suit shall be deemed to have been discharged and extinguished.

6. And it is hereby further ordered and decreed (*in the case where a sale is ordered under clause 5 above*)—

- (i) that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale first in payment of the amount paid by the plaintiff in respect of defendant No. 2's mortgage and the costs of the suit in connection therewith and in payment of the amount which the Court may adjudge due in respect of subsequent interest on the said amount ; and that the balance, if any, shall then be applied in payment of the amount adjudged due to the plaintiff in respect of his own mortgage under this decree and any further orders that may be passed and in payment of the amount which the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable to the plaintiff under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be paid to defendant No. 1 or other persons entitled to receive the same ; and
- (ii) that, if the money realised by such sale shall not be sufficient for payment in full of the amount due in respect of defendant No. 2's mortgage or the plaintiff's mortgage, defendant No. 2 shall be at liberty (where such remedy is open to him under the terms of his mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 1 for the amount of the balance.

7. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court from time to time as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE.

##### *Description of the mortgaged property.*

#### No. 11.

##### *Preliminary decree for sale.*

[Plaintiff—Sub or derivative mortgagee

vs.

Defendant No. 1.—Mortgagor.

Defendant No. 2—Original mortgagee.]

(Order XXXIV, rule 4.)

#### (TITLE.)

This suit coming on this                      day, etc. ; It is hereby declared that the amount due to defendant No. 2 on his mortgage calculated up to this                      day of                      is the sum of Rs.                      for principal, the sum of Rs.                      for interest on the said principal, the sum of Rs                      for costs, charges and expenses (other than the costs of the suit) in respect of the mortgage security together with interest

\* Words not required to be deleted.

thereon and the sum of Rs. \_\_\_\_\_ for the costs of the suit awarded to defendant No. 2, making in all the sum of Rs. \_\_\_\_\_.

*(Similar declarations to be introduced with regard to the amount due from defendant No. 2 to the plaintiff in respect of his mortgage)*

2. And it is hereby ordered and decreed as follows :—

- (i) that defendant No. 1 do pay into Court on or before the said day of \_\_\_\_\_ or any later date up to which time for payment may be extended by the Court the said sum of Rs. \_\_\_\_\_ due to defendant No. 2

*(Similar declarations to be introduced with regard to the amount due to the plaintiff, defendant No. 2 being at liberty to pay such amount).*

- (ii) that, on payment of the sum declared due to defendant No. 2 by defendant No. 1 in the manner prescribed in clause 2 (i) and on payment thereafter before such date as the Court may fix of such amount as the Court may adjudge due in respect of such costs of the suit and such costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, the plaintiff and defendant No. 2 shall bring into Court all documents in their possession or power relating to the mortgaged property in the plaint mentioned and all such documents (except such as relate only to the sub-mortgage) shall be delivered over to defendant No. 1 or to such person as he appoints, and defendant No. 2 shall if so required, re-convey or re-transfer the property to defendant No. 1 free from the said mortgage clear of and from all incumbrances created by defendant No. 2 or any person claiming under him or any person under whom he claims and free from all liability arising from the mortgage or this suit and shall, if so required, deliver up to defendant No. 1 quiet and peaceable possession of the said property ; and

- (iii) that upon payment into the Court by defendant No. 1 of the amount due to defendant No. 2, the plaintiff shall be at liberty to apply for payment to him of the sum declared due to him together with any subsequent costs of the suit and other costs, charges and expenses, as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11 of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908 ; and that the balance, if any, shall then be paid to defendant No. 2 and that if the amount paid into the Court be not sufficient to pay in full the sum due to the plaintiff, the plaintiff shall be at liberty (if such remedy is open to him by the terms of the mortgage and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 for the amount of the balance.

3. And it is further ordered and decreed that if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff, the plaintiff shall bring into the Court all documents, etc., [as in sub-clause (ii) of clause 2].

4. And it is hereby further ordered and decreed that, in default of payment by defendants Nos. 1 and 2 as aforesaid, the plaintiff may apply to the Court for a final decree for sale, and on such application being made the mortgaged property or a sufficient part thereof shall be directed to be sold ; and that for the purposes of such sale the plaintiff and defendant No. 2 shall produce before the Court or such officer as it appoints, all documents in their possession or power relating to the mortgaged property.

5. And it is hereby further ordered and decreed that the money realised by such sale shall be paid into Court and be duly applied (after deduction therefrom of the expenses of the sale) first in payment of the amount due to the plaintiff as specified in clause 1 above with such costs of the suit and other costs, charges and expenses as may be payable under rule 10, together with such subsequent interest as may be payable under rule 11, of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, and that the balance, if any, shall be applied in payment of the amount due to defendant No. 2 ; and that, if any balance be left, it shall be paid to defendant No. 1 or other persons entitled to receive the same.

6. And it is hereby further ordered and decreed that, if the money realised by such sale shall not be sufficient for payment in full of the amounts payable to the plaintiff and defendant No. 2, the plaintiff or defendant No. 2 or both of them, as the case may be, shall be at liberty (if such remedy is open under their respective mortgages and is not barred by any law for the time being in force) to apply for a personal decree against defendant No. 2 or defendant No. 1 (as the case may be) for the amount of the balance.

7. And it is hereby further ordered and decreed that, if defendant No. 2 pays into Court to the credit of this suit the amount adjudged due to the plaintiff but defendant No. 1 makes default in payment of the amount due to defendant No. 2, defendant No. 2 shall be at liberty to apply to the Court for a final decree for foreclosure or sale (as the case may be)—(*declarations in the ordinary form to be introduced according to the nature of defendant No. 2's mortgage and the remedies open to him thereunder*).

8. And it is hereby further ordered and decreed that the parties are at liberty to apply to the Court as they may have occasion, and on such application or otherwise the Court may give such directions as it thinks fit.

#### SCHEDULE.

##### *Description of the mortgaged property.*

— — — — —  
No 12.

#### DECREE FOR RECTIFICATION OF INSTRUMENT.

(Title)

IT is hereby declared that the \_\_\_\_\_, dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, does not truly express the intention of the parties to such \_\_\_\_\_.  
And it is decreed that the said \_\_\_\_\_ be rectified by \_\_\_\_\_

— — — — —  
No. 13.

#### DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CREDITORS.

(Title)

IT is hereby declared that the \_\_\_\_\_, dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, and made between \_\_\_\_\_ and \_\_\_\_\_, is void as against the plaintiff and all other the creditors, if any, of the defendant.

— — — — —  
No. 14.

#### INJUNCTION AGAINST PRIVATE NUISANCE.

(Title)

LET the defendant \_\_\_\_\_, his agents, servants and workmen, be perpetually restrained from burning, or causing to be burnt, any bricks on the defendant's plot of land marked B in the annexed plan, so as to occasion a nuisance to the plaintiff as the owner or occupier of the dwelling-house and garden mentioned in the plaint as belonging to and being occupied by the plaintiff.

— — — — —  
No. 15.

#### INJUNCTION AGAINST BUILDING HIGHER THAN OLD LEVEL.

(Title.)

LET the defendant \_\_\_\_\_, his contractors, agents and workmen, be perpetually restrained from continuing to erect upon his premises in any house or building of a greater height than the buildings which formerly stood upon his said premises and which have been recently pulled down so or in such manner as to darken, injure or obstruct such of the plaintiff's windows in the said premises as are ancient lights.

— — — — —  
No. 16.

#### INJUNCTION RESTRAINING USE OF PRIVATE ROAD.

(Title.)

LET the defendant \_\_\_\_\_, his agents, servants and workmen be perpetually restrained from using or permitting to be used any part of the lane at \_\_\_\_\_, the

soil of which belongs to the plaintiff as a carriage-way for the passage of carts, carriages or other vehicles, either going to or from the land marked B in the annexed plan or for any purpose whatsoever.

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No. 17.

PRELIMINARY DECREE IN AN ADMINISTRATION-SUIT.

(Title.)

It is ordered that the following accounts and inquiries be taken and made ; that is to say :—

*In creditor's suit—*

1. That an account be taken of what is due to the plaintiff and all the other creditors of the deceased.

*In suit by legatees—*

2. That an account be taken of the legacies given by the testator's Will.

*In suits by next-of-kin—*

3. That an inquiry be made and account taken of what or of what share if any, the plaintiff is entitled to as next-of-kin [*or* one of the next-of-kin] of the intestate.

[After the first paragraph, the decree will, where necessary, order, in a creditor's suit, inquiry and accounts for legatees, heirs-at-law and next-of-kin. In suits by claimants other than creditors, after the first paragraph, in all cases, an order to inquire and take an account of creditors will follow the first paragraph and such of the others as may be necessary will follow, omitting the first formal words. The form is continued as in a creditor's suit.]

4. An account of the funeral and testamentary expenses.

5. An account of the movable property of the deceased come to the hands of the defendant, or to the hands of any other person by his order or for his use.

6. An inquiry what part (if any) of the movable property of the deceased is outstanding and undisposed of.

7. And it is further ordered that the defendant do on or before the day of next, pay into Court all sums of money which shall be found to have come to his hands, or to the hands of any person by his order or for his use.

8. And that if the \*shall find it necessary for carrying out the objects of the suit to sell any part of the movable property of the deceased, that the same be sold accordingly, and the proceeds paid into Court.

9. And that Mr. E. F. be receiver in the suit (*or* proceeding) and receive and get in all outstanding debts and outstanding movable property of the deceased, and pay the same into the hands of the \* (and shall give security by bond for the due performance of his duties to the amount of rupees).

10. And it is further ordered that if the movable property of the deceased be found insufficient for carrying out the objects of the suit, then the following further inquiries be made and accounts taken, that is to say—

(a) an inquiry what immovable property the deceased was seized of or entitled to at the time of his death ;

(b) an inquiry what are the incumbrances (if any) affecting the immovable property of the deceased or any part thereof ;

(c) an account, so far as possible, of what is due to the several incumbrancers, and to include a statement of the priorities of such of the incumbrancers as shall consent to the sale hereinafter directed.

11. And that the immovable property of the deceased, or so much thereof as shall be necessary to make up the fund in Court sufficient to carry out the object of the suit, be sold with the approbation of the Judge free from incumbrances (if any) of such incumbrancers as shall consent to the sale and subject to the incumbrances of such of them as shall not consent.

12. And it is ordered that G. H. shall have the conduct of the sale of the immovable property, and shall prepare the conditions and contracts of the sale subject to the approval of the \*and that in case any doubt or difficulty shall arise the papers shall be submitted to the Judge to settle.

13. And it is further ordered that for the purpose of the inquiries hereinbefore directed, the \*shall advertise in the newspapers according to the

\* Here insert name of proper officer.

practice of the Court or shall make such inquiries in any other way which shall appear to the \_\_\_\_\_  
 \*to give the most useful publicity to such inquiries.

14. And it is ordered that the above inquiries and accounts be made and taken, and that all other acts ordered to be done be completed before the \_\_\_\_\_ day of \_\_\_\_\_ and that the \_\_\_\_\_ \*do certify the result of the inquiries and the accounts, and that all other acts ordered are completed, and have his certificate in that behalf ready for the inspection of the parties on the \_\_\_\_\_ day of \_\_\_\_\_.

15. And, lastly it is ordered that this suit (or proceeding) stand adjourned for making final decree to the \_\_\_\_\_ day of \_\_\_\_\_  
 [Such part only of this decree is to be used as is applicable to the particular.]

— — —  
 No. 18.

FINAL DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE.

(Title.)

1. It is ordered that the defendant \_\_\_\_\_ do, on or before the \_\_\_\_\_ day of \_\_\_\_\_, pay into Court the sum of Rs. \_\_\_\_\_ the balance by the said certificate found to be due from the said defendant on account of the estate of \_\_\_\_\_, the testator, and also the sum of Rs. \_\_\_\_\_ for interest, at the rate of Rs. \_\_\_\_\_ per cent. per annum. from the \_\_\_\_\_ day of \_\_\_\_\_ to the \_\_\_\_\_ day of \_\_\_\_\_ amounting together to the sum of Rs. \_\_\_\_\_.

2. Let the \_\_\_\_\_ \* of the said Court tax the costs of the plaintiff and defendant in this suit, and let the amount of the said costs, when so taxed, be paid out of the said sum of Rs. \_\_\_\_\_ ordered to be paid into Court as aforesaid, as follows :—

(a) The costs of the plaintiff to Mr. \_\_\_\_\_, his attorney [or pleader] or the costs of the defendant to Mr. \_\_\_\_\_, his attorney [or pleader].

(b) And (if any debts are due) with the residue of the said sum of Rs. \_\_\_\_\_ after payment of the plaintiff's and defendant's costs as aforesaid, let the sums found to be owing to the several creditors mentioned in the \_\_\_\_\_ schedule to the certificate, of the \_\_\_\_\_ \* together with subsequent interest on such of the debts as bear interest be paid ; and, after making such payments, let the amount coming to the several legatees mentioned in the \_\_\_\_\_ schedule, together with subsequent interest (to be verified as aforesaid) be paid to them.

3. And if there should then be any residue, let the same be paid to the residuary legatee.

— — —  
 No. 19

PRELIMINARY DECREE IN AN ADMINISTRATION SUIT BY A LEGATEE  
 WHERE AN EXECUTOR IS HELD PERSONALLY LIABLE FOR THE  
 PAYMENT OF LEGACIES.

(Title.)

1. It is declared that the defendant is personally liable to pay the legacy of Rs. \_\_\_\_\_ bequeathed to the plaintiff ;

2. And it is ordered that an account be taken of what is due for principal and interest on the said legacy ;

3. And it is also ordered that the defendant do within \_\_\_\_\_ weeks after the date of the certificate of the \_\_\_\_\_ \*pay to the plaintiff the amount of what the \_\_\_\_\_ \*shall certify to be due for principal and interest ;

4. And it is ordered that the defendant do pay the plaintiff his costs of suit the same to be taxed in case the parties differ.

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\* Here insert name of propor officer.

No. 20.

## FINAL DECREE IN AN ADMINISTRATION-SUIT BY NEXT-OF-KIN.

(Title.)

1. LET the \* of the said Court tax the costs of the plaintiff and defendant in this suit and let the amount of the said plaintiff's costs, when so taxed be paid by the defendant to the plaintiff out of the sum of Rs. , the balance by the said certificate found to be due from the said defendant on account of the personal estate of *E. F.*, the intestate, within one week after the taxation of the said costs by the said \*and let the defendant retain for her own use out of such sum her costs, when taxed.

2. And it is ordered that the residue of the said sum of Rs. after payment of the plaintiff's and defendant's costs as aforesaid, be paid and applied by defendant as follows :—

(a) Let the defendant within one week after the taxation of the said costs by the \*as aforesaid, pay one-third share of the said residue to the plaintiffs *A. B.*, and *C. D.*, his wife, in her right as the sister and one of the next-of-kin of the said *E. F.*, the intestate.

(b) Let the defendant retain for her own use one other third-share of said residue, as the mother and one of the next-of-kin of the said *E. F.*, the intestate.

(c) And let the defendant, within one week after the taxation of the said costs by the \* as aforesaid, pay the remaining one-third share of the said residue to *G. H.*, as the brother and the other next-of-kin of the said *E. F.*, the intestate.

No. 21.

PRELIMINARY DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP  
AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is declared that the proportionate shares of the parties in the partnership are as follows :—

It is declared that this partnership shall stand dissolved [or shall be deemed to have been dissolved] as from the day of and it is ordered that the dissolution thereof as from that day be advertised in the Gazette, etc.

And it is ordered that be the receiver of the partnership estate and effects in this suit and do get in all the outstanding book-debts and claims of the partnership ;

And it is ordered that the following accounts be taken :—

1. An account of the credits, property and effects now belonging to the said partnership ;

2. An account of the debts and liabilities of the said partnership ;

3. An account of all dealings and transaction between the plaintiff and defendant, from the foot of the settled account exhibited in this suit and marked (A), and and not disturbing any subsequent settled accounts.

And it is ordered that the goodwill of the business heretofore carried on by the plaintiff and defendant as in the plaint mentioned, and the stock-in-trade, be sold on the premises, and that the \*may on the application of any of the parties, fix a reserved bidding for all or any of the lots at such sale, and that either of the parties is to be at liberty to bid at the sale.

---

\* Here insert name of proper officer.

And it is ordered that the above accounts be taken, and all the other acts required to be done be completed, before the \_\_\_\_\_ day of \_\_\_\_\_, and that the \_\_\_\_\_ \*do certify the result of the accounts and that all other acts are completed, and have his certificate in that behalf ready for the inspection of the parties on the \_\_\_\_\_ day of \_\_\_\_\_.

And lastly, it is ordered that this suit stand adjourned for making a final decree to the \_\_\_\_\_ day of \_\_\_\_\_.

— — —  
No 22.

FINAL DECREE IN A SUIT FOR DISSOLUTION OF PARTNERSHIP  
AND THE TAKING OF PARTNERSHIP ACCOUNTS.

(Title.)

It is ordered that the fund now in Court, amounting to the sum of Rs. \_\_\_\_\_, be applied as follows :—

1. In payment of the debts due by the partnership set forth in the certificate of the \_\_\_\_\_ \* amounting in the whole to Rs. \_\_\_\_\_
2. In payment of the costs of all parties in this suit, amounting to Rs. \_\_\_\_\_

[These costs must be ascertained before the decree is drawn up]

3. In payment of the sum of Rs. \_\_\_\_\_ to the plaintiff as his share of the partnership-assets, of the sum of Rs. \_\_\_\_\_ being the residue of the said sum of Rs. \_\_\_\_\_ now in Court, to the defendant as his share of the partnership-assets

[Or, and that the remainder of the said sum of Rs. \_\_\_\_\_ be paid to the said plaintiff (or defendant) in part payment of the sum of Rs. \_\_\_\_\_ certified to be due to him in respect of the partnership accounts.

4. And that the defendant [or plaintiff] do on or before the \_\_\_\_\_ day of \_\_\_\_\_ pay to the plaintiff [or defendant] the sum of Rs. \_\_\_\_\_ being the balance of the said sum of Rs. \_\_\_\_\_ due to him, which will then remain due.

— — —  
No. 23.

DECREE FOR RECOVERY OF LAND AND MESNE PROFITS.

(Title.)

It is hereby decreed as follows :—

1. That the defendant do put the plaintiff in possession of the property specified in the schedule hereunto annexed.
2. That the defendant do pay to the plaintiff the sum of Rs. \_\_\_\_\_ with interest thereon at the rate of \_\_\_\_\_ per cent per annum to the date of realization on account of mesne profits which have accrued due prior to the institution of the suit.

Or

2. That an inquiry be made as to the amount of mesne profits which have accrued due prior to the institution of the suit.

3. That an inquiry be made as to the amount of mesne profits from the institution of the suit until [the delivery of possession to the decree-holder] [the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the Court] [the expiration of three years from the date of the decree].

Schedule.

**Note :—**For local amendment in Madras, *vide infra*.

\* Here insert name of proper officer.



## APPENDIX E. EXECUTION.

### No. 1.

NOTICE TO SHOW CAUSE WHY A PAYMENT OR ADJUSTMENT SHOULD  
NOT BE RECORDED AS CERTIFIED.

(O. 21, r. 2.)

(Title.)

To

WHEREAS in execution of the decree in the above-named suit has applied to this Court that the sum of Rs. \_\_\_\_\_ recoverable under the decree has been paid and should be recorded as certified, this is to give you notice that you are to appear before this Court on the day of \_\_\_\_\_ 19 , to show cause why the payment aforesaid should not be recorded as certified.  
adjustment

Given under my hand and the seal of the Court, this

day of \_\_\_\_\_

19 .

*Judge.*

### No. 2.

PRECEPT. (Section 46.)

(Title.)

Upon hearing the decree-holder it is ordered that this precept be sent to the Court of \_\_\_\_\_ at \_\_\_\_\_ under section 46 of the Code of Civil Procedure, 1908, with directions to attach the property specified in the annexed schedule and to hold the same pending any application which may be made by the decree-holder for execution of the decree.

*Schedule.*

Dated the \_\_\_\_\_

day of \_\_\_\_\_

19 .

*Judge.*

### No. 3.

ORDER SENDING DECREE FOR EXECUTION TO ANOTHER COURT.

(O. 21, r. 6.)

(Title.)

WHEREAS the decree-holder in the above suit has applied to this Court for a certificate to be sent to the Court of \_\_\_\_\_ ,

at \_\_\_\_\_ for execution of the decree in the above suit by the said Court, alleging that the judgment-debtor resides or has property within the local limits of the jurisdiction of the said Court, and it is deemed necessary and proper to send a certificate to the said Court under Order XXI, rule 6, of the Code of Civil Procedure, 1908, it is

*Ordered :*

That a copy of this order be sent to with a copy of the decree and of any order which may have been made for execution of the same and a certificate of non-satisfaction.

Dated the \_\_\_\_\_

day of \_\_\_\_\_

19 .

*Judge.*

### No 4.

CERTIFICATE OF NON-SATISFACTION OF DECREE. (O 21, r. 6.)

(Title.)

CERTIFIED that no \* satisfaction of the decree of this Court in Suit No. \_\_\_\_\_ of 19 \_\_\_\_\_ , a copy of which is hereunto attached, has been obtained by execution within the jurisdiction of this Court.

Dated the \_\_\_\_\_

day of \_\_\_\_\_

19 .

*Judge.*

---

\* If partial, strike out "no" and state to what extent.



No. 6.

## APPLICATION FOR EXECUTION OF DECREE. (O. 21, r. 11.)

In the Court of

I, \_\_\_\_\_, decree-holder, hereby apply for execution of  
decree herein below set forth :—

the

No. of suit.	Names of parties.	Date of decree.	Whether any appeal preferred from decree.	Payment or adjustment made, if any.	Previous application, if any, with date and result.	Amount with interest due upon the decree or other relief granted thereby together with particulars of any cross decree.	Amount of costs, if any, awarded.	Against whom to be executed.	Mode in which the assistance of Court is required.
1	2	3	4	5	6	7	8	9	10
789 of 1897.	A. B.—Plaintiff C. D.—Defendant	October 11, 1897.	No.	None.	Rs. 72-4 recorded on application, dated the 4th March, 1899.	Rs. 314-8-2 principal [interest at 6 per cent. per annum, from date of decree till payment]	Rs. A. P. As awarded in the decree . . . 47 10 4 Subsequently incurred . . . 8 2 0 TOTAL . . . 55 12 4	Against the defendant C. D.	[When attachment and sale of movable property is sought.] I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution, be realized by attachment and sale of defendant's movable property as per annexed list and paid to me. [When attachment and sale of immovable property is sought.] I pray that the total amount of Rs. [together with interest on the principal sum up to date of payment] and the costs of taking out this execution be realized by the attachment and sale of defendant's immovable property specified at the foot of this application and paid to me.

I declare that what is stated herein is true to the best of my knowledge and belief.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, Signed \_\_\_\_\_, decree-holder.

[When attachment and sale of immovable property is sought.]  
Description and Specification of Property.

The undivided one-third share of the judgment-debtor in a house situated in the village of \_\_\_\_\_, value Rs. 40, and bounded as follows :—  
East by G's house ; west by H's house ; south by public road ; north by private lane and J's house.

I declare that what is stated in the above description is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified.

Signed \_\_\_\_\_, decree-holder.

## No. 7.

## NOTICE TO SHOW CAUSE WHY EXECUTION SHOULD NOT ISSUE.

\* [(O. 21, r. 16.)]

To

(Title.)

WHEREAS

has made application to this Court for execution of decree in Suit No. \_\_\_\_\_ of 19\_\_\_\_, on the allegation that the said decree has been transferred to him by assignment, this is to give you notice that you are to appear before this Court \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, to show cause why execution should not be granted.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

## No. 8.

## WARRANT OF ATTACHMENT OF MOVABLE PROPERTY IN EXECUTION OF A DECREE FOR MONEY. (O. 21, r. 30)

(Title.)

To

The Bailiff of the Court.

WHEREAS

was ordered by decree of this Court passed on the \_\_\_\_\_ day of 19\_\_\_\_, in Suit No. \_\_\_\_\_ of \_\_\_\_\_ 19\_\_\_\_,

DECREE.	
Principal ...	...
Interest ...	...
Costs ...	...
Cost of execution ...	...
Further interest ...	...
TOTAL ...	...

to pay to the plaintiff the sum of Rs. \_\_\_\_\_ as noted in the margin ; and whereas the said sum of Rs. \_\_\_\_\_ has not been paid. These are to command you to attach the movable property of the said \_\_\_\_\_ as set forth in the schedule hereunto annexed, or which shall be pointed out to you by the said \_\_\_\_\_, and unless the said \_\_\_\_\_ shall pay to you the said sum of Rs. \_\_\_\_\_ together with Rs. \_\_\_\_\_

, the costs of this attachment, to hold the same until further orders from this Court.

You are further commanded to return this warrant on or before the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, with an endorsement certifying the day on which and manner in which it has been executed, or why it has not been executed.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

Schedule.

Judge.

## No. 9.

## WARRANT FOR SEIZURE OF SPECIFIC MOVABLE PROPERTY ADJUDGED BY DECREE. (O. 21, r. 31.)

(Title.)

To

The Bailiff of the Court.

WHEREAS

was ordered by decree of this Court passed on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in suit No. \_\_\_\_\_ of 19\_\_\_\_, to deliver to the plaintiff the movable property (or a share in the movable property) specified in the schedule hereunto annexed, and whereas the said property (or share) has not been delivered ;

\* This reference was substituted for the precluded reference "(O. 21, r. 22)" by s. 2 and Sch. I of the Repealing and Amending Act 1914 (10 of 1914).

These are to command you to seize the said movable property (*or* a share of the said movable property) and to deliver it to the plaintiff or to such person as he may appoint in his behalf.

GIVEN under my hand and the seal of the Court, this                      day of  
19 .

*Schedule.*

*Judge.*

No. 10.

NOTICE TO STATE OBJECTIONS TO DRAFT OF DOCUMENT. (O. 21, r. 34.)

(*Title.*)

To

TAKE notice that on the                      day of                      19 .  
the decree-holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of                      , whereof a draft is hereunto annexed, of the immovable property specified hereunder and that the                      day of                      19 , is appointed for the hearing of the said application, and that you are at liberty to appear on the said day and to state in writing any objection to the said draft.

*Description of property.*

GIVEN under my hand and the seal of the Court, this                      day of                      19 .  
*Judge.*

—  
No. 11.

WARRANT TO THE BAILIFF TO GIVE POSSESSION OF LAND, ETC.

(O. 21, r. 35.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS the undermentioned property in the occupancy of                      has been decreed to                      the plaintiff in this suit ; you are hereby directed to put the said                      in possession of the same, and you are hereby authorized to remove any person bound by the decree who may refuse to vacate the same.

GIVEN under my hand and the seal of the Court, this                      day of  
19 .

*Schedule*

*Judge.*

—  
No. 12.

NOTICE TO SHOW CAUSE WHY WARRANT OF ARREST SHOULD NOT ISSUE.

(O. 21, r. 37.)

(*Title.*)

To

WHEREAS                      has made application to this Court for execution of decree in suit No.                      of 19                      , by arrest and imprisonment of your person you are hereby required to appear before this Court on the                      day of                      19 , to show cause why you should not be committed to the civil prison in execution of the said decree.

GIVEN under my hand and the seal of the Court, this                      day of                      19 .  
*Judge.*

—  
No. 13.

WARRANT OF ARREST IN EXECUTION. (O. 21, r. 38.)

(*Title.*)

To

The Bailiff of the Court.

WHEREAS  
in Suit No.                      day of

was adjudged by a decree of the Court  
of 19 , dated the                      19 , to pay to the decree-holder

DECREE.			
Principal	...		
Interest	...		
Costs	...		
Execution	...		
<b>TOTAL</b>	...		

the sum of Rs. \_\_\_\_\_ as noted in the margin and whereas the said sum of Rs. \_\_\_\_\_ has not been paid to the said decree-holder in satisfaction of the said decree ; these are to command you to arrest the said judgment-debtor and unless the said judgment-debtor shall pay to you the said sum of Rs. \_\_\_\_\_ together with Rs. \_\_\_\_\_ for the costs of executing this process, to bring the said defendant before the Court with all convenient speed. You are further commanded to return this warrant on or before the

day of \_\_\_\_\_ 19\_\_\_\_, with an endorsement certifying the day on which and manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

*Judge.*

#### NO. 14.

#### WARRANT OF COMMITTAL OF JUDGMENT DEBTOR TO JAIL.

(O. 21, r. 40.)

(Title.)

To

The Officer-in-charge of the Jail at \_\_\_\_\_

WHEREAS \_\_\_\_\_ who has been brought before this Court this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, under a warrant in execution of a decree which was made and pronounced by the said Court on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, and by which decree it was ordered that the said \_\_\_\_\_ should pay \_\_\_\_\_ ; And whereas the said \_\_\_\_\_ has not obeyed the decree nor satisfied the Court that he is entitled to be discharged from custody ; You are hereby, in the name of the King Emperor of India, commanded and required to take and receive the said \_\_\_\_\_ into the civil prison and keep him imprisoned therein for a period not exceeding \_\_\_\_\_ or until the said decree shall be fully satisfied, or the said \_\_\_\_\_ shall be otherwise entitled to be released according to the terms and provisions of section 58 of the Code of Civil Procedure, 1908 ; and the Court does hereby fix \_\_\_\_\_ annas per diem as the rate of the monthly allowance for the subsistence of the said \_\_\_\_\_ during his confinement under this warrant of committal.

GIVEN under my signature and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

*Judge.*

#### NO. 15.

#### ORDER FOR THE RELEASE OF A PERSON IMPRISONED IN EXECUTION OF A DECREE. (Sections 58, 59.)

(Title.)

To

The Officer-in-charge of the Jail at \_\_\_\_\_

UNDER orders passed this day, you are hereby directed to set free judgment-debtor now in your custody.

Dated \_\_\_\_\_

*Judge.*

**Notes.**—For local amendments in Calcutta, Lahore, Madras and Rangoon, *vide infra*.

No. 16.

## ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OR RIGHT OF SOME OTHER PERSON TO THE IMMEDIATE POSSESSION THEREOF. (O. 21, r. 46.)

(Title.)

To

WHEREAS  
has failed to satisfy a decree passed against \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in Suit No. \_\_\_\_\_ of 19\_\_\_\_, in favour of \_\_\_\_\_ for Rs. \_\_\_\_\_; It is ordered that the defendant be, and is hereby, prohibited and restrained until the further order of this Court from receiving from \_\_\_\_\_ the following property in the possession of the said \_\_\_\_\_, that is to say \_\_\_\_\_ to which the defendant is entitled, subject to any claim of the said \_\_\_\_\_, and the said \_\_\_\_\_ is hereby prohibited and restrained, until the further order of this Court, from delivering the said property to any person or persons whomsoever.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_. \_\_\_\_\_ Judge

No. 17.

## ATTACHMENT IN EXECUTION.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF DEBTS NOT SECURED BY NEGOTIABLE INSTRUMENTS.

(O. 21, r. 46.)

(Title.)

To

WHEREAS  
has failed to satisfy a decree passed against \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in suit No. \_\_\_\_\_ of 19\_\_\_\_, in favour of \_\_\_\_\_ for Rs. \_\_\_\_\_; It is ordered that the defendant be, and is hereby, prohibited and restrained, until the further order of this Court, from receiving from you a certain debt alleged now to be due from you to the said defendant, namely, \_\_\_\_\_ and that you the said \_\_\_\_\_, be and you are hereby, prohibited and restrained, until the further order of this Court, from making payment of the said debt, or any part thereof, to any person whomsoever or otherwise than into this Court.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_. \_\_\_\_\_ Judge.

## ATTACHMENT IN EXECUTION.

No. 18.

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARES IN THE CAPITAL OF A CORPORATION. (O. 21, r. 46.)

(Title.)

To

Defendant and to \_\_\_\_\_,  
Secretary of \_\_\_\_\_ Corporation.  
WHEREAS \_\_\_\_\_ has failed to satisfy a decree passed against \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in Suit No. \_\_\_\_\_ of 19\_\_\_\_, in favour of \_\_\_\_\_ for Rs. \_\_\_\_\_; It is ordered that you, the defendant, be, and you are hereby, prohibited and restrained, until the further order of this Court, from making any transfer of \_\_\_\_\_ shares in the aforesaid Corporation, namely, \_\_\_\_\_, or from receiving payment of any dividends thereon: and you \_\_\_\_\_, the Secretary

of the said Corporation, are hereby prohibited and restrained from permitting any such transfer or making any such payment.

GIVEN under my hand and the seal of the Court, this                      day of  
19                      Judge.

No. 19.

ORDER TO ATTACH SALARY OF PUBLIC OFFICER OR SERVANT OF  
RAILWAY COMPANY OR LOCAL AUTHORITY. (O. 21, r. 48.)  
(Title.)

To.

**WHEREAS**

judgment-debtor in the above-named case, is a *(describe office of judgment-debtor.)* receiving his salary *(or allowances)* at your hands ; and whereas *(Name of decree-holder)*, decree-holder in the said case, has applied in this Court for the attachment of the salary *(or allowances)* of the said *(Name of judgment-debtor)* to the extent of *(Amount)* due to him under the decree ; You are hereby required to withhold the said sum of *(Amount)* from the salary of the said *(Name of judgment-debtor)* in monthly instalments of *(Amount)* and to remit the said sum *(or monthly instalments)* to this

GIVEN under my hand and the seal of the Court, this                  day of        19 .  
Judge.

No. 20.

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT.  
(O. 21, r. 51.)  
{*Title.*}

To

**The Bailiff of the Court.**

WHEREAS an order has been passed by this Court on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, for the attachment of \_\_\_\_\_; You are hereby directed to seize the said \_\_\_\_\_, and bring the same into Court.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

*Judge.*

NO. 21.

**ATTACHMENT.**

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY SECURITY IN THE CUSTODY OF A COURT OF JUSTICE OR OFFICER OF GOVERNMENT. (O. 21, r. 52.)

**(Title.)**

**To**

Sir,

Sir,  
The plaintiff having applied, under rule 52 of Order XXI of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (*here state how the money is supposed to be in the hands of the person addressed, on what account, etc.*) I request that you will hold the said money subject to the further order of this Court.

I have the honour to be,      ✓

**Sir,**

Your most obedient servant,  
*Judge.*

**Dated the**

**day of**

19



No. 22.

## NOTICE OF ATTACHMENT OF A DECREE TO THE COURT WHICH PASSED IT.

(O. 21, r. 53.)

(Title.)

To

The Judge of the Court of

SIR,

I have the honour to inform you that the decree obtained in your Court on the day of 19, by in Suit No. of 19, in which he was and was has been attached by this Court on the application of the in the suit specified above. You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment-debtor.

I have the honour, etc ,  
Judge.

Dated the day of 19 .

No. 23.

## NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE

DECREE. (O. 21, r. 53.)

(Title.)

To

WHEREAS an application has been made in this Court by the decree-holder in the above suit for the attachment of a decree obtained by you on the day of 19, in the Court of in Suit No. of 19, in which was and was ; It is ordered that you, the said , be, and you are hereby, prohibited and restrained, until the further order of this Court, from transferring or charging the same in any way.

GIVEN under my hand and the seal of the Court, this day of 19 .

Judge.

No. 24.

## ATTACHMENT IN EXECUTION.

## PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS OF IMMOVABLE

PROPERTY. (O. 21, r. 54.)

(Title.)

To

Defendant,

WHEREAS you have failed to satisfy a decree passed against you on the day of 19, in suit No. of 19, in favour of for Rs. ; It is order that you, the said be, and you are hereby prohibited and restrained, until the further order of this Court, from transferring or charging the property specified in the schedule hereunto annexed, by sale, gift or otherwise, and that all persons be, and that they are

hereby prohibited from receiving the same by purchase, gift or otherwise  
 GIVEN under my hand and the seal of the Court, this                      day of  
 19                      .

*Judge.*

*Schedule.*

— — —  
 No. 25.

ORDER FOR PAYMENT TO THE PLAINTIFF, ETC., OF MONEY, ETC.,  
 IN THE HANDS OF A THIRD PARTY. (O. 21, r. 56.)

(Title.)

To  
 WHEREAS the following property                      has been attached in execution  
 of a decree in Suit No.                      of                      19                      , passed on the                      day of  
                     19                      , in favour of                      for Rs.                      ; It is ordered  
 that the property so attached, consisting of Rs.                      in money and Rs.  
 in currency-notes, or a sufficient part thereof to satisfy the said decree, shall be paid  
 over by you, the said                      , to

GIVEN under my hand and the seal of the Court this                      day of  
 19                      .

*Judge.*

— — —  
 No. 26.

NOTICE TO ATTACHING CREDITOR. (O. 21, r. 58.)

(Title.)

To  
 WHEREAS                      has made application to  
 this Court for the removal of attachment on                      placed at your  
 instance in execution of the decree in suit No.                      of 19                      , this is to give you  
 notice to appear before this Court on                      , the  
                     day of                      19                      , either in person or by a pleader  
 of the Court duly instructed to support your claim, as attaching creditor.

GIVEN under my hand and the seal of the Court, this                      day of  
 19                      .

*Judge.*

— — —  
 No. 27.

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR  
 MONEY. (O. 21, r. 66.)

(Title.)

To

The Bailiff of the Court.

These are to command you to sell by auction, after giving                      days'  
 previous notice by affixing the same in this Court house, and after making due  
 proclamation, the                      property attached under a warrant from  
 this Court, dated the                      day of                      19                      , in execution of a  
 decree in favour of                      in Suit No.                      of 19                      , or  
 so much of the said property as shall realize the sum of Rs.                      being the  
                     of the said decree and costs still remaining unsatisfied.

You are further commanded to return this warrant on or before the                      , day  
 of                      19                      , with an endorsement certifying the manner in which it  
 has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this                      day of                      19                      .

*Judge.*

No. 28

**NOTICE OF THE DAY FIXED FOR SETTLING A SALE PROCLAMATION.**

(O. 21, r. 66.)

(Title.)

To WHEREAS in the above-named suit Judgment-debtor.  
for the sale of the decree-holder, has applied  
informed ; You are hereby  
that the day of 19 , has been fixed for  
settling the terms of the proclamation of sale.  
GIVEN under my hand and the seal of the Court, this day of  
19 .

*Judge.*

No. 29.

PROCLAMATION OF SALE. (O. 21, r. 66)

(*Title.*)

Notice is hereby given that, under rule 64 of order XXXI of the Code of Civil Procedure, 1908 an order has been passed by this Court for the sale of the attached property mentioned in the annexed schedule, in satisfaction of the claim of the decree-holder in the suit mentioned in the margin, amounting with costs and interest up to date of sale to the sum of

Suit No. \_\_\_\_\_ of 19\_\_\_\_, decided by the \_\_\_\_\_ of \_\_\_\_\_ in which \_\_\_\_\_ was plaintiff and \_\_\_\_\_ was defendant.

The sale will be by public auction, and the property will be put up for sale in the lots specified in the schedule. The sale will be of the property of the judgment-debtors above-named as mentioned in the schedule below; and the liabilities and claims attaching to the said property so far as they have been ascertained, are those specified in the schedule against each lot.

In the absence of any order of postponement, the sale will be held by \_\_\_\_\_ at the monthly sale commencing at \_\_\_\_\_ o'clock on the \_\_\_\_\_ at \_\_\_\_\_. In the event, however, of the debt above specified and of the costs of the sale being tendered or paid before the knocking down of any lot, the sale will be stopped.

At the sale the public generally are invited to bid, either personally or by duly authorized agent. No bid by, or on behalf of, the judgment-creditors above-mentioned, however, will be accepted, nor will any sale to them be valid without the express permission of the Court previously given. The following are the further

### Conditions of Sale.

1. The particulars specified in the schedule below have been stated to the best of the information of the Court, but the Court will not be answerable for any error, mis-statement or omission in this proclamation.

2. The amount by which the biddings are to be increased shall be determined by the officer conducting the sale. In the event of any dispute arising as to the amount bid, or as to the bidder, the lot shall at once be again put up to auction.

3. The highest bidder shall be declared to be the purchaser of any lot, provided always that, he is legally qualified to bid, and provided that it shall be in the discretion of the Court or officer holding the sale to decline acceptance of the highest bid when the price offered appears so clearly inadequate as to make it advisable to do so.\*

4. For reasons recorded, it shall be in the discretion of the officer conducting the sale to adjourn it subject always to the provisions of rule 69 of Order XXI.

5. In the case of movable property, the price of each lot shall be paid at the time of sale or as soon after as the officer holding the sale directs, and in default of payment the property shall forthwith be again put up and re-sold.

6. In the case of immovable property, the person declared to be the purchaser shall pay immediately after such declaration a deposit of 25 per cent. on the amount of his purchase-money to the officer conducting the sale, and in default of such deposit the property shall forthwith be put up again and re-sold.

\* *Vide* A. I. R. 1932 Rang. 17=9 Rang. 608=135 Ind. Cas. 654.

7. The full amount of the purchase-money shall be paid by the purchaser before the Court closes on the fifteenth day after the sale of the property, exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the fifteenth day.

8. In default of payment of the balance of purchase-money within the period allowed, the property shall be re-sold after the issue of a fresh notification of sale. The deposit after defraying the expenses of the sale, may, if the Court thinks fit, be forfeited to Government and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may be subsequently sold.

GIVEN under my hand and the seal of the Court, this                      day of

19 .

*Judge.*

*Schedule of property.*

Number of lot.	Description of property to be sold, with the name of each owner where there are more judgment-debtors than one.	The revenue assessed upon the estate or part of the estate, if the property to be sold is an interest in an estate or of a part of an estate paying revenue to Government	Detail of any incumbrances to which the property is liable.	Claims, if any, which have been put forward to the property and any other known particulars bearing on its nature and value.
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Notes.—For local amendments in Allahabad and Madras, *vide infra*.

No. 30.

ORDER ON THE NAZIR FOR CAUSING SERVICE OF PROCLAMATION OF SALE. (O. 21, r. 66)  
(Title.)

To

The Nazir of the Court.

WHEREAS an order has been made for the sale of the property of the judgment-debtor specified in the schedule hereunder annexed, and whereas the                      day of 19                      , has been fixed for the sale of the said property, copies of the proclamation of sale are by this warrant made over to you, and you are hereby ordered to have the proclamation published by beat of drum within each of the properties specified in the said schedule, to affix a copy of the said proclamation on a conspicuous part of each of the said properties and afterwards on the Court-house, and then to submit to this Court a report showing the dates on which and the manner in which the proclamations have been published.

Dated the                      day of                      19 .

*Schedule*

*Judge.*

No. 31.

CERTIFICATE BY OFFICER HOLDING A SALE OF THE DEFICIENCY OF PRICE  
ON A RE-SALE OF PROPERTY BY REASON OF THE PURCHASER'S DEFAULT.  
(O. 21, r. 71.)

(Title.)

Certified that at the re-sale of the property in execution of the decree in the  
above-named suit, in consequence of default on the part of \_\_\_\_\_, purchaser,  
there was a deficiency in the price of the said property amounting to Rs. \_\_\_\_\_,  
and that the expenses attending such re-sale amounted to Rs. \_\_\_\_\_, making a  
total of Rs. \_\_\_\_\_, which sum is recoverable from the defaulter.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_

\_\_\_\_\_  
*Officer holding the sale.*

No. 32.

NOTICE TO PERSON IN POSSESSION OF MOVABLE PROPERTY SOLD IN  
EXECUTION. (O. 21, r. 79.)

(Title.)

To \_\_\_\_\_  
WHEREAS \_\_\_\_\_ has become the purchaser at a public  
sale in execution of the decree in the above suit of \_\_\_\_\_ now in your  
possession you are hereby prohibited from delivering possession of the said  
\_\_\_\_\_ to any person except the said \_\_\_\_\_

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of  
19\_\_\_\_

\_\_\_\_\_  
*Judge.*

No. 33.

PROHIBITORY ORDER AGAINST PAYMENT OF DEBTS SOLD IN EXECUTION TO  
ANY OTHER THAN THE PURCHASER. (O. 21, r. 79.)

(Title.)

To \_\_\_\_\_ and to \_\_\_\_\_  
WHEREAS \_\_\_\_\_ has become the purchaser at a public sale in  
execution of the decree, in the above suit of \_\_\_\_\_ being debts due  
from you \_\_\_\_\_ to you \_\_\_\_\_; it is ordered that you  
\_\_\_\_\_ be, and you are hereby, prohibited from receiving, and you  
from making payment of, the said debt to any person or persons except the said \_\_\_\_\_

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of  
19\_\_\_\_

\_\_\_\_\_  
*Judge.*

No. 34.

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXECUTION.  
(O. 21, r. 79.)

(Title.)

To \_\_\_\_\_ and \_\_\_\_\_, Secretary of \_\_\_\_\_ Corporation,  
WHEREAS \_\_\_\_\_ has become the purchaser at a public sale in execution  
of the decree, in the above suit of certain shares in the above Corporation that is  
to say, of \_\_\_\_\_ standing in the name of you \_\_\_\_\_  
\_\_\_\_\_; It is ordered that you \_\_\_\_\_ be and you are hereby,  
prohibited from making any transfer of the said shares to any person except the  
said \_\_\_\_\_ the purchaser aforesaid or from receiving any  
dividends thereon; and you \_\_\_\_\_ Secretary of the said Corporation  
from permitting any such transfer or making any such payment to any person except  
the said \_\_\_\_\_ the purchaser aforesaid.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of  
19\_\_\_\_

\_\_\_\_\_  
*Judge.*

## No. 35.

CERTIFICATE TO JUDGMENT-DEBTOR AUTHORIZING HIM TO MORTGAGE,  
LEASE OR SELL PROPERTY. (O. 21, r. 83)

(Title.)

WHEREAS in execution of the decree passed in the above suit an order was made on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, for the sale of the under-mentioned property of the judgment-debtor \_\_\_\_\_, and whereas the Court has, on the application of the said judgment-debtor, postponed the said sale to enable him to raise the amount of the decree by mortgage, lease or private sale of the said property or of some part thereof :

This is to certify that the Court doth hereby authorize the said judgment-debtor to make the proposed mortgage, lease or sale within a period of \_\_\_\_\_ from the date of this certificate : provided that all monies payable under such mortgage, lease or sale shall be paid into this Court and not to the said judgment-debtor.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

Judge.

*Description of property.*

## No. 36

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE.

(O. 21, rr. 90-92.)

(Title.)

To

WHEREAS the under-mentioned property was sold on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in execution of the decree passed in the above-named suit, and whereas \_\_\_\_\_, the decree-holder [ or judgment-debtor ], has applied to this Court to set aside the sale of the said property on the ground of a material irregularity [ or fraud ] in publishing [ or conducting ] the sale, namely, that

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

*Description of property.*

Judge.

## No. 37.

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE.

(O. 21, rr. 91, 92.)

(Title.)

To

WHEREAS \_\_\_\_\_, the purchaser of the under-mentioned property sold on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in execution of the decree passed in the above-named suit, has applied to this Court to set aside the sale of the said property on the ground that \_\_\_\_\_ the judgment-debtor, had no saleable interest therein :

Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

*Description of property.*

Judge

No. 38.

## CERTIFICATE OF SALE OF LAND. (O. 21, r. 94.)

(Title.)

THIS is to certify that \_\_\_\_\_ has been declared  
the purchaser at a sale by public auction on the \_\_\_\_\_ day of  
19\_\_\_\_, of \_\_\_\_\_  
in execution of decree in this suit, and that the said sale has been duly confirmed  
by this Court.

GIVEN under my hand and the seal of the Court, this  
day of \_\_\_\_\_ 19\_\_\_\_.

*Judge.*

NOTE :—For local amendments in Nagpur and Patna, *vide infra*.

No. 39.

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT  
A SALE IN EXECUTION. (O. 21, r. 95.)

(Title)

To

The Bailiff of the Court.

WHEREAS \_\_\_\_\_ has become  
the certified purchaser of \_\_\_\_\_ at a  
sale in execution of decree in suit No. \_\_\_\_\_ of \_\_\_\_\_ 19\_\_\_\_; You are hereby  
ordered to put the said \_\_\_\_\_, the certified purchaser, as aforesaid, in possession  
of the same.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of  
19\_\_\_\_.

*Judge.*

No 40

SUMMONS TO APPEAR AND ANSWER CHARGE OF OBSTRUCTING EXECUTION  
OF DECREE. (O. 21, r. 97.)

(Title.)

To

WHEREAS, \_\_\_\_\_, the decree-holder  
in the above suit, has complained to this Court that you have resisted (*or* obstructed)  
the officer charged with the execution of the warrant for possession :

You are hereby summoned to appear in this Court on the \_\_\_\_\_ day of  
19\_\_\_\_, at \_\_\_\_\_ A.M., to answer the said complaint.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

*Judge.*

No. 41.

## WARRANT OF COMMITTAL. (O. 21, r. 98.)

(Title.)

To

The Officer-in-Charge of the Jail at

WHEREAS the undermentioned property has been decreed to  
\_\_\_\_\_, the plaintiff in this suit, and whereas the Court is satisfied that \_\_\_\_\_ without  
any just cause resisted (*or* obstructed) and is still resisting (*or* obstructing) the  
said \_\_\_\_\_, in obtaining possession of the property, and whereas the  
said \_\_\_\_\_ has made application to this Court that the said \_\_\_\_\_ be  
committed to the Civil prison ;

You are hereby commanded and required to take and receive the said \_\_\_\_\_ into  
the civil prison and to keep him imprisoned therein for the period of \_\_\_\_\_ days.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

*Judge.*

NOTE :—For local amendment in Oudh, *vide infra*.

No. 42.

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND.  
(Section 72 )

(Title.)

To

Collector of

SIR,

In answer to your communication No. \_\_\_\_\_ dated \_\_\_\_\_  
representing that the sale in execution of the decree in this suit of  
land situate within your district is objectionable, I have the honour to inform you  
that you are authorized to make provision for the satisfaction of the said decree in  
the manner recommended by you.

I have the honour to be  
SIR,  
Your most obedient servant,  
Judge.

NOTE :—For local amendment in Allahabad, *vide infra*.

## APPENDIX F.

## SUPPLEMENTAL PROCEEDINGS.

No 1.

## WARRANT OF ARREST BEFORE JUDGMENT. (O. 38, r. 1.)

(Title.)

To

The Bailiff of the Court.

WHEREAS

the plaintiff in the above suit, claims the sum

Principal	...	
Interest	...	
Costs	...	
TOTAL		...

of Rs. \_\_\_\_\_ as noted in the margin, and  
has proved to the satisfaction of the Court that there  
is probable cause for believing that the defendant  
is about to

These are to command you to demand and  
receive from the said \_\_\_\_\_ the sum of  
Rs. \_\_\_\_\_ as sufficient to satisfy the  
plaintiff's claim, and unless the said sum of  
Rs. \_\_\_\_\_ is forthwith delivered  
to you by or on behalf of the said

\_\_\_\_\_, to take the said \_\_\_\_\_ into custody,  
and to bring him before this Court, in order that he may show cause why he should  
not furnish security to the amount of Rs. \_\_\_\_\_ for his personal appearance  
before the Court, until such time as the said suit shall be fully and finally disposed  
of, and until satisfaction of any decree that may be passed against him in the suit.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of

19

Judge.

No. 2.\*

SECURITY FOR APPEARANCE OF A DEFENDANT ARRESTED BEFORE  
JUDGMENT. (O. 38, r. 2.)

(Title.)

WHEREAS at the instance of \_\_\_\_\_, the plaintiff in the above suit,  
the defendant, has been arrested and brought before the Court ;

And whereas on the failure of the said defendant to show cause why he should  
not furnish security for his appearance, the Court has ordered him to furnish such  
security :

\* *Vide* 1930 A. L. J. 913.



Therefore I have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall appear at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the said suit ; and in default of such appearance I bind myself, my heirs and executors, to pay to the said Court, at its order, any sum of money that may be adjudged against the said defendant in the said suit.

Witness my hand at this day of 19 (Signed)

**Witnesses.**

I.

## 2.

No. 3.

SUMMONS TO DEFENDANT TO APPEAR ON SURETY'S APPLICATION  
FOR DISCHARGE. (O, 38 r. 3.)

(Title.)

To.

WHEREAS \_\_\_\_\_ who became surety on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_\_, \_\_\_\_\_ for your appearance in the above suit, has applied to this Court to be discharged from his obligation :

You are hereby summoned to appear in this Court in person on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ A. M., when the said application will be heard and determined.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

*Judge.*

No. 4.

ORDER FOR COMMITTAL. (O. 38, r. 4)

(Title.)

To

WHEREAS \_\_\_\_\_, plaintiff in this suit, has made application to the Court that security be taken for the appearance of \_\_\_\_\_, the defendant, to answer any judgment that may be passed against him in the suit; and whereas the Court has called upon the defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which he has failed to do; it is ordered that the said defendant be committed to the civil prison until the decision of the suit: or if judgment be pronounced against him, and until satisfaction of the decree.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_.

*Judge.*

No. 5.

ATTACHMENT BEFORE JUDGMENT WITH ORDER TO CALL FOR SECURITY  
FOR FULFILMENT OF DECREE. (O. 38, r. 5.)

(Title)

**To**

**The Bailiff of the Court.**

**WHEREAS** \_\_\_\_\_ has proved to the satisfaction of the Court that the  
defendant in the above suit \_\_\_\_\_ ;

These are to command you to call upon the said defendant on or before the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, either to furnish security for the sum of rupees \_\_\_\_\_ to produce and place at the disposal of this Court when required or the value thereof, or such portion of the value as may be sufficient to satisfy any decree that may be passed against him; or to appear and show cause why he should not furnish security; and you are further ordered to attach the said \_\_\_\_\_ and keep the same under

safe and secure custody until the further order of the Court ; and you are further commanded to return this warrant on or before the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

*Judge.*

-----  
No. 6.\*

SECURITY FOR THE PRODUCTION OF PROPERTY. (O. 38, r. 5.)

(Title.)

WHEREAS at the instance of \_\_\_\_\_, the plaintiff in the above suit, the defendant has been directed by the Court to furnish security in the sum of Rs. \_\_\_\_\_ to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed ;

Therefore I \_\_\_\_\_ have voluntarily become surety and do hereby bind myself, my heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree ; and in default of his so doing, I bind myself, my heirs and executors, to pay to the said Court, at its order, the said sum of Rs. \_\_\_\_\_ or such sum not exceeding the said sum as the said Court may adjudge.

*Schedule.*

Witness my hand at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

(Signed)

Witnesses.

1. \_\_\_\_\_
2. \_\_\_\_\_

-----  
No. 7.

ATTACHMENT BEFORE JUDGMENT ON PROOF OF FAILURE TO FURNISH SECURITY (O. 38, r. 6)

(Title)

To

The Bailiff of the Court.

WHEREAS \_\_\_\_\_, the plaintiff in this suit, as applied to the Court to call upon \_\_\_\_\_, the defendant to furnish security, to fulfil any decree that may be passed against him in the suit and whereas the Court has called upon the said \_\_\_\_\_ to furnish such security, which he has failed to do : These are to command you to attach \_\_\_\_\_, the property of the said \_\_\_\_\_, and keep the same under safe and secure custody until the further order of the Court ; and you are further commanded to return this warrant on or before the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, with an endorsement certifying the date on which and the manner in which it has been executed, or the reason why it has not been executed.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

*Judge.*

-----  
No. 8.

TEMPORARY INJUNCTIONS (O. 39, r. 1.)

(Title.)

Upon motion made unto this Court by \_\_\_\_\_ Pleader of [or Counsel for] the plaintiff A, B., and upon reading the petition of the said plaintiff in this matter filed [this day] [or the plaint filed in this suit on the \_\_\_\_\_ day of \_\_\_\_\_] or the written statement of the said plaintiff filed on the \_\_\_\_\_ day of \_\_\_\_\_ of \_\_\_\_\_ ] and upon hearing the evidence of \_\_\_\_\_ and \_\_\_\_\_ in \_\_\_\_\_

\* Vide 54 B, 113 = 31 Bom. L. R. 1442 = A. I. R. 1930 Bom. 122.

support thereof [if after notice and defendant not appearing ; add, and also the evidence of as to service of notice of this motion upon the defendant, C. D.] This Court doth order that an injunction be awarded to restrain the defendant C.D. his servants, agents and workmen, from pulling down [or suffering to be pulled down the house in the plaint in the said suit of the plaintiff mentioned [or in the written statement, or petition, of the plaintiff and evidence at the hearing of this motion mentioned] being No. 9 Oilmongers Street Hindupur, in the Taluk of and from selling the materials whereof the said house is composed. until the hearing of this suit or until the further order of this Court.

Dated this            day of            19   .

*Judge.*

[Where the injunction is sought to restrain the negotiation of a note or bill, the ordering part of the order may run thus :—] to restrain the defendants and from parting with out of the custody of them or any of them or endorsing, assigning or negotiating the promissory note [or bill of exchange] in question, dated on or about the , etc., mentioned in the plaintiff's plaint [or petition] and the evidence heard at this motion until the hearing of this suit, or until the further order of this Court.

[In Copyright cases] to restrain the defendant C. D., his servants, agents, or workmen, from printing publishing or vending a book called , or any part thereof until the, etc.

[Where part only of a book is to be restrained] to restrain the defendant C. D., his servants, agents or workmen, from printing, publishing, selling or otherwise disposing of such parts of the book in the plaint [or petition and evidence, etc.] mentioned to have been published by the defendant as hereinafter specified, namely, that part of the said book which is entitled and also that part which is entitled [or which is contained in page to page both inclusive] until etc.

[In patent cases] to restrain the defendant C. D., his agents, servants and workmen, from making, or vending any perforated bricks [or as the case may be] upon the principle of the invention in the plaintiff's plaint [or petition, etc., or written statement, etc.] mentioned belonging to the plaintiff's or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint [or as the case may be] mentioned, and from counterfeiting imitating or resembling the same inventions, or either of them, or making any addition thereto or subtraction therefrom, until the hearing, etc.

[In cases of Trademarks] to restrain the defendant C. D., his servants, agents or workmen, from selling or exposing for sale, or procuring to be sold, any composition or blacking [or as the case may be] described as or purporting to be blacking manufactured by the plaintiff, A. B., in bottles having affixed thereto such labels as in the plaintiff's plaint [or petition, etc.] mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking manufactured and sold by the plaintiff A. B., and from using trade-cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff A. B. until the, etc.

[To restrain a partner from in any way interfering in the business].

to restrain the defendant C. D., his agents and servants, from entering into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note or written security in the name of the partnership-firm of B. and D., and from contracting any debt, buying and selling any goods, and from making or entering into any verbal or written promise, agreement or undertaking, and from doing, or causing to be done any act, in the name or on the credit of the said partnership firm of B. and D., or whereby the said partnership-firm can or may in any manner become or be made liable to or for the payment of any sum of money, or for the performance of any contract promise or undertaking until the, etc.

No. \*[9]

APPOINTMENT OF A RECEIVER. (O. 40, r. 1.)

(Title.)

To

**WHEREAS** \_\_\_\_\_ has been attached in execution of a decree passed in the above suit on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in favour of \_\_\_\_\_; you are hereby (subject to your giving security to the satisfaction of the Court) appointed receiver of the said property under Order XL of the Code of Civil Procedure, 1908, with full powers under the provisions of that order.

You are required to render a due and proper account of your receipts and disbursements in respect of the said property on \_\_\_\_\_. You will be entitled to remuneration at the rate of \_\_\_\_\_ per cent. upon your receipts under the authority of this appointment.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, Judge.

Note.—For local amendment in Madras, *vide infra*.

No. \*[10].

BOND TO BE GIVEN BY RECEIVER. (O. 40, r. 3.)

(Title.)

KNOW all men by these presents, that we, \_\_\_\_\_ and \_\_\_\_\_ and \_\_\_\_\_, are jointly and severally bound to \_\_\_\_\_ of the Court of \_\_\_\_\_ in Rs. \_\_\_\_\_ to be paid to the said \_\_\_\_\_ or his successor in office for the time being. For which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this \_\_\_\_\_ day of \_\_\_\_\_

19\_\_\_\_.

**WHEREAS** a plaint has been filed in this Court by \_\_\_\_\_ against \_\_\_\_\_ for the purpose of [*here insert the object of suit*]:

And whereas the said \_\_\_\_\_ has been appointed, by order of the above-mentioned Court to receive the rents and profits of the immovable property and to get in the outstanding movable property of \_\_\_\_\_ in the said plaint named :

Now the condition of this obligation is such, that if the above-bounden \_\_\_\_\_ shall duly account for all and every the sum and sums of money which he shall so receive on account of the rents and profits of the immovable property, and in respect of the movable property, of the said \_\_\_\_\_ at such periods as the said Court shall appoint, and shall duly pay the balances which shall from time to time be certified to be due from him as the said Court hath directed or shall hereafter direct, then this obligation shall be void, otherwise it shall remain in full force.

Signed and delivered by the above-bounden in the presence of \_\_\_\_\_.

*Note*.—If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond.

Note.—For local amendment in Allahabad, *vide infra*.

## APPENDIX G.

### APPEAL, REFERENCE AND REVIEW.

No. 1.

MEMORANDUM OF APPEAL. (O. 41, r. 1.)

(Title.)

The above-named appeals to the \_\_\_\_\_ Court at \_\_\_\_\_ from the decree of \_\_\_\_\_ in suit No. \_\_\_\_\_ of \_\_\_\_\_ 19\_\_\_\_, dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, and sets forth the following grounds of objection to the decree appealed from, namely :—

\* Forms 6 and 7 were re-numbered 9 and 10 respectively by s. 2 and Sch. 1 of the Repealing and Amending Act, 1914 (10 of 1914).

No. 2.

**SECURITY BOND TO BE GIVEN ON ORDER BEING MADE TO STAY EXECUTION  
OF DECREE. (O. 41, r. 5.)**

(Title.)

To

THIS security bond on stay of execution of decree executed by  
witnesseth :—

That \_\_\_\_\_, the plaintiff in Suit No. \_\_\_\_\_ of 19\_\_\_\_, having sued \_\_\_\_\_, the defendant, in this Court and decree having been passed on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the \_\_\_\_\_ Court, the said appeal is still pending.

Now the plaintiff, decree-holder having applied to execute the decree, the defendant has made an application praying for stay of execution and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs. \_\_\_\_\_, mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be confirmed or varied by the Appellate Court the said defendant shall duly act in accordance with decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

Schedule

Witnessed by

(Signed).

1.  
2.

No. 3

**SECURITY BOND TO BE GIVEN DURING THE PENDENCY OF  
APPEAL. (O. 41, r. 6.)**

(Title.)

To

THIS security bond on stay of execution of decree executed by \_\_\_\_\_ witnesseth :—

That \_\_\_\_\_, the plaintiff in Suit No. \_\_\_\_\_ of 19\_\_\_\_, having sued \_\_\_\_\_, the defendant, in this Court and a decree having been passed on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the \_\_\_\_\_ Court, the said appeal is still pending.

Now the plaintiff, decree-holder has applied for execution of the said decree and has been called upon to furnish security. Accordingly I, of my own free will, stand security to the extent of Rs. \_\_\_\_\_ mortgaging the properties specified in the schedule hereunto annexed, and covenant that if the decree of the first Court be reversed or varied by the Appellate Court, the plaintiff shall restore any property which may be or has been taken in execution of the said decree and shall duly act in accordance with the decree of the Appellate Court and shall pay whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

Schedule.

Witnessed by

(Signed)

1.  
2.

## No. 4.

## SECURITY FOR COSTS OF APPEAL. (O. 41, r. 10.)

(Title.)

To

THIS security bond for costs of appeal executed by \_\_\_\_\_ witnesseth :—

This appellant has preferred an appeal from the decree in Suit No. \_\_\_\_\_ of 19\_\_\_\_, against the respondent, and has been called upon to furnish security. Accordingly I, of my own free will, stand security for the costs of the appeal, mortgaging the properties specified in the schedule hereunto annexed. I shall not transfer the said properties or any part thereof and in the event of any default on the part of the appellant, I shall duly carry out any order that may be made against me with regard to payment of the costs of appeal. Any amount so payable shall be realized from the properties hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due I and my legal representatives will be personally liable to pay the balance. To this effect I execute this security bond this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

Schedule.

Witnessed by

(Signed.)

1.

2.

## No. 5.

## INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL

(O. 41, r. 13.)

(Title.)

To

You are hereby directed to take notice that \_\_\_\_\_, the \_\_\_\_\_ in the above suit, has preferred an appeal to this Court from the decree passed by you therein on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

You are requested to send with all practicable despatch all material papers in the suit.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

Judge.

## No. 6.

## NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING

(O. 47, r. 14.)

(Title.)

APPEAL from the \_\_\_\_\_ of the Court of \_\_\_\_\_ dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

Respondent.

To

TAKE notice that an appeal from the decree of \_\_\_\_\_ in this case has been presented by \_\_\_\_\_ and registered in this Court, and that the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, has been fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself, your pleader, or by some one by law authorized to act for you in this appeal, it will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

Judge.

[Note.—If a stay of execution has been ordered, intimation should be given of the fact on this notice.]

Note.—For local amendment in Madras, *vide infra*.

## No. 7.

NOTICE TO A PARTY TO A SUIT NOT MADE A PARTY TO THE APPEAL  
BUT JOINED BY THE COURT AS A RESPONDENT.

(O. 41, r. 20.)

(Title.)

To

WHEREAS you were a party in Suit No. \_\_\_\_\_ of 19 \_\_, in the Court of \_\_\_\_\_, and whereas the \_\_\_\_\_ has preferred an appeal to this Court from the decree passed against him in the said suit and it appears to this Court that you are interested in the result of the said appeal :

This is to give you notice that this Court has directed you to be made a respondent in the said appeal and has adjourned the hearing thereof till the day of 19 \_\_, at \_\_\_\_\_ A.M. If no appearance is made on your behalf on the said day and at the said hour the appeal will be heard and decided in your absence.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of 19 \_\_.

*Judge.*

## No. 8.

## MEMORANDUM OF CROSS OBJECTION. (O. 41, r. 22.)

(Title.)

WHEREAS the \_\_\_\_\_ has preferred an appeal to the Court at \_\_\_\_\_ from the decree of \_\_\_\_\_ in Suit No. \_\_\_\_\_ of 19 \_\_, dated the \_\_\_\_\_ day of 19 \_\_, and whereas notice of the day fixed for hearing the appeal was served on the \_\_\_\_\_ on the \_\_\_\_\_ day of 19 \_\_, the \_\_\_\_\_ files this memorandum of cross objection under rule 22 of Order XLI of the Code of Civil Procedure, 1908, and sets forth the following grounds of objection to the decree appealed from, namely :—

## No. 9.

## DECREE IN APPEAL. (O. 41, r. 35.)

(Title.)

Appeal No. \_\_\_\_\_ of 19 \_\_, from the decree of the Court of \_\_\_\_\_ dated the \_\_\_\_\_ day of 19 \_\_,

Memorandum of appeal.

*plaintiff,**Defendant.*

The \_\_\_\_\_ above-named appeals to the \_\_\_\_\_ Court at \_\_\_\_\_ from the decree of \_\_\_\_\_ in the above suit, dated the \_\_\_\_\_ day of 19 \_\_, for the following reasons, namely:—

This appeal coming on for hearing on the \_\_\_\_\_ day of 19 \_\_, before \_\_\_\_\_, in the presence of \_\_\_\_\_ for the appellant and of \_\_\_\_\_ for the respondent, it is ordered —

The costs of this appeal, as detailed below, amounting to Rs. \_\_\_\_\_ are to be paid by \_\_\_\_\_. The costs of the original suit are to be paid by \_\_\_\_\_.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of 19 \_\_.

*Judge.*

**Note.**—For local amendment in Patna, *vide infra*.

*Costs of Appeal.*

Appellant.	Amount.			Respondent.	Amount.		
	Rs.	As.	P.		Rs.	As.	P.
1. Stamp for memorandum of appeal.				Stamp for power ...			
2. Do. for power.				Do. for petition ...			
3. Service of processes				Service of processes.			
4. Pleader's fee on Rs. ...				Pleader's fee on Rs.			
TOTAL. ...				TOTAL. ...			

## No. 10.

## APPLICATION TO APPEAL IN FORMA PAUPERIS. (O. 14, r. 1)

*(Title.)*

I the above-named, present the accompanying memorandum of appeal from the decree in the above suit and apply to be allowed to appeal as a pauper.

Annexed is a full and true schedule of all the movable and immovable property belonging to me with the estimated value thereof.

Dated the day of 19 .

*(Signed.)*

**Note.**—Where the application is by the plaintiff he should state whether he applied and was allowed to sue in the Court of first instance as a pauper

## No. 11.

## NOTICE OF APPEAL IN FORMA PAUPERIS.(O.44, r.1.)

*(Title.)*

WHEREAS the above-named has applied to be allowed to appeal as a pauper from the decree in the above suit dated the day of 19 , and whereas the day 19 , has been fixed for hearing the application, notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pauper an opportunity will be given to you of doing so on the aforementioned date.

GIVEN under my hand and the seal of the Court, this day of 19 .

*Judg.*

## No. 12.

## NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO THE KING IN COUNCIL SHOULD NOT BE GRANTED (O. 45, r. 3.)

*(Title.)*

To

TAKE notice that has applied to this Court for a certificate that as regards amount or value and nature the above case fulfils requirements



of section 110 of the Code of Civil Procedure, 1908, or that it is otherwise a fit one for appeal to His Majesty in Council.

The            day of            19   , is fixed for you to show cause why the Court should not grant the certificate asked for.

GIVEN under my hand and the seal of the Court, this            day of 19   .

*Registrar,*

NOTE. —For local amendment in Madras, see *infra*.

No. 13.

NOTICE TO RESPONDENT OF ADMISSION OF APPEAL TO THE  
KING IN COUNCIL. (O. 45, r. 8.)

(Title.)

To

WHEREAS            the            in the above case, has furnished the security and made the deposit required by Order XLV, rule 7, of the Code of Civil Procedure, 1908 :

TAKE notice that the appeal of the said            to His Majesty in Council has been admitted on the            day of            19   .

GIVEN under my hand and the seal of the Court, this            day of            19   .

*Registrar.*

No. 14.

NOTICE TO SHOW CAUSE WHY A REVIEW SHOULD NOT BE GRANTED.

(O. 47, r. 4.)

(Title.)

To

TAKE notice that            has applied to this Court for a review of its decree passed on the            day of            19   , in the above case. The            day of            19   , is fixed for you to show cause why the Court should not grant a review of its decree in this case.

GIVEN under my hand and the seal of the Court, this            day of            19   .

*Judge*

## APPENDIX H.

### MISCELLANEOUS.

No. 1.

AGREEMENT OF PARTIES AS TO ISSUES TO BE TRIED.

(O. 14, r. 6.)

(Title.)

WHEREAS we, the parties in the above suit, are agreed as to the question of fact [*or of law*] to be decided between us and the point at issue between us is whether a claim founded on a bond, dated the            day of            19   , and filed as Exhibit            in the said suit, is or is not beyond the statute of limitation (*or state the point at issue whatever it may be*) :

We therefore severally bind ourselves that, upon the finding of the Court in the negative [*or affirmative*] of such issue,            will pay to the said            the sum of Rupees            (*or such sum as the Court shall hold to be due thereon*) and I, the said            will accept the said sum of Rupees            (*or such sum as the Court shall hold to be due*) in full satisfaction of my claim on the bond

aforesaid [*or* that upon such finding I, the said  
etc., etc.]

will do or abstain from doing,

*Plaintiff,*  
*Defendant.*

Witnesses,—

- 1.
- 2.

Dated the                      day of                      19   .

\_\_\_\_\_  
No. 2.

NOTICE OF APPLICATION FOR THE TRANSFER OF A SUIT TO ANOTHER  
COURT FOR TRIAL. (SECTION 24.)

In the Court of the District Judge of                      No.  
of 19   .  
To

WHEREAS an application, dated the                      day of                      19   ,                      has  
been made to this Court by  
the                      in Suit No.                      of 19   ,                      now pending  
in the Court of the                      at                      , in which                      is  
plaintiff and                      is defendant, for the transfer of the suit for trial to the  
Court of the                      at                      :—

You are hereby informed that the                      day of                      19   , has been fixed for  
the hearing of the application, when you will be heard if you desire to offer any  
objection to it.

GIVEN under my hand and the seal of the Court, this                      day of  
19   .

\_\_\_\_\_  
*Judge.*

\_\_\_\_\_  
No. 3.

NOTICE OF PAYMENT INTO COURT. (O. 24, r. 3.)

(Title.)

TAKE notice that the defendant has paid into Court Rs.  
and says that that sum is sufficient to satisfy the plaintiff's claim in full.

*X. Y., Pleader for the defendant.*

*To Z, Pleader for the plaintiff.*

\_\_\_\_\_  
No. 4.

NOTICE TO SHOW CAUSE (GENERAL FORM.)

(Title.)

To  
WHEREAS the above-named                      has made application  
to this Court that                      ;

You are hereby warned to appear in this Court in person or by a pleader duly  
instructed on the                      day of                      19   ,  
at                      o'clock in the forenoon, to show cause against the application, failing  
wherein, the said application will be heard and determined *ex parte*.

GIVEN under my hand and the seal of the Court, this  
day of                      19   .

\_\_\_\_\_  
*Judge*

No. 5.

LIST OF DOCUMENTS PRODUCED BY  $\frac{\text{Plaintiff}}{\text{Defendant}}$  (O. 13, r. 1.)  
(*Title.*)

No	Description of document	Date, if any, which the document bears.	Signature of party or pleader.
1	2	3	4

No. 6.

NOTICE TO PARTIES OF THE DAY FIXED FOR EXAMINATION OF A WITNESS  
ABOUT TO LEAVE THE JURISDICTION. (O. 18, r. 16).

(*Title.*)

To,

WHEREAS in the above suit application has been made to the Court by *plaintiff* (or *defendant*).  
that the examination of , a witness required by the said  
in the said suit may be taken immediately; and it has been  
shown to the Court's satisfaction that the said witness is about to leave the Court's  
jurisdiction (*or any other good and sufficient cause to be stated*):

C. P. Code—111.

TAKE notice that the examination of the said witness  
will be taken by the Court on the \_\_\_\_\_ day of \_\_\_\_\_ 19 .  
Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 .

Judge.

—  
No. 7.

COMMISSION TO EXAMINE ABSENT WITNESS. (O. 26, rr. 4, 18.)

(Title.)

TO

WHEREAS the evidence of \_\_\_\_\_ is required by the \_\_\_\_\_ in the above  
suit ; and whereas \_\_\_\_\_ ; you are requested to take the evidence on interrogatories  
[or *viva voce*] of such witness \_\_\_\_\_, and you are hereby appointed Commissioner  
for that purpose. The evidence will be taken in the presence of the parties or  
their agents if in attendance, who will be at liberty to question the witness on the  
points specified, and you are further requested to make return of such evidence as  
soon as it may be taken.

Process to compel the attendance of the witness will be issued by any Court  
having jurisdiction on your application.

A sum of Rs. \_\_\_\_\_, being your fee in the above, is herewith forwarded.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_  
19 .

Judge.

Note.—For local amendment in Patna, *vide infra*

—  
No. 8.

LETTER OF REQUEST. (O. 26, r. 5)

(Title)

(Heading :—To the President and Judges of, etc., etc.,  
or as the case may be.)

WHEREAS a suit is now pending in the \_\_\_\_\_ in which *A. B.* is plaintiff  
and *C. D.* is defendant ; and in the said suit the plaintiff claims.

(Abstract of claim.)

And whereas it has been represented to the said Court that it is necessary for  
the purposes of justice and for the due determination of the matters in dispute between  
the parties ; that the following persons should be examined as witnesses upon  
oath touching such matters, that is to say :

*E. F.*, of \_\_\_\_\_

*G. H.*, of \_\_\_\_\_

*I. J.*, of \_\_\_\_\_

and \_\_\_\_\_

And it appearing that such witnesses are resident within the jurisdiction of your  
honourable Court ;

Now I \_\_\_\_\_, as the \_\_\_\_\_ of the said Court, have the honour to  
request and do hereby request, that for the reasons aforesaid and for the assistance  
of the said Court, you, as the President and Judges of the said \_\_\_\_\_, or some one  
or more of you, will be pleased to summon the said witness (and such other witnesses  
as the agents of the said plaintiff and defendant shall humbly request you in  
writing so to summon) to attend at such time and place as you shall appoint before  
some one or more of you or such other person as according to the procedure of your  
Court is competent to take the examination of witnesses, and that you will cause  
such witnesses to be examined upon the interrogatories which accompany this letter  
of request (or *viva voce*) touching the said matters in question in the presence of  
the agents of the plaintiff and defendant, or such of them as shall, on due notice  
given attend such examination.

**WHEREAS** an application has been presented on the part of the plaintiff in

the above suit for the appointment of a guardian for the suit to the minor defendant, you, the said minor, and you\* , are hereby required to take notice that unless within                      days from the service upon you of this notice an application is made to this Court for the appointment of you\*                      or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

GIVEN under my hand and the seal of the Court, this                      day of  
19                      .

*Judge.*

**Note :—**For local amendments in Allahabad, Madras, Nagpur and Patna, *vide infra*.

#### No 12.

#### NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE. OF PAUPERISM. (O. 33, r. 6.)

(Title.)

To

WHEREAS                      has applied to this Court for permission to institute a suit against                      *in forma pauperis* under Order XXXIII of the Code of Civil Procedure, 1908 ; and whereas the Court sees no reason to reject the application ; and whereas the                      day of                      19                      , has been fixed for receiving such evidence as the applicant may adduce in proof of his pauperism and for hearing any evidence which may be adduced in disproof thereof :

Notice is hereby given to you under rule 6 of Order XXXIII that in case you may wish to offer any evidence to disprove the pauperism of the applicant, you may do so on appearing in this Court on the said                      day of                      19                      .

GIVEN under my hand and the seal of the Court, this                      day of  
19                      .

*Judge.*

#### No. 13.

#### NOTICE TO SURETY OF HIS LIABILITY UNDER A DECREE.

(Section 145.)

(Title.)

To

WHEREAS you                      did on                      become liable as surety for the performance of any decree which might be passed against the said defendant in the above suit ; and whereas a decree was passed on the day of                      19                      , against the said defendant for the payment of                      , and whereas application has been made for execution of the said decree against you ;

TAKE notice that you are hereby required on or before the day of                      19                      , to show cause why the said decree should not be executed against you, and if no sufficient cause shall be, within the time specified, shown to the satisfaction of the Court an order for its execution will be forthwith issued in the terms of the said application.

GIVEN under my hand and the seal of the Court, this                      day of  
19                      .

*Judge.*

\* Here insert the name of guardian.

No. 14.\*  
REGISTER OF CIVIL SUITS. (O. 4. r. 2.)

Court of the \_\_\_\_\_ at \_\_\_\_\_  
REGISTER OF CIVIL SUITS in the year 10 .

PLAINTIFF.	DEPENDANT.	CLAIM.	APPEARANCE.	JUDGMENT.	APPEAL.	EXECUTION.	RETURN OF EXECUTION.
Number of suit.							
Date of presentation of plaint.							
Name.	Description.	Place of residence.	Name.	Description.	Place of residence.	Particulars.	Amount or value.
							When the cause of action accrued.
						Day for parties to appear.	Plaintiff.
						Defendant.	Date.
						For whom.	For what, or amount.
						Date of decision of appeal.	Judgment in appeal.
						Date of application.	Date of order.
						Against whom.	For what and amount if money.
						Amount of costs.	Amount paid into Court.
						Arrested.	Minute of other Return than payment or Arrest, and date of every return.

NOTE :— Where there are numerous plaintiffs or numerous defendants, the name of the first plaintiff only, or the first defendant only as the case may be, need be entered in the register.

\* For local amendment in Calcutta, *vide infra*.





## THE SECOND SCHEDULE.

## ARBITRATION.

*Arbitration in Suits.*

1. [S. 506.] (1) Where in any suits all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

(2) Every such application shall be in writing and shall state the matter sought to be referred.

**Second schedule.**—Provisions of Schedule 2 are recommendatory. A. I. R. 1928 Mad. 1025=55 M. L. J. 429=28 L. W. 321=51 M. 800 (F. B.)=113 Ind. Cas. 632. Object of Schedule II is that parties having made reference must stick to it. A. I. R. 1928 All. 674=(1929) A. L. J. 31=111 Ind. Cas. 559. This schedule applies also to cases where parties intend to refer to arbitration without Court's intervention. A. I. R. 1926 Cal. 116=90 Ind. Cas. 624. Schedule II does not extend to execution proceedings. A. I. R. 1925 Cal. 812=29 C. W. N. 885=52 C. 559=42 C. L. J. 26=87 Ind. Cas. 633. Main provisions of Schedule II are only permissive and not compulsory or exhaustive. A. I. R. 1927 Bom. 565=51 B. 908=29 Bom. L. R. 1254 (F. B.)=105 Ind. Cas. 516. Party seeking benefit of Schedule II must comply with provisions of rr. 1 to 15. A. I. R. 1927 Bom. 565=51 B. 908=29 Bom. L. R. 1254=105 Ind. Cas. 516. Procedure taken under Schedule II regarding matter converted into one under Arbitration Act, is without jurisdiction. A. I. R. 1926 Cal. 730=43 C. L. J. 292=94 Ind. Cas. 177. Suits of a public nature *e. g.*, under s. 92 cannot be referred to arbitration. A. I. R. 1923 Nag. 112=6 N. L. J. 7=72 Ind. Cas. 1016. Provisions of the Schedule II are permissive and not mandatory. A. I. R. 1931 Oudh 127=1 O. W. N. 71=131 Ind. Cas. 443.

**Scope.**—The Court can refer to arbitration only matters in difference in suit itself, and not all matters in dispute between the parties. A. I. R. 1921 Mad. 709=14 L. W. 666=(1921) M. W. N. 756=65 Ind. Cas. 92. A Court can restrain the defendant from proceeding to arbitration when an action brought impeaches the instrument containing the agreement for reference. 15 S. L. R. 5=70 Ind. Cas. 864. An award under an invalid reference, being itself invalid gives no rights either as an award or as compromise. A. I. R. 1921 Mad. 709=14 L. W. 666=1921 M. W. N. 756=65 Ind. Cas. 92. If a claimant objects to the attachment of property in execution of a decree and the matter is referred to arbitration the judgment debtor is a necessary party to the reference. 64 Ind. Cas. 469. An agreement to refer to an arbitration even if relating to an office, is not necessarily unlawful or opposed to public policy, but the Court must ascertain whether it is in violation of the trusts of the institution or affects adversely the interests of the public. A. I. R. 1922 Mad. 429=15 L. W. 111=31 M. L. T. 52=(1921) M. W. N. 423=79 Ind. Cas. 410. Where a pleader signs a reference on behalf of a party but his *vakalatnama* does not contain a power to refer to arbitration, the reference is not valid so far as that party is concerned. 25 C. W. N. 832. Absence of one of the arbitrators at one of the meetings, at which nothing material was done, does not make the award invalid. 12 L. W. 505=60 Ind. Cas. 181. Without the consent of the other party a portion of the claim under reference to an arbitration can not be withdrawn. 28 C. L. J. 275=46 Ind. Cas. 477. Parties can refer disputes to private arbitration though a suit between them is pending without Court's permission. (1916) 1 M. W. N. 203=19 M. L. T. 228. Where a reference to arbitration in a suit is a general one of the whole case, the power of dealing with costs rests with the arbitrator. 46 Ind. Cas. 182. An agreement of arbitration entered into by his predecessor-in-title binds the minor. 23 C. W. N. 293=50 Ind. Cas. 879. The provisions of Schedule II para 1, have to be strictly complied with so that there may be a valid reference to arbitration suit. 49 Ind. Cas. 262. Where it is impossible to ascertain what is referred to arbitration the agreement to refer is bad for indefiniteness. 49 Ind. Cas. 522. A consent given by the parties to abide by the decision of a Court as an arbitrator does not fall within Schedule II. The provisions of Schedule II do not govern the proceedings of the Court acting as such arbitrator. 52 Ind. Cas. 569=37 M. L. J. 100; see also 51 Ind. Cas. 827=42 M. 625=36 M. L. J. 291=(1919) M. W. N. 221=25 M. L. T. 397. Parties to a pending litigation can not make a reference to private arbitration without reference to Court. 46 Ind. Cas. 902; *contra* (1916) 1 M. W. N. 203=19

M. L. T. 228=33 Ind. Cas. 67. So where a matter in dispute in pending suit is referred to arbitration without the intervention of the Court the reference does not fall within Schedule II, but the award may be recorded as an agreement adjusting or compromising the suit and a decree may be passed in the terms of the award. 49 Ind. Cas. 746. Where an application is made for adjustment before the Court in which it is asked to send the records to a certain arbitrator to whom the parties had already referred the matter in dispute in the pending suit, it amounts to a request to make reference to arbitrator. 3 L. W. 375=34 Ind. Cas. 741. If an order of arbitration is made by the Court on the application of the plaintiff and one of the defendants it is legal 64 Ind. Cas. 480. No appeal or revision lies from the decree as per award whether the Court does or does not give proper opportunities for hearing all the objections to the award or whether it is right or wrong in deciding that the objection put in was not a proper application to set aside the award does not matter. A. I. R. 1922 Mad. 429=15 L. W. 111=31 M. L. T. 52=(1921) M. W. N. 423=70 Ind. Cas. 410. Arbitrators acting under an order made in pursuance of paras 1 and 2 must comply with its terms. An award made otherwise than in accordance with the authority by the order conferred upon them is an award which is "otherwise invalid" and which may accordingly be set aside by the Court under para 15. A. I. R. 1925 P. C. 393=28 Bom. L. R. 217=49 M. L. J. 812=24 A. L. J. 13=43 C. L. J. 14=53 I. A. 1=53 C. 258 (P. C.)=92 Ind. Cas. 633. Where parties are litigating for title and possession of *mutt* in their own right, and the *mutt* is not of the nature of publiccharity, dispute between parties interested can be referred to arbitrator. A. I. R. 1934 All. 368. It is doubtful whether death of the parties who had signed a reference to arbitration itself is enough to bring their agreement to an end. 143 Ind. Cas. 635=A. I. R. 1933 Sind 68. Reference by unauthorised person is not valid. A. I. R. 1933 All. 924. It is not open to party to an agreement of reference to revoke it after submission except for good cause and sufficient cause is not confined to cases of fraud, coercion and undue influence. 143 Ind. Cas. 635=A. I. R. 1933 Sind 68; see also A. I. R. 1932 All. 348=1932 A. L. J. 331. When reference is made by some of the parties the reference is not a valid one. A. I. R. 1933 Oudh 384=10 O. W. N. 790. Where all the parties and arbitrators agree to withdraw reference, arbitration should be superseded. A. I. R. 1934 All. 95.

**All the parties interested agree.**—Where there is no agreement of all the parties at the time of reference a subsequent agreement cannot make the reference valid. A. I. R. 1926 All. 238=48 A. 2 9=24 A. L. J. 235=91 Ind. Cas. 930; 86 Ind. Cas. 839=A. I. R. 1925 Mad. 621=48 M. L. J. 142. An award passed on reference to which all the parties interested in the dispute are not parties, is illegal and should be set aside. A. I. R. 1930 Mad. 646=126 Ind. Cas. 735. Where all the parties to the proceeding do not join in the reference to arbitration but the Court passes an order of reference all the same, the order of reference is invalid. 31 P. L. R. 55=121 Ind. Cas. 328. "All the parties interested" meant not all the parties to the suit, but all the parties interested in the subject-matter of reference. A. I. R. 1928 Bom. 248=52 B. 408=30 Bom. L. R. 530=110 Ind. Cas. 343; see also A. I. R. 1927 Sind 239=104 Ind. Cas. 342; A. I. R. 1924 Pat. 33=76 Ind. Cas. 2=2 Pat. 777=5 P. L. T. 239. A reference is valid when made by all parties to the suit except one whose rights are not in dispute. A. I. R. 1927 Cal. 619=45 C. L. J. 458=103 Ind. Cas. 625. Before arbitrators get jurisdiction to decide a dispute it must be clear that it is referred. 95 Ind. Cas. 740=A. I. R. 1926 Mad. 752=50 M. L. J. 514=23 L. W. 681=1926 M. W. N. 445. The mere fact that one of the parties did not sign the petition of reference does not prove that he was not a party to the case sent to arbitration and the award will not be invalid by reason of such omission. 38 Ind. Cas. 226. The Court can make an order of reference only if all the parties interested in the suit agree to the reference. Else the order of reference is invalid against all. An award made upon such an invalid reference is not valid and no decree can be based upon it. 25 C. L. J. 339=21 C. W. N. 387=41 Ind. Cas. 295. A Court cannot make an order of reference without the consent of all the parties including the parties who does not appear. 47 C. 555=31 C. L. J. 150=55 Ind. Cas. 747; see also 42 M. 632=36 M. L. J. 538=51 Ind. Cas. 155; 43 Ind. Cas. 167=27 C. L. J. 339. It is a question of fact who are the parties interested in the litigation. 45 Ind. Cas. 321. Where some of the defendants to a suit do not join in a reference to arbitration, the Court should examine the facts of each case before coming to the conclusion that the arbitration is invalid since no reliefs may have been claimed against them. 39 A. 489=15 A. L. J. 427=41 Ind. Cas. 357. A natural guardian can on behalf of a minor enter into an arbitration to bind the minor if it is proper,

reasonable and for the benefit of the minor. 44 B. 202=22 Bom. L. R. 266=56 Ind. Cas. 399 ; see also 56 Ind. Cas. 593. A Court cannot make an order of reference to arbitration unless all the parties interested assent to such reference. An order of reference made without such assent is invalid and an award based thereupon can be set aside. 14 S. L. R. 156=61 Ind. Cas. 451 ; 64 Ind. Cas. 221 ; A. I. R. 1924 Cal. 353=71 Ind. Cas. 326 ; 73 Ind. Cas. 202=A. I. R. 1923 Mad. 502=44 M. L. J. 359=17 L. W. 424=(1923) M. W. N. 296=32 M. L. T. (H. C.) 298=73 Ind. Cas. 202 ; A. I. R. 1925 Mad. 621=48 M. L. J. 142=21 L. W. 498=(1925) M. W. N. 97=86 Ind. Cas. 839 ; A. I. R. 1925 Mad. 1209=50 M. L. J. 100=22 M. L. W. 395=(1925) M. W. N. 744=91 Ind. Cas. 313 ; A. I. R. 1929 Lah. 477=119 Ind. Cas. 235. "Parties interested in the suit" need not be restricted to persons against whom relief is claimed. A person against whom no relief is claimed may be interested in the result of the suit. A. I. R. 1925 Mad. 621=48 M. L. J. 142=21 L. W. 498=86 Ind. Cas. 839. Some parties not joining in making reference does not make award invalid or ineffectual as between the persons making the reference. A. I. R. 1921 Nag. 176=71 Ind. Cas. 860. Where some of the parties to a reference to arbitration are minors, Court must ascertain if the reference is for the benefit of the minors. A. I. R. 1922 Sind 1=15 S. L. R. 165=65 Ind. Cas. 50. Where three out of four plaintiffs did not sign the agreement to refer to arbitration the defect is cured if their pleader having power even to refer the case to arbitration appears before the arbitrator on behalf of these plaintiffs. A. I. R. 1930 Lah. 523=31 P. L. R. 192=122 Ind. Cas. 100. A guardian *ad litem* for the minor, alone can represent the minor in all proceedings in that suit. If without any reference to the guardian *ad litem* of the minor the other parties to the suit refer their disputes to arbitration, the award cannot bind the minor. A. I. R. 1930 All. 646=(1930) A. L. J. 923=128 Ind. Cas. 437. It is a question of fact whether any particular person is interested in the specific dispute referred to arbitration or not, and that question is to be decided from the whole circumstances of the case and the Court is not merely to be guided by the written statements. 124 Ind. Cas. 374=A. I. R. 1930 Sind 256 ; see also A. I. R. 1929 All. 763=52 A. 84. The award binds parties to the reference even if some of the parties interested were not parties thereto. 10 P. L. T. 53=115 Ind. Cas. 680. An award not contemplated or authorised by the order of reference is an invalid one and the same arbitration cannot be held as to matters within the jurisdiction of the Court and matters without the jurisdiction of the Court, between the parties to the suit and between them and other persons and partly upon an order of reference and partly under an agreement. A. I. R. 1925 P. C. 293=28 Bom. L. R. 217=49 M. L. J. 812=43 C. L. J. 14=27 P. L. R. 35=1926 M. W. N. 96=53 I. A. 1=53 C. 258 (P. C.)=92 Ind. Cas. 633 ; a reference to arbitration is valid if the non-contesting defendant do not consent to it. A. I. R. 1934 All. 658=148 I. C. 1168=1934 A. L. J. 694.

One partner of a firm has no power to enter into an agreement to refer a matter in dispute to arbitration on behalf of a firm unless all partners join in it. A. I. R. 1926 Lah. 91=7 Lah. L. J. 603=92 Ind. Cas. 705 ; see also A. I. R. 1927 Mad. 1154=102 Ind. Cas. 2 ; 118 Ind. Cas. 906 ; A. I. R. 1930 Sind 40=117 Ind. Cas. 783. A. I. R. 1934 Lah. 483=148 I. C. 1080. Unless all the parties to the suit join in asking for the reference there cannot be any valid reference to arbitration. A. I. R. 1928 Cal. 249. Where a person admits the plaintiff's claim without reference to the liability of his co defendants and absents himself from subsequent proceedings he is not interested in the suit. A. I. R. 1925 Oudh 201=80 Ind. Cas. 821. Where a Judge refers a case to arbitration without the consent of parties interested, he exercises a jurisdiction not vested in him by law. A. I. R. 1925 Mad 1209=50 M. L. J. 100=22 L. W. 395=91 Ind. Cas. 313. No private reference to arbitration can be allowed unless consented by both parties. A. I. R. 1927 Cal. 887=47 C. L. J. 59=33 C. W. N. 390=104 Ind. Cas. 360. A reference to arbitration made by the manager of a joint Hindu family consisting of himself and his sons is binding upon the sons unless the father's act was tainted with fraud or collusion or was otherwise done in bad faith. A. I. R. 1927 Lah. 362=8 Lah. 693=9 Lah. L. J. 569=104 Ind. Cas. 202. The section is not mandatory but is permissive. The Court must keep control over the proceedings only where the parties apply to the Court for an order for reference. A. I. R. 1924 Pat. 488=3 Pat. 443=(1924) Pat. 110=6 P. L. T. 122=3 P. L. R. 52 Civ.=81 Ind. Cas. 994. Parties must agree to make a reference to arbitration otherwise than under orders of a Court. A. I. R. 1925 Nag. 203=83 Ind. Cas. 22. Reference to arbitration only by parties interested in subject-matter

in difference is good. A. I. R. 1934 Pat. 19. Reference by one partner is not good. 36 C. W. N. 8=A. I. R. 1932 Cal. 343=138 Ind. Cas. 386; see also 34 Bom. L. R. 112=A. I. R. 1932 Bom. 516. An attorney of a firm can not refer in the absence of a special authority. *Ibid.* When reference is made by some of the partners it is binding on them. 134 Ind. Cas. 99; see also 1931 A. L. J. 442=A. I. R. 1931 All. 453=133 Ind. Cas. 31.

**Matter of difference.**—A dispute implies an assertion of a right by one party and a repudiation thereof by another. A. I. R. 1921 Cal. 342=33 C. L. J. 545=64 Ind. Cas. 798. A mere failure to pay claim amounts to a difference between the parties to a submission. A. I. R. 1924 Sind 105=17 S. L. R. 15=80 Ind. Cas. 969; see also A. I. R. 1924 Sind 117=17 S. L. R. 86=80 Ind. Cas. 1009. Where the parties agree to refer all disputes out of a contract, the right to submit is not exhausted though one dispute is finally decided. Successive disputes as they arise can be referred and successive awards passed. 24 C. W. N. 775=60 Ind. Cas. 195. Existence of difference or dispute is essential condition for arbitrator's jurisdiction. A. I. R. 1931 Bom. 164=33 Bom. L. R. 51=130 Ind. Cas. 588. Any agreement as contemplated by Schedule II, para 1, regarding matters in difference between the parties should be set forth clearly in the form of issues. A. I. R. 1930 All. 319=125 Ind. Cas. 583. There is no provision in Schedule II providing for reference regarding future disputes. A. I. R. 1930 All. 319=125 Ind. Cas. 583. Whether or not the Court can legally enquire into any question on which the parties join issue is a dispute coming under para 1 A. I. R. 1925 Cal. 312=52 C. 559=42 C. L. J. 26=29 C. W. N. 886=87 Ind. Cas. 633. Where the plaintiff claims a legal right to partition and the parties are in dispute both as to articles to be divided and the allotment between them these matters can be referred to arbitration. A. I. R. 1927 Pat. 135=7 P. L. T. 739=95 Ind. Cas. 321.

**What matter can be referred to arbitration.**—Judge can not allow arbitration regarding a dispute relating to the genuineness of a Will in a probate proceedings pending before him. A. I. R. 1930 All. 840=(1930) A. L. J. 1584=128 Ind. Cas. 817. A suit which relates to personal rights between the parties cognizable by civil Court can be referred to arbitration. A. I. R. 1930 Sind 195=121 Ind. Cas. 164. An executor can not make any reference to arbitration against the terms of the Will. A. I. R. 1928 Cal 275=32 C. W. N. 108=107 Ind. Cas. 70. Though a Will directs that a legatee should take his share on attaining a particular age, the decision of the arbitrators appointed by other legatees and executors empowering the legatee to take his share before the particular age is valid. A. I. R. 1928 Pat. 7=6 Pat. 556=109 Ind. Cas. 821. A Court cannot refer to arbitrators a proceeding in insolvency. 50 P. R. 1916=135 P. W. R. 1916=151 P. L. R. 1916=34 Ind. Cas. 549. Suit cognizable by a Civil Court under Civil Procedure Code may be referred to arbitration. A. I. R. 1926 Sind. 128=20 S. L. R. 116=98 Ind. Cas. 550, see also A. I. R. 1930 Sind 195=121 Ind. Cas. 164. A criminal complaint cannot be referred to arbitration and the award following it cannot be made a rule of a civil Court. A. I. R. 1929. Lah. 394=(1929) Lah. 471=30 P. L. R. 122=11 Lah. L. J. 89=116 Ind. Cas. 215. The dispute regarding a private trust may be referred to arbitration. 151 I. C. 148=1934 A. L. J. 711=A. I. R. 1934 All. 368.

**Application shall be in Writing.**—That the application shall be in writing is not a mandatory provision. All the parties need not sign the application. It is enough if it is proved that all the parties consented. A. I. R. 1928 Mad. 48=105 Ind. Cas. 105; see also 27 C. 61; 43 C. 290=43 I. A. 1=20 C. W. N. 137=30 M. L. J. 67=14 A. L. J. 97=19 M. L. T. 108=23 C. L. J. 130=18 Bom. L. R. 308 (P. C.)=32 Ind. Cas. 161, 155 I. C. 290. Oral statements by the parties or their pleaders recorded by the Court is an agreement in writing and supplies the place of a written application by the parties or pleaders. A. I. R. 1924 All. 540=46 A. 208=27 A. L. J. 67=79 Ind. Cas. 816; see also 38 Ind. Cas. 226. If the parties want to have the award made a decree of the Court they have to get the award reduced to writing and to be filed in Court. A. I. R. 1924 Rang 60=2 Bur. L. J. 163=79 Ind. Cas. 742. Where a reference is not signed by one of the parties, but is signed by his son and verified by his pleader and he himself appeared before the arbitrator the award is valid. A. I. R. 1924 All. 457=84 Ind. Cas. 640; see also A. I. R. 1927 Lah. 362=8 Lah. 693=9 Lah. L. J. 569=104 Ind. Cas. 202. Clause (2) of para 1 of the second Schedule is not merely directory but the parties are estopped from raising the plea that application for reference was not in writing in order to defeat the entire arbitration pro-

ceeding and the award following it, where the matter had advanced a stage further and the order had actually been made. A. I. R. 1924 Oudh 400=11 O. L. J. 142=78 Ind. Cas. 378. A written application to refer a pending suit to arbitrator is not necessary. A. I. R. 1933 Rang 407; but see 34 P. L. R. 247=142 Ind. Cas. 678. The actual signature of a party is not necessary provided he agrees to it. 133 Ind. Cas. 606=1931 A. L. J. 934=A. I. R. 1931 All. 320. Where no body signs on behalf of a party, he is not bound by the reference. 130 Ind. Cas. 291=1931 A. L. J. 100=A. I. R. 1931 All. 242.

**Award.**—Where the award is according to agreement it is valid, though incomplete. A. I. R. 1929 Lah. 831=117 Ind. Cas. 89. Court has no jurisdiction to refer dispute on award made by arbitrator outside Court so as to modify award. It has either to file it or to dismiss application for filing award. A. I. R. 1929 Sind 107=23 S. L. R. 349=116 Ind. Cas. 102. An arbitrator, reading a letter eventually rejected as evidence, is not prejudiced by the letter, and is not guilty of any misconduct and as such his award cannot be set aside. A. I. R. 1928 Bom 55=30 Bom. L. R. 90=108 Ind. Cas. 18. The forms and steps for a reference to arbitration and for the award made by the arbitrator to be embodied in the decree of the Court, must be complied with. Where the petition of compromise does not contemplate any award to be made by the arbitrator and to be embodied in the judgment of the Court provisions of Sch. II do not apply. A. I. R. 1928 Cal. 108=46 C. L. J. 353=106 Ind. Cas. 509. A Court referring a matter to arbitration at the request of some only of the parties, acts without jurisdiction and if an award is passed on such reference, and a decree is passed, a revision lies. A. I. R. 1927 All. 563=49 A. L. J. 812=25 A. L. J. 605=102 Ind. Cas. 236. Application to file an award is not a suit. A. I. R. 1927 Sind 103=19 S. L. R. 202=99 Ind. Cas. 178. An award is final and cannot be questioned except upon such grounds as corruption or apparent illegality. 1917 U. B. R. 36=54 Ind. Cas. 622. Parties to a suit pending in Court having jurisdiction can refer the subject-matter to arbitration without Court's intervention but award cannot be filed either under Sch. II or Arbitration Act. A. I. R. 1921 Sind 65=16 S. L. R. 174 (F.B.)=81 Ind. Cas. 653. For setting aside an award, reference should be made to the substantive provisions of the C. P. Code. 38 C. W. N. 784. A. I. R. 1934 Bom. 398.

**2. [S. 507 para 1.]** The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

**Appointment of arbitrator.** **Scope.**—A pleader cannot revoke the appointment of arbitrators made by his clients, without instructions from the client, and appoint a new arbitrator in substitution. A. I. R. 1922 Nag. 39=5 N. L. J. 229=18 N. L. R. 140=65 Ind. Cas. 879. A pleader can refer a matter to arbitration without special authority on strength of his *wakalatnama*. A. I. R. 1930 Sind 190=123 Ind. Cas. 694. Where a pleader of a party appoints himself as arbitrator, without authority and that party joins in the reference, neither such reference nor the pleader's conduct is objectionable. *Ibid.* In the section of arbitration good faith on the part of all the parties are absolutely essential. A. I. R. 1933 Sind 68=143 Ind. Cas. 635.

**3. [S. 503.]** (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the same suit.

**Scope of sub-section (1).**—The Court cannot refer the question as to restitution of conjugal rights to arbitration but other matters in dispute between the parties as distinct from the suit for the said purpose can be so referred and the Court can, on the whole award of the arbitrators or on the facts determined by the arbitrators, decide whether or not it should exercise its discretion in favour of the plaintiff. A. I. R. 1930 Lah. 707=31 P. L. R. 380=12 Lah. L. J. 105=125 Ind. Cas. 610; but see 152 I. C 90=A. I. R. 1934 Oudh 494. Where a Court wants to appoint an arbitrator under Sch. II it should pass an order to that effect and fix a date for the return of the award and also for objections being filed. A. I. R. 1929 Mad. 789=123

Ind. Cas. 5. The provisions of para 3 is mandatory. To leave the arbitrators collectively with a free hand as to time subject to no limitation by the Court, is exactly what the Act is taking measure to avoid. A reasonable time must be fixed for the making of the award. A. I. R. 1923 Cal. 310=27 C. W. N. 420=80 Ind. Cas. 459; see also 14 A. 347; 30 A. 139; 13 A. 300 (P. C.)=18 I. A. 55. Court should appoint a date to make the award. Where it does not do so, but fixes a date for the filing of the award an award made before but filed beyond the date can be received. 5 O. L. J. 205=46 Ind. Cas. 324; see also 37 Ind. Cas. 844; 27 A. 459; 8 C. W. N. 916; 26 A. 105. By referring matters to arbitration under Sch. II parties should not be allowed to delay the decision in the suit. A. I. R. 1925 Cal. 83=28 C. W. N. 755=83 Ind. Cas. 128. Where the award made by the arbitrators is impeached on the ground that the reference itself is bad, a revision will lie. A. I. R. 1928 All. 740=26 A. L. J. 1009=50 A. 955=110 Ind. Cas. 881. Where a reference to arbitration by Court is not in express terms action of Court and of parties may establish a substantial reference by Court. A. I. R. 1922 Mad. 429=15 L. W. 111=31 M. L. T. 52=(1921) M. W. N. 423=70 Ind. Cas. 410. A payment to arbitrator does not amount to payment of money into Court. A. I. R. 1924 Rang. 263=3 Bur. L. J. 6=80 Ind. Cas. 238. In giving leave to revoke a submission the Court shall be satisfied that a substantial miscarriage of justice will take place in event of its refusal. Leave to revoke should be granted where the arbitrators are exceeding their jurisdiction or refusing jurisdiction or failing to do all that their jurisdiction requires them to do. Unless a substantial miscarriage of justice may take place leave ought not to be given. A. I. R. 1925 All. 202=78 Ind. Cas. 1050; see also 29 A. 13; 29 C. 278=6 C. W. N. 235. Otherwise a submission to arbitration is ordinarily irrevocable. 7 W. R. 269; see also 10 W. R. 51 (P. C.); 7 A. 23; 27 M. 112. Where a matter is referred to arbitration by Court, the scope of the enquiry is the scope of the suit as disclosed by the pleadings. 38 L. W. 927=A. I. R. 1933 Mad. 862=65 M. L. J. 755; see also 139 Ind. Cas. 842=A. I. R. 1932 Sind 77; 54 A. 297=A. I. R. 1932 All. 665. The question of jurisdiction can not be referred to arbitration. 54 A. 297=A. I. R. 1932 All. 665. The authority of the arbitrator having been revoked by both the parties with his consent, cannot be reconferred upon him by only one of the parties and the Court. 1934 A. L. J. 473=A. I. R. 1934 All. 43=150 I. C. 222.

**Scope of sub-para(2).**—Provisions of para 3(2) are imperative. A. I. R. 1926 Nag. 37=89 Ind. Cas. 782; see also 10 B. 381. After a Court has referred a pending suit to arbitration, its power to further deal with the case is of a very limited nature. A. I. R. 1930 Lah. 26=11 Lah. 342=31 P. L. R. 668=124 Ind. Cas. 339; 7 C. W. N. 186; 9 A. 186; 24 A. 312; 4 A. 546. The Court can appoint a receiver in the interval between the submission of an award and the final acceptance or rejection of it and also where an arbitrator is proceeding with a reference. On the latter case save in exceptional circumstances Court should not exercise its powers. A. I. R. 1925 Sind 102=18 S. L. R. 303=78 Ind. Cas. 81. Where compromise is arrived at between the parties after reference but there is no order superseding the arbitration Court cannot record the compromise. A. I. R. 1924 Cal. 72=51 C. 432=83 Ind. Cas. 606. But in a proper case and for good cause the Court has inherent power to cancel the order. A. I. R. 1925 Pat. 720=6 P. L. T. 488=86 Ind. Cas. 540. After reference the Court becomes *functus officio* and cannot even award cost to parties which were incurred prior to reference. 54 A. 122=136 Ind. Cas. 789=1931 A. L. J. 1155=A. I. R. 1932 All. 183. The Court has jurisdiction, in a proper case to grant leave to revoke arbitration on good cause being shown. A. I. R. 1934 Bom. 388=36 Bom. L. R. 827.

Where reference is to two or more, order to provide for difference of opinion.

4. [S. 509.] (1) Where the reference is to two or more arbitrators, provision shall be made in the order for a difference of opinion among the arbitrators—

- (a) by the appointment of an umpire; or
- (b) by declaring that, if the majority of the arbitrators agree, the decision of the majority shall prevail; or
- (c) by empowering the arbitrators to appoint an umpire; or
- (d) otherwise as may be agreed between the parties or, if they cannot agree, as the Court may determine.

(2) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the making of his award in case he is required to act.

**Scope.**—On a reference to arbitration by Court, an award by majority of arbitrators is valid if so agreed upon. A. I. R. 1925 Oudh 712=88 Ind. Cas. 547. A majority award can be maintained even in the absence of a specific provision to that effect in the reference. 21 C. W. N. 895=40 Ind. Cas. 646; but see 49 Ind. Cas. 522; 4 W. R. 4. If a power is given to appoint an umpire if the arbitrators fail to agree, and the arbitrators do not agree such umpire can be appointed. 44 A. 472=20 A. L. J. 219=A. I. R. 1922 A. 377=67 Ind. Cas. 487. Appointment of the same person as arbitrator as well as umpire cannot be allowed. 138 Ind. Cas. 651=36 C. W. N. 332=A. I. R. 1932 Cal. 491. In case of difference an umpire may be competent to decide a case entirely on his own opinion. 6 I. R. Lah. 48=144 Ind. Cas. 1020=A. I. R. 1933 Lah. 587. Where a dispute is referred to three arbitrators and one of them is appointed *Sarpanch* but no provision is made for difference between them unanimous decision is necessary for valid award. A. I. R. 1934 All. 109=1934 A. L. J. 66=147 I. C. 623 (1)=A. L. R. 1934 All. 192.

**5. [Ss. 507 (2), 510, 511.]** (1) In any of the following cases, namely :—

- (a) where the parties cannot agree within a reasonable time with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator, or
  - (b) where an arbitrator or umpire—
    - (i) dies, or
    - (ii) refuses or neglects to act or becomes incapable of acting, or
    - (iii) leaves British India in circumstances showing that he will probably not return at an early date, or
  - (c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so,
- any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire or make an order superseding the arbitration, and in such case shall proceed with the suit.

**Scope.**—Court can appoint arbitrator or umpire or make order superseding arbitration if cl. 1 of para 5 it is complied with and if party serves required notice. A. I. R. 1928 All. 674=(1929) A. L. J. 31=111 Ind. Cas. 559. Court should decide facts whether arbitrator had died or refused to act and whether it should give chance to parties to appoint a new arbitrator. A. I. R. 1928 All. 740=50 A. 955=26 A. L. J. 1009=110 Ind. Cas. 881. Where the arbitrators refuse to act and the Court acting *suo motu* supersedes the reference to arbitration the order superseding the arbitration is contrary to law and should be set aside. 7 C. W. N. 1043=129 Ind. Cas. 162. After resignation, an arbitrator is not competent to make an award. A. I. R. 1930 Lah. 125=31 P. L. R. 386=124 Ind. Cas. 676; see also A. I. R. 1929 All. 144=51 A. 501=(1929) A. L. J. 182=115 Ind. Cas. 611. Order of Court thrusting arbitrator on unwilling party and ordering parties to pay costs of reference is void. A. I. R. 1929 All. 144=51 A. 501=(1929) A. L. J. 182=115 Ind. Cas. 612. Appointment of new arbitrators must be made by both parties. 112 P. R. 1918=139 P. L. R. 1918=48 Ind. Cas. 395. Appointment of fresh arbitrator without notice to the other party is material irregularity. 1 U. P. L. R. (H. C.) 25=17 A. L. J. 643=50 Ind. Cas. 655. Where one arbitrator has withdrawn, remaining one cannot proceed and file award, Court should either appoint another arbitrator or supersede arbitration and decide a case. 2 Lah. L. J. 637=56 Ind. Cas. 644. Failure to move Court under para 5 (2) does not make award invalid. A. I. R. 1924 Cal. 665=28 C. W. N. 634=81 Ind. Cas. 574. Where one arbitrator refuses to act, Court can appoint new arbitrator. 19 A. L. J. 823=64 Ind. Cas. 459. Where arbitration has not been superseded Court cannot try a case. 5 P. L. J. 672=1 Pat. L. T. 416=57 Ind.

Cas. 473. Court can revoke arbitration but not a case. A. I. R. 1927 Mad. 910=39 M. L. T. 195=(1927) M. W. N. 921=105 Ind. Cas. 92. No appeal lies for mistake in construing original reference. A. I. R. 1925 Oudh 361=12 O. L. J. 174=2 O. W. N. 64=86 Ind. Cas. 613. "Appoint" means concur in appointing. A. I. R. 1925 Oudh 251=12 O. L. J. 174=2 O. W. N. 64=86 Ind. Cas. 613. Application by party to appoint surviving arbitrator as sole arbitrator is written notice within para 5. A. I. R. 1925 Oudh 361=12 O. L. J. 174=2 O. W. N. 64=86 Ind. Cas. 613. Court cannot take any action where no notice has been given to other party for removal of arbitrator. A. I. R. 1925 Lah. 374=7 Lah. L. J. 163=26 P. L. R. 476=88 Ind. Cas. 975. An award is not bad simply because one party is purposely absenting himself from hearing. 29 C. W. N. 895=40 Ind. Cas. 646. Finding that arbitrator resigned because of obstruction by plaintiff and that arbitrator is willing will justify Court in extending time of hearing. A. I. R. 1928 All. 740=50 A. 955=26 L. J. 1000=110 Ind. Cas. 881. Where parties agreed to arbitration but named arbitrators refused to act, the Court can appoint other arbitrators in the absence of any provision in the reference as to what to happen on refusal. A. I. R. 1934 All. 368=151 I. C. 148=A. L. R. 1934, 621=1934 A. L. J. 711; 56 All. 721. But if the second batch of arbitrators also refuses to act, the proceeding come to an end and further proceedings can be continued only after due notice to parties under this rule. 1931 A. L. J. 682=A. I. R. 1931 A. L. J. 761. In case of refusal the Court can appoint new arbitrators only after observing the formalities mentioned in this para. *Ibid*; see also 134 Ind. Cas. 733=33 Bom. L. R. 1022=A. I. R. 1931 Bom. 529; 151 I. C. 1001=11 O. W. N. 1188. In case of refusal by arbitrator to act the Court can not, in acting *suo motu* supersede the reference. 129 Ind. Cas. 162=7 O. W. N. 1043. Appointment of new arbitrator by Court without observing the formalities prescribed by this para is without jurisdiction and can be set aside in revision. A. I. R. 1933 Oudh 540=146 Ind. Cas. 493.

6. [S. 512.] Every arbitrator or umpire appointed under paragraph 4 or paragraph 5 shall have the like powers as if his name had been inserted in the order of reference.

7. [S. 513.] (1) The Court shall issue the same processes to the parties and witness whom the arbitrator or umpire desires to examine, as the Court may issue in suits tried before it.

(2) Persons not attending in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the matters referred, shall be subject to the like disadvantages, penalties and punishments, by order of the Court on the representation of the arbitrator or umpire, as they would incur for the like offences in suits tried before the Court.

**Scope.**—The words "refusing to give evidence" in clause 2 of para 7 of Schedule II of the Code of Civil Procedure Code, 1908, refer to the case of a person who refuses to give evidence when placed on oath and is required to answer question put to him, and not to a case where a person elects not to produce any evidence in his case. 11 Ind. Cas. 259=8 A. L. J. 929. The Court has power to order an *ex parte* arbitration in case the defendant has failed to appear. A. I. R. 1935 All. 852.

8. [S. 514.] Where the arbitrators or the umpire cannot complete the award within the period specified in the order, the Court may, if it thinks fit, either allow further time and from time to time, either before or after the expiration of the period fixed for the making of the award, enlarge such period; or may make an order superseding the arbitration, and in such case shall proceed with the suit.

**Scope.**—Award submitted after fixed time is void. 55 Ind. Cas. 221. But it can extend time to file award although time first fixed has expired. 52 Ind. Cas. 352; see also 50 Ind. Cas. 52=4 Pat. L. J. 265; 45 B. 1071=23 Bom. L. R. 614=63 Ind. Cas. 929; 19 C. W. N. 165=31 Ind. Cas. 597. In case of arbitrators



not submitting award within time, Court can supersede award and try the case. 57 Ind. Cas. 890. Award though filed after fixed time is not void. 44 P. W. R. 1916=56 P. L. R. 1917=34 Ind. Cas. 177; see also 4 Pat. L. J. 394=48 Ind. Cas. 711. Where arbitrators returned the record without award, and parties are unwilling to arbitration, Court cannot proceed with case without express supersession. 5 Pat. L. J. 672=1 Pat. L. T. 416=57 Ind. Cas. 473. "Making the award" includes announcement of award and filling it in Court. A. I. R. 1928 Lah. 753=110 Ind. Cas. 748. Where award was not filed on fixed date, and the Court issued *takid* to file it on certain date, the *takid* may be construed as an order for extending time. A. I. R. 1925 Cal. 475=78 Ind. Cas. 335. Court is not competent at once to try a case if award is not filed on fixed date. A. I. R. 1923 Pat. 115=3 P. L. T. 346=65 Ind. Cas. 144. In considering the question of extension of time, the Court is competent to take all the circumstances of the case into consideration, including allegations of misconduct on the part of the arbitrators. 146 Ind. Cas. 1081=A. I. R. 1933 Pat. 565. The Court can extend the time even where the arbitrators returned the paper to the Court but did not refuse to act. 54 All. 297=A. I. R. 1932 All. 665. The Court can extend the time where the arbitrators made award in time, but not filed within the time fixed. 152 I. C. 1068=A. I. R. 1934 Bom. 398=36 Bom. L. R. 831.

Where umpire may arbitrate in lieu of arbitrators. 9. [S. 515.] Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators,—

- (a) If they have allowed the appointed time to expire without making an award, or
- (b) If they have delivered to the Court or to the umpire a notice in writing stating that they cannot agree.

**Scope.**—An agreement to refer to arbitration was filed in Court and in accordance therewith two arbitrators were appointed on each side and an umpire. The Court made an order fixing a date within which the award was to be filed, but before the expiry of the period so fixed two of the arbitrators retired. Subsequently to their retirement, the umpire forwarded a document to the Court, which was of the nature of a compromise, and which he recommended should become the subject of a decree. *Held*, that no decree could be based upon such document, in as much as it is not an award. 1 A. L. J. 29=A. W. N. 1904, 49. An umpire can act without arbitrators. 111 Ind. Cas. 559=A. I. R. 1928 All. 674=(1929) A. L. J. 31.

10. [S. 516.] Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in Court, together with any depositions and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.

**Scope.**—Award must be signed by all arbitrators and presented personally. A. I. R. 1929 Pat. 178=118 Ind. Cas. 606; see also 54 Ind. Cas. 912=38 M. L. J. 145; 33 C. 498; 32 M. 510; 107 Ind. Cas. 532=A. I. R. 1928 Pat. 231. Award is not a ministerial act. A. I. R. 1928 Pat. 231=107 Ind. Cas. 532. Award is void if it is not signed and filed. A. I. R. 1929 Mad. 31=56 M. L. J. 35=29 L. W. 227=114 Ind. Cas. 818. Where award is made by some arbitrators only, acceptance of a such award is tantamount to error of law or fact. A. I. R. 1929 Cal. 831=125 Ind. Cas. 273. Knowledge *alunde* of award being filed is not sufficient. Notice must be given to the parties or to their counsels or pleaders. A. I. R. 1930 Lah. 228=119 Ind. Cas. 331; 107 Ind. Cas. 658=A. I. R. 1928 Nag. 166; 94 Ind. Cas. 115=A. I. R. 1926 Cal. 1018; A. I. R. 1927 Cal. 619=45 C. L. J. 458=103 Ind. Cas. 625; 95 Ind. Cas. 547=A. I. R. 1926 Bom. 312=28 Bom. L. R. 511; A. I. R. 1931 Oudh 148=24 O. C. 234=8 O. L. J. 626=64 Ind. Cas. 90; 89 Ind. Cas. 240=A. I. R. 1925 Lah. 619; (1921) M. W. N. 793=15 L. W. 160=45 M. 466=71 Ind. Cas. 266. A. I. R. 1922 Mad. 179; 62 Ind. Cas. 649=24 O. C. 263=8 O. L. J. 280. Where arbitrators do not sign award before filing it, decree thereon is illegal. 1 Pat. L. J. 303=2 Pat. L. W. 377=35 Ind. Cas. 358. Arbitrators are presumed to commit to writing depositions but are not bound to preserve them. A. I. R. 1929 Nag. 24=119 Ind. Cas. 694. Award is not void for mere failure to file document or deposition. A. I. R. 1926 Oudh 307=1 Luck. 139=13 O. L. J. 224=3 O. W. N. 279=93 Ind. Cas. 446. Where parties agree to abide by the decision of the majority of arbitrators an award is not invalid simply because minority refuses to sign the award. 1 Pat.

L. J. 90=2 Pat. L. W. 411=34 Ind. Cas. 105. This para is applicable to award which are made when the suit is referred to arbitration through the intervention of the Court. 12 Pat. L. T. 733. It is doubtful whether oral award is good. A. I. R. 1933 Lah. 777. Failure to issue a notice of the filing of the award under this para is fatal to the validity of the decree passed on the basis of the award. A. I. R. 1935 All. 852=158 I. C. 904.

11. [S 517.] Upon any reference by an order of the Court, the arbitrator or umpire may, with the leave of the Court state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order, such opinion to be added to and to form part of the award.

**Scoope.**—In case of difference between the arbitrators, the question of law may be referred to the Court in the form of a special case. 35 B. 130=12 Bom. L. R. 852=8 Ind. Cas. 171; see also 84 Ind. Cas. 378=48 B. 663=26 Bom. L. R. 836. Refusal by an umpire to state a special case cannot strengthen the charge of misconduct against him. 134 Ind. Cas. 1080=54 C.L. J. 372=33 Bom. L. R. 1536=34 L. W. 676=35 C. W. N. 1287=1931 A. L. J. 1116=A. I. R. 1931 P. C. 289=61 M. L. J. 623 (P. C.).

Power to modify or correct award. 12. [S 518.] The Court may, by order, modify or correct an award :—

- (a) Where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred ; or
- (b) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision ; or
- (c) Where the award contains a clerical mistake or an error arising from an accidental slip or omission.

**Scoope.**—This paragraph is applicable in case of imperfection in form in award. A. I. R. 1930 Lah. 26=11 Lah. 342=31 P. L. R. 668=124 Ind. Cas. 339. After reference to arbitrators Court's power to deal further with the case is very limited. It can act under para 12 only. A. I. R. 1930 Lah. 26=11 Lah. 342=31 P. L. R. 668=124 Ind. Cas. 339. Court may correct or modify partly valid award. If some portion of award refers to matters not referred to, it can be separated. A. I. R. 1924 Pat. 33=2 Pat. 777=(1923) Pat. 225=2 Pat. L. R. 76=5 P. L. T. 239=76 Ind. Cas. 2; see also 76 Ind. Cas. 1007=A. I. R. 1923 Lah. 411. Award based on arithmetical mistake in document cannot be corrected. Proper remedy is appeal or revision. A. I. R. 1927 Mad. 720=53 M. L. J. 38=(1927) M. W. N. 242=103 Ind. Cas. 829. Court cannot enter into merits of dispute. A. I. R. 1921 Bom. 191=45 B 512=59 Ind. Cas. 785. Court has no jurisdiction to modify or correct award more than what is confined to para 12. 78 P. R. 1916=124 P. W. R. 1916=40 P. L. R. 1917=35 Ind. Cas. 887. Arbitrator is fully authorised to direct payment by instalment and their order though harsh or erroneous is an error of substance and not of form and as such Court has no power to amend it. A. I. R. 1930 Lah. 26=11 Lah. 342=31 P. L. R. 668=124 Ind. Cas. 339. Award can not be set aside except for misconduct of arbitrator or patent mistake, though arbitrator is an officer of Court. A. I. R. 1925 Sind 89=78 Ind. Cas. 60; see also 80 Ind. Cas. 10=A. I. R. 1925 Cal. 322. In a suit for dissolution of partnership and accounts, arbitrator can award interest also. 56 Ind. Cas. 941; see also 46 C. 584=54 Ind. Cas. 285=23 C. W. N. 704. Arbitrator cannot review his own award. 99 P. R. 1917=173 P. W. R. 1917=43 Ind. Cas. 350. A Court may modify or correct an award passed by an arbitrator under conditions prescribed by clauses (a), (b) and (c) of para 12 of Sch. II of the Code of Civil Procedure. A decree passed on an award which has been so modified is a proper decree in accordance with the award under para 16. A. L. R. 1933 Lah. 572=34 P. L. R. 34=A. I. R. 1933 Lah. 139=141 Ind. Cas. 72. Where a prayer is only for the modification or remission of an award, the prayer comes within para 12 or 14, and consequently Art. 158 of the Limitation Act is not applicable. A. L. R. 1933 A. 290=1933 A. L. J. 519=A. I. R. 1933 All. 648.

13. [S. 519.] The Court may also make such order as it thinks fit respecting the costs of the arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

Order as to costs of arbitration.

concerning them.

**Scope.**—In case of omission of costs in award, Court can make order regarding costs. A. I. R. 1930 Oudh 89=7 O. W. N. 97=5 Luck. 678=125 Ind. Cas. 508; see also 6 S. L. R. 226=19 Ind. Cas. 611; 152 I. C. 373=A. I. R. 1934 Nag. 199=17 N. L. J. 153. Court has power to reduce excessive costs which are not part of award, but award cannot be questioned. A. I. R. 1930 Sind 190=123 Ind. Cas. 694.

14. [S. 520.] The Court may remit the award or any matter referred to arbitration to the reconsideration of the same arbitrator or umpire, upon such terms as it thinks fit,—

Where award or matter referred to arbitration may be remitted.

(a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated without affecting the determination of the matters referred;

(b) where the award is so indefinite as to be incapable of execution;

(c) where an objection to the legality of the award is apparent upon the face of it.

**Scope.**—Remittal of part of award is not proper. A. I. R. 1926 All. 567=24 A. L. J. 706=96 Ind. Cas. 531. It is open to parties to accept incomplete award. A. I. R. 1930 Cal. 255=50 C. L. J. 323=125 Ind. Cas. 293. Where award decides some matters only, it cannot be taken that the remaining matters have been decided against the plaintiff. A. I. R. 1928 Lah. 874=29 P. L. R. 531=110 Ind. Cas. 738. Award is not illegal, where decision is based on personal knowledge with consent of parties. A. I. R. 1925 Oudh 741=89 Ind. Cas. 832. Remitting award means remitting to same arbitrators. Setting aside award means making order to supersede arbitration. A. I. R. 1921 Pat. 161=2 Pat. L. T. 277=6 Pat. L. J. 287=61 Ind. Cas. 390. It is not competent to Court to force arbitrator to give decision against his will. 18 A. L. J. 952=43 A. 101=59 Ind. Cas. 567. Arithmetical error in award does not render it illegal. 42 A. 277=2 U. P. L. R. (A) 104=18 A. L. J. 241=58 Ind. Cas. 585. An order remitting an award for reconsideration of the arbitrators is not open to challenge on appeal. 146 Ind. Cas. 22=A. I. R. 1933 Lah. 530. In the absence of any objection, the Court is not bound to scrutinise the terms of the award and satisfy itself before the passing of its decree, that the award disposed of all the matters referred to arbitration and if the award did not so dispose of them, *suo motu* to remit the award under para 14. A. I. R. 1933 Mad. 559=A. I. R. 1933 Mad. 697=38 L. W. 330=65 M. L. J. 376=1933 M. W. N. 831. Where a case is transferred after order of reference and before award, award should be filed before Court to which case is transferred. 146 Ind. Cas. 582=10 O. W. N. 1196=A. I. R. 1933 Oudh 546. An award submitted by the arbitrators is final and the only exceptions are the cases where the award is the result of corruption or fraud and one other where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. 10 O. W. N. 1195=A. I. R. 1933 Oudh 547; see also 145 Ind. Cas. 465=27 S. L. R. 96=A. I. R. 1933 Sind 260. Where the arbitrators determine matter not referred to them it is open to Court to remit the award to them again. 12 Lah. L. J. 314=A. I. R. 1931 Lah. 215=131 Ind. Cas. 303. A Court has no jurisdiction to remit an award made by arbitration on a ground other than those of Sch. II of the C. P. Code. A. I. R. 1935 Lah. 113.

**Clause (a).**—Award exceeding terms of reference is void regarding exceeding portion when it is separable from and independent of the rest. 22 C. L. J. 237=31 Ind. Cas. 33. Award on matters beyond terms of reference is without jurisdiction and Court can remit it. A. I. R. 1926 Mad. 201=49 M. L. J. 523=91 Ind. Cas. 745; A. I. R. 1931 Lah. 215=12 Lah. L. J. 314; A. I. R. 1928 Lah. 915=110 I. C. 401. Award is valid only to the extent of matters referred to it if they are separable. 10 Pat. L. T. 53=115 Ind. Cas. 680; see also A. I. R. 1928 Sind 144=103 Ind. Cas. 791; A. I. R. 1923 Rang. 130=1 Bur. L. J. 265=4 U. B. R. 157=72 Ind. Cas. 193. Court is not competent to amend arithmetical error in private award and

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remit it for re-consideration. A. I. R. 1925 Lah. 85=78 Ind. Cas. 1042. Power to make partition include right to award maintenance. A. I. R. 1924 Oudh 84=10 O. L. J. 226=73 Ind. Cas. 39. Slip is not material irregularity in award. A. I. R. 1925 Cal. 599=52 C. 100=88 Ind. Cas. 49. Award is vitiated where arbitrator leaves some matter undetermined. A. I. R. 1934 All. 493. Where the award is incomplete it should be remitted for reconsideration. 146 Ind. Cas. 22=A. I. R. 1933 Lah. 530. Where an arbitrator neglects to consider some of the matters referred to arbitration he is guilty of an irregularity and the award is vitiated. 149 I. C. 396=A. I. R. 1934 All. 493.

**Clause (b).—**Court is empowered to set aside award if uncertain. 3 O. L. J. 137=34 Ind. Cas. 355. Under clause (b), the award is to be remitted when it is indefinite as to be incapable of execution. 35 Ind. Cas. 761=3 O. L. J. 258. But where award is returned for modifying certain part only and this to remove indefiniteness, the whole award cannot be altered. A. I. R. 1929 Sind. 164=116 Ind. Cas. 590. But where amount is not ascertained but can be made certain, arbitration cannot be held as uncertain. A. I. R. 1930 Lah. 22=119 Ind. Cas. 726. Where extra amount is given to eldest son for services rendered, mere use of word *jeshtha bhagam* does not make award void. A. I. R. 1930 Mad. 38=30 L. W. 868=124 Ind. Cas. 209; 78 Ind. Cas. 238=A. I. R. 1925 Mad. 301. Award is not uncertain if rate of exchange is not mentioned. A. I. R. 1924 Sind 117=17 S. L. R. 86=80 Ind. Cas. 1009. Award not specifying sum to be paid is not good ground for remittal if arbitrator has given rule for calculating amounts to be paid. A. I. R. 1922 Cal. 447=49 C. 646=69 Ind. Cas. 995.

**Clause (c).—**Court is empowered to remit an award if there is error of law patent on face of it. 44 B. 780=21 Bom. L. R. 1037=53 Ind. Cas. 799; see also 101 P. R. 1868; 3 P. R. 1872. "Error of law on the face of award" means erroneous legal proposition which is basis of the award. A. I. R. 1925 Cal. 599=52 C. 100=88 Ind. Cas. 49; see also 30 L. W. 868=A. I. R. 1930 Mad. 38=124 Ind. Cas. 209; A. I. R. 1931 Mad. 619=34 L. W. 507. Erroneous decision on point of law by arbitrator does not entail setting aside of award. 41 M. 1022=34 M. L. J. 323=24 M. L. T. 60=45 Ind. Cas. 644. Where the arbitrator considers all the evidence before him and the arguments of pleaders and then makes the award, mere mistake in construing contract referred to in award but not incorporated in it is not error on face of award. A. I. R. 1927 P. C. 164=55 C. 126=54 I. A. 427=53 M. L. J. 18=29 Bom. L. R. 1150=46 C. L. J. 9=31 C. W. N. 1027=39 M. L. T. 61=21 S. L. R. 101 (P. C.)=104 Ind. Cas. 476. An error in law on the face of the award must be found in the award or a document actually incorporated therein, and which is the basis of the award. A. I. R. 1926 All. 501=48 A. 475=24 A. L. J. 480=95 Ind. Cas. 416. Failure of arbitrator to ask parties to produce witness is not a defect for setting aside the award. 158 I. C. 832=A. I. R. 1935 Rang. 308.

**15. [S. 521.]** (1) An award remitted under paragraph 14 becomes void on failure of the arbitrator or umpire to reconsider grounds for setting aside it. But no award shall be set aside except on one of the following grounds, namely :—

(a) corruption or misconduct of the arbitrator or umpire ;  
 (b) either party having been guilty of fraudulent concealment of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpire ;

(c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.

(2) Where an award becomes void or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit.

**Scope.**—Paragraph 15 contemplates the entertaining by the first Court of all possible grounds which can be urged against the validity of the award. A. I. R. 1926 All. 202=48 A. 226=23 A. L. J. 997=90 Ind. Cas. 904. Paras 15 and 16 depend for their operation on a valid reference. A. I. R. 1925 Cal. 812=52 C. 559=42 C. L. J. 26=29 C. W. N. 886=81 Ind. Cas. 633. It is only the party prejudiced by the exercise of excessive authority by the arbitrator who is entitled to object to the award by reason of it. A. I. R. 1927 Sind 206=102 Ind. Cas.

277. An award should not be set aside merely upon the ground that the decree based on it would not be one which would have been ordinarily passed by the Court in which that suit was instituted. A. I. R. 1928 Oudh 1=3 Luck. 1=4 O. W. N. 1085 (F. B.)=107 Ind. Cas. 545. Where parties and arbitrator agree to withdraw reference, arbitration should be superseded. Reference can be revived only by fresh agreement, not by resiling from previous resolve by one of the parties. A. I. R. 1934 All. 95. Award not warranted by terms of reference and going beyond it is not enforceable. A. I. R. 1934 All. 117. A clause in a compromise petition providing that any of the parties thereto may object to the award on any account is contrary to para 15. 1 Pat. L. J. 306=2 Pat. L. W. 377=35 Ind. Cas. 358. Agreement to object to award does not preclude parties from objecting on the ground of fraud or bad faith of arbitrators. If arbitrators imparted their personal knowledge without giving an opportunity of testing such knowledge, it is misconduct on their part. 107 P. W. R. 1916=117 P. R. 1916=34 Ind. Cas. 192. The filing of a suit regarding the same subject-matter does not *ipso facto* render the arbitrators *functus officio*. A. I. R. 1924 Sind 105=17 S. L. R. 15=80 Ind. Cas. 959. The only time for entertaining the charge of misconduct is when the award has been filed. A. I. R. 1923 Cal. 410=27 C. W. N. 420=80 Ind. Cas. 459. Words "arbitration and award" and "award" in s. 14, Arbitration Act, and para 15 Sch. 2, C. P. Code respectively allow of no distinction. A. I. R. 1930 Bom. 43=32 Bom. L. R. 389=54 B. 696=126 Ind. Cas. 305. In case of a private reference to arbitration the award if it exceeds scope of the reference is not invalid; the portion of the award dealing with the matter referred is valid and can be enforced provided it is separable from the rest. 10 P. L. T. 53=115 Ind. Cas. 680. Though one of the parties is minor represented by guardian there is nothing wrong in parties agreeing to abide by award of majority. A. I. R. 1929 Mad. 144=115 Ind. Cas. 367. Where reference under para 3, Sch. II in a partition suit was with regard to "dispute in suit" and where parties during arbitration proceedings by consent suggested certain method for partition the question being not in dispute at the time of reference, award based on such future agreement is not invalid. A. I. R. 1926 All. 567=24 A. L. J. 705=96 Ind. Cas. 531. One and the same arbitration cannot be held as to matters within the jurisdiction and matters without the jurisdiction between the parties to the suit and between them and other persons and partly upon an order of reference and partly under agreement. A. I. R. 1925 P. C. 293=28 Bom. L. R. 217=92 Ind. Cas. 633=53 I. A. 1=53 C. 258=27 P. L. R. 35=3 P. L. R. 330=43 C. L. J. 14=49 M. L. J. 812=24 A. L. J. 13 P. C. An arbitrator is not entitled to adopt the procedure of a special nature unless all parties affected by it agree to the adoption of such procedure. 93 Ind. Cas. 840. Fact that the award is not given within specified time is not sufficient for refusing to file agreement in Court, especially where there is provision in agreement allowing extension of time. 55 P. W. R. 1919=155 P. R. 1919=51 Ind. Cas. 636. If the parties are not given notice of any meeting at which they would appear in the ordinary case that would clearly amount to misconduct and the award is liable to be set aside. A. I. R. 1924 Bom. 149=25 Bom. L. R. 392=85 Ind. Cas. 424. If an arbitrator consults strangers on question of law or as to the style, syntax or grammar of his award he is quite within his rights as an arbitrator but if he arrives at any findings of fact consulting people and if he allows them to affect his decision as assessors then there is misconduct. A. I. R. 1925 Pat. 465=3 Pat. L. R. 59=6 P. L. T. 544=86 Ind. Cas. 773. Where defendants are not present to prosecute their application to set aside their award, decree passed against them is not *ex parte*. A. I. R. 1924 Pat. 603=(1924) Pat. 170=3 Pat. 839=6 P. L. T. 212=83 Ind. Cas. 26. An award cannot be set aside merely because reference is not in writing. A. I. R. 1925 Oudh 269=11 O. L. J. 570=28 O. C. 74=80 Ind. Cas. 7. An award exceeding terms of reference is unenforceable. 151 I. C. 338=A. I. R. 1934 All. 117. Order on objections to an award of an arbitrator should comply with the provisions of or. 20, r. 5. 154 I. C. 310=A. I. R. 1935 All. 519.

**Remitted under paragraph 14.**—Award remitted by Court for reconsideration of arbitrators, becomes void on their failure to re-consider it. 7. W. R. 408<sup>8</sup>; 16 C. 168.

**When award can be set aside.**—An award can be set aside only on the grounds mentioned in this para. 81 Ind. Cas. 574=28 C. W. N. 634=1924 Cal. 665; see also 119 Ind. Cas. 726=A. I. R. 1930 Lah. 22; 30 C. 397=7 C. W. N. 545.

**Corruption or misconduct.**—Decision based on secret enquiry and opinion of strangers amount to misconduct on part of arbitrator. A. I. R. 1931 Lah. 111=131 Ind. Cas. 220; see also A. I. R. 1931 Lah. 65=130 Ind. Cas. 833. Failure to record evidence when indispensable, is misconduct. A. I. R. 1931 Lah. 65=130 Ind. Cas. 833. Strict compliance with paras 1 and 2 is essential for Court to refer to arbitration. A. I. R. 1931 Cal. 109=34 C. W. N. 813=130 Ind. Cas. 137. Where one of the arbitrators was absent at some sittings but nothing important was done in his absence and in fact everything was done over again when all were present, there was no misconduct which would vitiate award. A. I. R. 1931 Cal. 53=58 C. 269=34 C. W. N. 689=129 Ind. Cas. 428. But taking evidence of plaintiff in the absence of defendant is misconduct on the part of arbitrators even when they are empowered to dispose of the case without taking any evidence. A. I. R. 1930 Mad. 646=126 Ind. Cas. 735. But an objection to irregularity or improper conduct of an arbitrator may be waived by parties provided the party waiving it has full knowledge of the defect. A. I. R. 1930 Sind 79=123 Ind. Cas. 234; A. I. R. 1929 Sind 200=119 Ind. Cas. 529. But the mere signature of a party to an award does not estop him from contesting the validity of award. A. I. R. 1929 Rang. 166=7 Rang. 136=117 Ind. Cas. 574. Where arbitrators used personal knowledge only in understanding and appreciating evidence, the award based entirely or almost entirely on evidence, is not bad. A. I. R. 1929 Mad. 144=144 Ind. Cas. 367. Refusing opportunity to party to produce evidence is misconduct. 111 Ind. Cas. 82. Where no objection is taken to an award and a decree is passed in accordance with its terms the decree cannot be subsequently treated as nullity because the arbitrators had wrongly decided a mixed question of fact and law. A. I. R. 1929 All. 521=(1929) A. L. J. 540=117 Ind. Cas. 361. Arbitrators can not conduct enquiries behind back of parties. If they do so their awards are open to serious objections. 9 P. L. T. 571=109 Ind. Cas. 21. The word "misconduct" in this para does not necessarily imply fraud. But it may include cases where the arbitrator has failed to perform the essential duties which are cast upon him as an arbitrator. A. I. R. 1928 Bom. 49=52 B. 116=30 Bom. L. R. 92=107 Ind. Cas. 707; 152 I. C. 029; A. I. R. 1934 All. 658=148 I. C. 1168=1934 A. L. J. 694; 158 I. C. 379=A. I. R. 1935 Lah. 491; 155 I. C. 522=A. I. R. 1935 Oudh 349; 59 Bom. 268=155 I. C. 669=A. I. R. 1935 Bom. 127=37 Bom. L. R. 69; A. I. R. 1936 Rang. 191. Where the award has been made by an arbitrator according to his own views as to what was right and proper in the circumstances, the award cannot be attacked on the ground of a technical misconduct in so far as he applied a perverse view of law. A. I. R. 1929 Oudh 1=5 O. W. N. 1001=113 Ind. Cas. 785. Decision without giving notice to parties or hearing their comments on evidence is legal misconduct. A. I. R. 1927 Lah. 447=100 Ind. Cas. 895. Where umpire makes enquires behind back of parties, he is guilty of misconduct. A. I. R. 1927 Lah. 425=8 Lah. 329=2 Lah. L. J. 218=28 P. L. R. 425=101 Ind. Cas. 153. Unless parties consent no arbitrator has a right to decide the matter on his personal knowledge and the award based on such knowledge is vitiated. A. I. R. 1926 Mad. 752=50 M. L. J. 514=23 L. W. 681=(1926) M. W. N. 445=95 Ind. Cas. 740. But where particular arbitrator has been selected only because of his personal knowledge in the matter in dispute, it would not be a misconduct on his part to use his personal knowledge in coming to a certain decision. A. I. R. 1926 Bom. 527=28 Bom. L. R. 986=97 Ind. Cas. 673; A. I. R. 1935 Mad. 152=159 I. C. 1059=69 M. L. J. 558=1935 M. W. N. 572.

When parties have agreed to abide by decision of a tribunal of their own selection unless there has been something radically wrong and vicious in the proceeding it must not be set aside. An award should not be set aside on the ground of highly technical error. A. I. R. 1925 Rang. 383=3 Rang. 387=91 Ind. Cas. 654. An arbitrator, who makes secret inquiry and relies on opinion of third parties is guilty of misconduct. A. I. R. 1931 Lah. 111=131 Ind. Cas. 220. Examination of witnesses out of the hearing of the parties amounts to misconduct. A. I. R. 1931 Mad. 619=1931 M. W. N. 451=34 L. W. 507=133 Ind. Cas. 522. Omission to examine witnesses may also amount to misconduct. A. I. R. 1931 Lah. 65=130 Ind. Cas. 833. Taking legal advice upon the general rules of law bearing upon the case does not amount to misconduct. 1931 A. L. J. 1196=54 C. L. J. 372=61 M. L. J. 623 (P. C.)=33 Bom. L. R. 1536=35 C. W. N. 1287=34 L. W. 676=8 O. W. N. 1066=A. I. R. 1931 P. C. 289. An error in calculation, unless so palpable and gross as to afford strong evidence of misconduct, is no ground for interference by Court. But the Court is not competent to correct the error. 133 Ind. Cas. 522=34 L. W.

507=1931 M. W. N. 451=A. I. R. 1931 Mad. 619. Where the parties appointed two arbitrators one for each and an umpire and agreed to abide by the decision of the majority and the award of the umpire substantially agreed with one arbitrator but there was a difference as to the amount which plaintiff was entitled to, the lower Court accepted the award of the umpire. *Held* even though the award was of no avail, because there was no majority, the decree cannot be changed under s. 115 C. P. Code. 1931 A. L. J. 906=134 Ind. Cas. 30. An arbitrator is guilty of misconduct if he delegates his functions and his award is invalid. 22 C. L. J. 237=31 Ind. Cas. 33. An arbitrator who has got personal interest not known to the party, can not act as such unless the interest is very small. 19 C. W. N. 165=31 Ind. Cas. 597. Arbitrators with expert knowledge of the particular trade in relation to which a question is pending before them can use their personal knowledge of the usages of that trade. 41 B. 518=18 Bom. L. R. 532=37 Ind. Cas. 271; see also 57 Ind. Cas. 604. The presence of all the arbitrators at all meetings and above all at the last meeting when the final act of the arbitrators is done is essential. 49 Ind. Cas. 522. Arbitrator deciding dispute upon his own personal knowledge and without taking evidence is fatal to the award in the absence of special agreement. 42 A. 185=18 A. L. J. 78=54 Ind. Cas. 443; 57 Ind. Cas. 604. Where a person is guilty of a final, irrevocable or conclusive refusal to have anything to do with an arbitration, the arbitrators need not give notice but may proceed *ex parte*. 47 Cal. 29=56 Ind. Cas. 325. Arbitrators must not receive or act upon evidence or decide upon grounds which would render their award utterly unfair and worthless. An arbitrator can act *ex parte* in some cases. 13 S. L. R. 75=53 Ind. Cas. 337. Refusal of an arbitrator to summon witnesses cited by a party does not vitiate the award where there is nothing to show that the arbitrator was not acting within his powers and wherein the exercise of a wise and prudent discretion, he declined to summon them. 39 Ind. Cas. 767. Where arbitrator takes evidence or hears argument in the absence of one party without giving notice he is guilty of misconduct. Arbitrator need not give any further notice when defendant knew that arbitrator was proceeding in spite of repeated notice of withdrawal. 33 Ind. Cas. 467; see also 49 Ind. Cas. 303; A. I. R. 1925 Lah. 507=7 Lah. L. J. 463=26 P. L. R. 706=88 Ind. Cas. 161. Simply because the arbitrator asks a person certain question relating to the accounts in the absence of the parties, it cannot be said that he misconducts himself. A. I. R. 1935 Pat. 16.

Where award is impeached owing to defendants having given false evidence supporting fraudulent accounts, it is open to review but is not liable to be set aside by suit. 98 P. R. 1915=179 P. W. R. 1915=31 Ind. Cas. 196. An arbitrator has power to determine a matter relating to a joint family business and to award share in favour of even a stranger where finding is recorded with full consent of parties. 18 A. L. J. 241=42 A. 277=58 Ind. Cas. 585. Where both arbitrators are pleaders the mere fact that one has appeared for the other in various cases without fees does not show that the latter would not take a fair view of the matter under arbitration. A. I. R. 1930 Sind. 190=123 Ind. Cas. 694. Where an award does not decide the real question at issue, it is vitiated by technical misconduct. A. I. R. 1930 Sind. 103=125 Ind. Cas. 824. Where some of the arbitrators give evidence in arbitration proceeding before them but parties allow them to do so without objection and where conduct of parties show that it was within their contemplation while entering into contract to refer that they should thus give evidence, award is not invalid. A. I. R. 1931 Cal. 53=34 C. W. N. 689=58 C. 269=129 Ind. Cas. 428. Mere fact of questioning the parties on different dates does not amount to misconduct so long as the parties are given an opportunity of meeting the representations made by the other side. A. I. R. 1926 Mad. 1158=24 L. W. 482=97 Ind. Cas. 478. Where the order of reference implies that no further evidence was to be put forward by the parties and that parties have sufficiently stated their case, absence of notice by arbitrators that they were prepared to receive evidence does not render award invalid. A. I. R. 1927 Mad. 1010=106 Ind. Cas. 332. In case of agreement of parties that proceedings in one suit may be used to determine the questions in the cross suit, the arbitrators did not set issues in the later award, *held* the award was not invalid. 38 C. W. N. 784.

The Court will set aside an award if there is an error of law patent on the face of it. Legal misconduct means misconduct in the judicial sense of the word, not from a moral point of view and means some honest though erroneous breach of duty causing a miscarriage of justice. Where the arbitrators admit improper evidence

and are misled by it they commit an error of law patent on the face of the award and this can amount to legal misconduct. A. I. R. 1924 Sind 75=17 S. L. R. 353. Whether the arbitrator can import their own personal knowledge into the consideration of the case depends upon the terms of submission to arbitration. A. I. R. 1925 Mad. 1086=49 M. L. J. 115=(1925) M. W. N. 503=88 Ind. Cas. 660. No arbitrator performing his functions can listen to confidential information adverse to one or the other party without committing grave misconduct. A. I. R. 1925 Pat. 465=6 P. L. T. 544=86 Ind. Cas. 773. Where an arbitrator refuses to allow evidence under honest belief of want of jurisdiction to admit it, the award is not vitiated by misconduct. A. I. R. 1924 Oudh 400=11 O. L. J. 142=78 Ind. Cas. 378. Where the umpire made the award without giving the parties opportunity to be heard, the award should be set aside. A. I. R. 1924 Sind 27=17 S. L. R. 172=83 Ind. Cas. 543. Where there is no provision for making and publishing the award in the submission neither the award is invalid nor the arbitrators are guilty of misconduct if they do publish the award. A. I. R. 1924 Nag. 204=78 Ind. Cas. 194. Where parties to arbitration do not produce evidence and the award is based on hearsay and conjecture it can be upheld. A. I. R. 1922 Lah. 480=67 Ind. Cas. 866. Arbitrators cannot make private enquiries. But where the Court has found as a fact that the decision of the arbitrator was based exclusively on the evidence recorded in the presence of both parties there is no ground for interference. A. I. R. 1923 Oudh 235=26 O. C. 107=74 Ind. Cas. 401. It is improper on the part of an arbitrator to get information from one side in the absence of the other; but consent of the parties will cure the defect. A minor's guardian can not waive the minor's right. A. I. R. 1923 Mad. 301=47 Mad. 30=17 M. L. J. 71=(1923) M. W. N. 7=32 M. L. T. 32=44 M. L. J. 253=73 Ind. Cas. 470; see also A. I. R. 1923 Rang. 187=1 Rang. 15=2 Bur. L. J. 30=74 Ind. Cas. 6. Irregularities in procedure of arbitration may be waived provided parties knew of them. 10 L. W. 57=51 Ind. Cas. 53. An award made out of time is not necessarily void, it is only voidable and becomes binding if not sought to be set aside within 10 days after it is filed. 4 Pat. L. J. 265=50 Ind. Cas. 52. Where arbitrator communicates information gained privately to other arbitrators without objection from parties there is no misconduct. A. I. R. 1921 Mad. 271=41 M. L. J. 276=14 L. W. 394=1921 M. W. N. 509=65 Ind. Cas. 676. Where the arbitrator is silent in his award as to a point originally submitted to him but which in fact he found to be no longer in controversy, the award is not vitiated. A. I. R. 1921 All. 384=43 A. 108=60 Ind. Cas. 626. Court in setting aside award must supersede arbitration. A. I. R. 1921 Pat. 16=2 Pat. L. T. 277=6 Pat. L. J. 287=(1921) Pat. 170=61 Ind. Cas. 390. Where the reference is cancelled Judge has no power to look at the award subsequently submitted and treat it as if it were the report of the commissioner. A. I. R. 1922 Lah. 194=4 Lah. L. J. 48. Where the arbitrator makes private communication with one of the parties unknown to the other during course of arbitration proceedings he is guilty of misconduct except when reference authorises such communication and the award can be set aside. L. R. 3 A. 84. An arbitrator to whom a dispute about succession to property is referred by a Hindu joint family, so long as he is not compelled that he should decide only according to Hindu Law, can take into consideration wishes of parties and decide in accordance therewith. A. I. R. 1921 Lah. 34=2 Lah. 114=3 Lah. L. J. 349=73 P. L. R. 1921=61 Ind. Cas. 628. Award given after time fixed is not valid. A. I. R. 1933 Lah. 173=145 Ind. Cas. 129. Even before the award is made the Court can deal with the misconduct of the arbitrators. 146 Ind. Cas. 1081=A. I. R. 1933 Pat. 566. Arbitrators can accept a compromise by the parties under s. 32, rule 7. 145 Ind. Cas. 329=34 P. L. R. 397=A. I. R. 1933 Lah. 538. Award based on reference without authority of a party can be challenged in a suit. 1933 M. W. N. 1475. Court should summon arbitrators as witnesses at the instance of a party who impugns the award on the ground that the arbitrator held his enquiry in the absence of the objector. 34 P. L. R. 397=A. I. R. 1933 Lah. 538=145 Ind. Cas. 329. An award can be set aside if the arbitrators grants excessive costs. 27 S. L. R. 327=A. I. R. 1933 Sind 295=146 Ind. Cas. 439. The fact that an award has been filed after the time allowed by Court, may be set aside by Court, but if not set aside it is a valid one. 10 O. W. N. 177=A. I. R. 1933 Oudh 563. Arbitrators taking fees from one side only the other side being unable are not guilty of such misconduct as would require setting aside of their award. 38 C. W. N. 784.

**Clause (b).**—Where the arbitrator is directly interested in the subject-matter of the litigation a party knowingly not disclosing the matter to Court when the case is going to be referred is guilty of fraudulent misconduct. A. I. R. 1926 Oudh 307



=1 Luck. 139=13 O. L. J. 224=3 O. W. N. 279=63 Ind. Cas. 446 ; see also 25 C. 141 ; 29 C 678. Party coming to relationship of the opposite party with the arbitrator and omitting to object in ignorance of his right to revoke is not barred by the operation of waiver. 155 I. C. 522=A. I. R. 1935 Oudh 349.

**Clause (o).**—In cl. (c) sub-para 1 para 15 words "or being otherwise invalid" have same bearing as word "invalidity" referred to in clause (c). A. I. R. 1931 Cal. 211=52 C. L. J. 298=35 C. W. N. 238=58 C. 628=130 Ind. Cas. 209 ; see also 34 C. W. N. 813=130 Ind. Cas. 137. Ground is not *ejusdem generis* with previous grounds mentioned. A. I. R. 1934 All. 95. The words "or being otherwise invalid" can not cover award where reference itself is bad. A. I. R. 1928 All. 740=50 A. 955=26 A. L. J. 1009=110 Ind. Cas. 881 ; 159 I. C. 441=A. I. R. 1935 All. 1014. Where an arbitrator in a reference pending suit treats person not a party to the suit as a party to arbitration and decides disputes between parties and such person, however, just, the award may be "it is otherwise invalid" A. I. R. 1927 Sind 193=101 Ind. Cas. 802. An award made otherwise than in accordance with the order of reference is "otherwise invalid" within para 15. A. I. R. 1925 P. C. 293=28 Bom. L. R. 217=49 M. L. J. 812=3 O. W. N. 127=24 A. L. J. 13=43 C. L. J. 14=27 P. L. R. 35=(1926) M. W. N. 96=3 Pat. L. R. 33=53 I. A. 1=53 C. 258 (P. C.)=92 Ind. Cas. 633. The words "being otherwise invalid" imply that any objection to the award on the ground that it is not an award or on the ground of its invalidity should be made when the award is filed. A. I. R. 1924 Bom. 324=26 Bom. L. R. 171=79 Ind. Cas. 723. The words "or otherwise invalid" in para 15 are not *ejusdem generis* with the other cases mentioned therein but are meant to include all cases of invalidity on grounds other than those mentioned. 34 M. L. J. 71=23 M. L. T. 89=495 Ind. Cas. 763 ; 12 Rang. 675=156 I. C. 414=A. I. R. 1935 Rang. 94. An award may be challenged on any ground whatsoever because of the words "being otherwise invalid" A. I. R. 1936 Oudh 1. There is nothing in para 15 to indicate that there is any necessity for the award being submitted or delivered or filed in time in order to maintain its validity. 38 C. W. N. 784.

**Revision.**—Revision under s. 115 C. P. Code is not competent against an order passed under Sch. II, para 15, setting aside an award, and directing trial of suit to proceed. 34 Bom. L. R. 376=133 Ind. Cas. 215=A. I. R. 1932 Bom 232=A. L. R. 1932 Bom. 79. An appeal lies against an order setting aside an arbitration as the proceedings amount to a suit on which decree should follow. The rejection of an award is not open to revision. 107 P. W. R. 1916=117 P. R. 1916=70 P. L. R. 1917=34 Ind. Cas. 192. An objection to the validity of a reference is not an objection within para 15. Any order passed on such objection is open to revision. A. I. R. 1926 All. 258=48 A. 239=24 A. L. J. 235=91 Ind. Cas. 930. Court's omission to give notice of the filing of the award to the parties is a good ground for revision. A. I. R. 1926 Cal. 1018=94 Ind. Cas. 115. Judgment in accordance with award are to be final. Therefore unless Judge exercises jurisdiction wrongly there should be no interference in revision. A. I. R. 1928 Mad. 48=105 Ind. Cas. 105. Revision lies against order refusing to set aside award. A. I. R. 1939 Lah 369=111 Ind. Cas. 145. Where reference itself is impugned owing to dissent of parties, judgment and decree is appealable under para 16. A. I. R. 1931 Cal. 109=34 C. W. N. 813=130 Ind. Cas. 137. High Court in revision cannot set aside decree in accordance with award on ground that one of three *punches* refused to sign award. A. I. R. 1927 All. 573=100 Ind. Cas. 76. Revision does not lie against order superseding award made in pending case and directing suit to proceed. A. I. R. 1925 All. 566=23 A. L. J. 656=89 Ind. Cas. 173. Arbitration proceedings entered upon in the course of a trial of a suit do not constitute a separate case within s. 115 and therefore an order setting aside an award is not open to revision. A. I. R. 1926 Lah. 191=26 P. L. R. 253. Revision does not lie where Court supersedes award on misinterpretation of terms of reference. A. I. R. 1922 All. 64=20 A. L. J. 117=65 Ind. Cas. 779. If the judgment of the Court is pronounced according to the award under paragraph 16 there is neither appeal nor revision. A. I. R. 1929 Sind 1=15 S. L. R. 165=65 Ind. Cas. 50. Where award was set aside on ground that reference ought not to have been made, *held* that revision lay. A. I. R. 1921 All. 16=43 A. 305=19 A. L. J. 33=60 Ind. Cas. 857. When objection to an award is disallowed, a decree based on award cannot be questioned either in revision or in appeal. 10 O. W. N. 659=A. I. R. 1933 Oudh 327. Where some of the arbitrators took part in the hearing but no objection was taken and thereby the award was not affected on merits, an order confirming such an award can not be questioned in appeal or in revision. 38 L. W. 927=A. I. R. 1933 Mad. 862=65 M. L. J. 755. A. I. R. 1936 Mad. 619.

16. [S. 522.] (1) Where the Court sees no cause to remit the award or any judgment to be according to award. of the matters referred to arbitration for re-consideration in manner aforesaid, and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.

**Scope.**—Para 16 contemplates award made in cases where there has been valid submission. Where reference itself is impugned for want of consent or any other cause an appeal will lie against the decree passed on the invalid award. A. I. R. 1931 Cal. 109=34 C. W. N. 813=130 Ind. Cas. 137; see also A. I. R. 1931 Cal. 211=35 C. W. N. 738=58 C. 628=52 C. L. J. 298; but see A. I. R. 1929 Lah. 479=10 Lah. 871=31 P. L. J. 165=116 Ind. Cas. 559; A. I. R. 1927 Lah. 352=8 Lah. 693=9 Lah. L. J. 569=104 Ind. Cas. 202. Para 16 (1) does not prevent the Court from passing a decree on an award even without giving the parties 10 days' time to file their objection, if the parties so desire. 27 N. L. R. 240=134 Ind. Cas. 282=A. I. R. 1931 Nag. 112. Where the objection is rejected, a decree should be passed on the award and a finality attaches to such a decree which cannot be challenged in revision. 134 Ind. Cas. 30=1931 A. L. J. 906. The Court should not pronounce judgment within 10 days of the receipt of the award, which is the period for putting in objection. 152 I. C. 157=A. I. R. 1934 Mad. 619=67 M. L. J. 377. Court should not *suo motu* fix the date for evidence in support of an objection to an award filed in the Court. It is for the parties to move the Court for the purpose. A. I. R. 1926 Lah. 584=96 Ind. Cas. 108. Where Court without further trial passed decree immediately after a report is filed, procedure is wholly irregular whether report is considered as award or as commissioner's report. A. I. R. 1929 Mad. 783=129 Ind. Cas. 5. The question whether a party is interested must be decided on the facts of each case. A. I. R. 1931 Lah. 126=32 P. L. R. 44=131 Ind. Cas. 348. It is not for the arbitrator to dismiss or decree the suit. 159 I. C. 35=A. I. R. 1935 All. 372=1935 A. L. J. 396.

A decree must be passed in accordance with the award after the application for setting it aside on grounds of misconduct and illegality has been dismissed. A. I. R. 1924 All. 788=46 A. 686=22 A. L. J. 676=L. R. 5 A. 465 Civ.=82 Ind. Cas. 16 Oral award has the same effect as the written one. It also bars a fresh suit for dealing with the same subject-matter. A. I. R. 1924 Rang. 60=2 Bur. L. J. 163=79 Ind. Cas. 742. An agreement not to object to the award on ground other than those of fraud, cannot prevent party to the agreement from moving to set it aside on the ground of illegality on the face of it. A. I. R. 1922 Mad 179=45 M. 466=15 L. W. 160=(1921) M. W. N. 793=71 Ind. Cas. 266 Suit to set aside award is not competent. The only way is by way of application to the Court to set it aside. 13 Bur. L. T. 34=10 L. B. R. 106=56 Ind. Cas. 677. Passing of decree in terms of an award is no ground for refusing to restore on merits application of objection to the award dismissed for default. 18 A. L. J. 756=2 U. P. L. R. (A) 253=57 Ind. Cas. 200.

Where invalid part of the award cannot be separated from the valid part, the whole award is bad and is, therefore, null and void A. I. R. 1922 Cal 399=31 C. L. J. 253=66 Ind. Cas. 342. When one of the parties takes an objection to the award and agrees to indemnify the other, latter can sue him for damages on breach of the agreement. 38 M. L. J. 470=57 Ind. Cas. 952. A suit on the original cause of action is barred after award has been made. 13 S. L. R. 75=53 Ind. Cas. 337. Time for filing objections to an award cannot be extended. 13 N. L. R. 172=42 Ind. Cas. 266. Award can be pleaded as a defence in a civil suit regarding the matter in respect of which award was made. 173 P. W. R. 1917=99 P. R. 1917=43 Ind. Cas. 350; see also 8 L. B. R. 157=33 Ind. Cas. 554. Court acts with material irregularity when it does not give time to adduce evidence in support of objections raised against validity of the award. 3 O. L. J. 583=37 Ind. Cas. 400. Expression in the award capable of many interpretations should be interpreted in the execution proceedings of the decree following the award. 3 O. L. J. 258=35 Ind. Cas. 761. Award is to be regarded as submitted on the date fixed by the Court

for filing it and the time for objection to the filing of the award is to be consulted from such date. 14 P. W. R. 1916=34 Ind. Cas. 250. Decree in terms of the award before the expiry of time allowed for making an application to set aside the award is illegal. Decree in terms of award is not binding on the minor unless the Court finds it beneficial to the minor. 9 S. L. R. 183=34 Ind. Cas. 845. Where an award is objected to, decree in terms of award without allowing objections to be proved by evidence is invalid. A. I. R. 1934 Mad. 614=152 I.C. 157=67 M. L. J. 377.

**Sub section 2.**—Though decree based on award is not appealable it is open to revision if Court acts without jurisdiction or fails to exercise jurisdiction or acts with material irregularity in dealing with award. 31 Ind. Cas. 458. Omission of sanction under order 32, r. 7 is no basis for revision. 99 P. R. 1915=207 P. W. R. 1915=32 Ind. Cas. 250. Appeal does not lie from an order recording an award. 1 Pat. L. J. 90=2 Pat. L. W. 411=34 Ind. Cas. 105; see also 1 Pat. L. J. 306=2 Pat. L. W. 377=35 Ind. Cas. 358. Appeal does not lie against decree passed in terms of an award unless it is in excess or not in terms of an award. 15 A. L. J. 453=39 A. 401=39 Ind. Cas. 730; see also 35 Ind. Cas. 914; 46 Ind. Cas. 785. Decree made in terms of the award can be appealed against for want of consent if the parties are interested. 49 Ind. Cas. 262. Revision lies from an order disposing of objections to award without giving the party opportunity to substantiate them. A. I. R. 1921 Lah. 249=3 Lah. L. J. 487=20 P. L. R. 1922=64 Ind. Cas. 394. Appeal does not lie from a decree passed in terms of the award even though no time has been given to object to it. But the High Court may exercise its jurisdiction under s. 115. A. I. R. 1921 Bom. 32=45 B. 832=59 Ind. Cas. 811. Order disposing of objections to an award can not be appealed against. A. I. R. 1922 Lah. 369=3 Lah. 295=69 Ind. Cas. 583; see also A. I. R. 1922 Mad. 429=15 L. W. 111=31 M. L. T. 52=(1922) M. W. N. 423=70 Ind. Cas. 410. Decree passed in terms of the award after objections to the filing of the award are disposed of legally, and is not subject to revision. A. I. R. 1923 Oudh 235=26 O. C. 107=74 Ind. Cas. 401. Court hearing objections does not become Court of appeal. A. I. R. 1924 Oudh 400=11 O. L. J. 142=78 Ind. Cas. 378. Where decree is based on award, no appeal lies from it on the ground that the party appealing was not a party to the reference. A. I. R. 1931 Lah. 126=32 P. L. R. 44=131 Ind. Cas. 348. No appeal lies even when reference is made on minor's behalf without Court's leave. A. I. R. 1931 Cal. 211=52 C. L. J. 298=35 C. W. N. 238=58 C. 628=138 Ind. Cas. 209. No appeal lies from decree purporting to follow award except on ground that it is not based on an award. 12 Lah. L. J. 289=132 Ind. Cas. 180. But appeal lies when decree is passed without giving 10 days' time for objection. A. I. R. 1930 Rang. 308=128 Ind. Cas. 847. Where objections against award are decided by trial Court, no appeal lies against decree in accordance with terms of award. A. I. R. 1929 Nag. 264=26 R. L. R. 168=119 Ind. Cas. 634; see also A. I. R. 1927 All. 120=49 A. 178=24 A. L. J. 1036=98 Ind. Cas. 993; A. I. R. 1927 Pat. 135=(1926) Pat. 161=7 Pat. L. T. 739=95 Ind. Cas. 321; A. I. R. 1925 All. 541=86 Ind. Cas. 942; A. I. R. 1929 Rang. 225=7 Rang. 269=149 Ind. Cas. 212. Decree passed in terms of award but without giving sufficient time to the objector to adduce evidence in support, of his objection, can be appealed against. A. I. R. 1925 Rang. 238=4 Bur. L. J. 39=88 Ind. Cas. 339. Appeal from an award on grounds other than those in para 16 (2) does not lie. A. I. R. 1926 Pat. 164=7 Pat. L. T. 264=(1925) Pat. 324=91 Ind. Cas. 799. Where part of award is remitted for re-consideration but the arbitrators failing to do so, decree based partly on award and partly on Court's finding can be appealed against. A. I. R. 1926 All. 567=24 A. L. J. 705=76 Ind. Cas. 531. No appeal lies from award made on reference, to which one of the parties had not consented. Per *Ashworth J.* in A. I. R. 1927 All. 563=49 A. 812=25 A. L. J. 606=102 Ind. Cas. 236; *contra per Mukerjee J.* in *Ibid.* Where parties joined in suit when the Court is considering objections and joined in objections, they are bound by Court's decision and no appeal lies against the decree at their instance. A. I. R. 1927 Lah. 362=8 Lah. 693=9 Lah. L. J. 569=10; Ind. Cas. 202. Where parties agreed to shut out oral evidence and substitute for it local inspection by Judge the decision is appealable. A. I. R. 1929 All. 116=113 Ind. Cas. 762.

Though no appeal lies against the decree passed on an award, yet a revision is competent where the Court which passed the decree missed the jurisdiction conferred upon it. 118 Ind. Cas. 906. Where parties agreed that trial Judge should decide a case on certain documentary evidence and local inspection and further agreed to accept the decision, there is no appeal from decision of the Court. A. I. R. 1929 All. 577=51 A. 885=(1929) A. L. J. 1024=117 Ind. Cas. 107; see also 11 N.

L. J. 247=113 Ind. Cas. 365. Rule prohibiting an appeal against a decree based on award does not apply where the objection is to the inherent jurisdiction of the Court to entertain suit. A. I. R. 1928 Lah. 730=10 Lah. L. J. 242=112 Ind. Cas. 262. Where trial Court sets aside award and the lower appellate Court decrees suit in terms of it second appeal lies. A. I. R. 1928 Oudh 1=3 Luck. 1=4 O. W. N. 1085 (F. B.)=107 Ind. Cas. 545. But no second appeal lies from order recording award as compromise. A. I. R. 1930 Lah. 860=31 P. L. R. 225=127 Ind. Cas. 705. A point against an award which could have been taken in the lower Court cannot for the first time be taken in revision. A. I. R. 1929 Cal. 831=125 Ind. Cas. 274. No appeal lies against decree passed on award under para 17 except so far as it is at variance with the award. A. I. R. 1936 Lah. 617.

Decree in accordance with award can be appealed against only if the arbitrators or the Courts have exceeded their jurisdiction or acted with material irregularity. A. I. R. 1925 Cal. 475=78 Ind. Cas. 335. Award made upon reference to arbitration made by a pleader having no authority in that behalf is invalid and decree thereon can be appealed against to the ordinary decree. A. I. R. 1924 Nag. 338=79 Ind. Cas. 48. When time is given for filing objections to the award, the decree which was passed in terms of the award before the expiry of such time, is liable to be set aside in revision. A. I. R. 1925 Rang. 103=76 Ind. Cas. 307. Decree based on award except when not based on valid award is not appealable but judgments or order passed on award are open to revision if there is material irregularity in the passing of it. 11 P. W. R. 1916=28 P. R. 1916=31 Ind. Cas. 700. No appeal is competent where the decree is in accordance with the award. The mere fact that in appeal the validity of the award is impeached on the ground that the party appealing was not a party to the reference does not take out the case out of this rule. 12 Lah. 408=32 P. L. R. 44=A. I. R. 1931 Lah. 126=131 Ind. Cas. 348; see also A. I. R. 1932 Lah. 239=33 P. L. R. 163=136 Ind. Cas. 11=13 Lah. 528; 138 Ind. Cas. 848=36 C. W. N. 1069=A. I. R. 1932 Cal. 713; 137 Ind. Cas. 151=9 O. W. N. 191=A. I. R. 1932 Oudh 156; I. R. 1932 Lah. 625; A. I. R. 1933 Rang. 38=142 Ind. Cas. 835. Where a decree has been passed in accordance with the award, it cannot be interfered with in revision unless the decree discloses some excess or defect of jurisdiction or irregularity in the exercise of jurisdiction. 1933 M. W. N. 831=38 L. W. 330=A. I. R. 1933 Mad. 697=65 M. L. J. 376; see also 146 Ind. Cas. 582=10 O. W. N. 1196=A. I. R. 1933 Oudh 541; 34 P. L. R. 651=A. I. R. 1933 Lah. 692=143 Ind. Cas. 309. What is open to challenge is not the award but the decree and an appeal lies only if the decree is in excess or not in accordance with the award. A. I. R. 1935 Pat. 16=152 I. C. 838, but see 153 I. C. 764=A. I. R. 1935 Pat. 109; 12 Rang. 675=A. I. R. 1935 Rang. 94=156 I. C. 414

*Order of reference on agreements to refer.*

17. [S. 528.] (1) Where any persons agree in writing that any difference between them shall be referred to arbitration,

Application to file in Court agreement to refer to arbitration. the parties to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator.

**Scope.**—The scope of this para is no more than this : that where an agreement of reference to arbitration has been entered into by the parties but the arbitrators have not so far functioned, the Court has power to enforce to agreement against the parties where the arbitrators are ready and willing to act in terms of the reference. Para 17, far from implying an ouster of jurisdiction, predicates that the arbitrators have the jurisdiction to act on the reference and the Court should step in and ask them to exercise their powers as arbitrators if they are agreeable to do so. 1932 A. L. J. 331=137 Ind. Cas. 198=A. I. R. 1932 All. 348=A. L. R. 1932 A 727. This para and the subsequent paras refer to cases where the parties agree in writing to refer to arbitration any difference between them independently of the Court. A proceeding under this para does not commence with a plaint. Sub-para (2) of para 17, however, provides that an application to file in Court an agreement to refer to arbitration shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and others or other of them as defendant or defendants. This provision does not convert the application into a suit for all purposes. When the law says that the application shall be numbered and registered as a suit it implies that it is not in fact a suit. If it were really a suit, it must *proprio vigore* have all the attributes of a suit ; and it would be wholly redundant to enact that it shall be numbered and registered as a suit. It is to be observed that the proceeding, which commences with an application under para 17 is governed by the special procedure prescribed by the second schedule and not by the rules applicable to a suit. 13 Lah. 672=137 Ind. Cas. 266=33 P. L. R. 508=A. I. R. 1932 Lah. 374. Question as regards the title to revenue-paying land is within the jurisdiction of civil Court and as such question might well be referred to arbitration. A. I. R. 1930 Lah. 836=11 Lah. 470=122 Ind. Cas. 724. Mortgage decree in terms of award made under para 17 is not a decree under Order 34, rules 4 and 5 have therefore no application. A. I. R. 1927 Sind 103=19 S. L. R. 202=99 Ind. Cas. 178. Award is not valid unless concurred in by all the arbitrators. Court cannot change original agreement between parties to refer dispute to certain number of arbitators and order that in case of disagreement opinion of the majority of arbitrators should prevail. A. I. R. 1926 Mad. 1183=51 M. L. J. 440=24 L. W. 384=97 Ind. Cas. 824.

All parties must consent to and sign reference to make it binding ; it is otherwise null and void even as to those who have executed it. Authority of arbitrator begins when all parties have executed the reference. 9 Bur. L. T. 253=38 Ind. Cas. 577. Dispute regarding claim as *mutawalli* to public trust can not be settled by arbitrators and should be decided by Court. 1 P. L. W. 260=(1917) Pat. 93=38 Ind. Cas. 296. Party in whose favour the award is made can sue for a decree in terms of award. Agreement to refer to arbitration can be filed when it is valid. Arbitrator can proceed with the reference even if one party refuses to submit. Once a valid reference has been made, clerical error as regards the date of the enquiry can not be taken advantage of by a party. 12 P. R. 1917=39 Ind. Cas. 349. Application relating to partition of revenue-paying land, to fill agreement to refer can not be entertained by Civil Court. 91 P. L. R. 1917=166 P. W. R. 1917=42 Ind. Cas. 261. To submission to which the Arbitration Act applies clauses of this schedule are not applicable. A. I. R. 1926 Cal. 730=43 C. L. J. 292=94 Ind. Cas. 177. Agreement to refer disputes in pending suit cannot be filed under para 17 of the schedule II. Nor can such disputes be referred under para 17 in conjunction with other disputes. A. I. R. 1926 Sind 5=89 Ind. Cas. 335 ; but see 4 O. L. J. 131=40 Ind. Cas. 38. Application presented under para (1) though it has to be numbered and registered as a suit is not a suit. A. I. R. 1921 Pat. 161=2 Pat. L. T. 277=6 Pat. L. J. 287=61 Ind. Cas. 390 ; see also A. I. R. 1924 Sind 23=17 S. L. R. 178=83 Ind. Cas. 598. An agreement for reference of a pending suit and also for withdrawal of the suit in pursuance of it can be filed under this para ; 152 I. C. 614=A. I. R. 1935 Lah. ; but see 156 I. C. 904=1935 A. L. J. 998.

Where a party has gone to arbitration in which if he has refused to go to arbitrations an order of reference would have been made under para 17, it is too late for him when a difficulty arises at a latter stage of the proceedings which has not been provided for unless an order of reference has been made, to dispute the right of his opponent to obtain an order of reference under para 17, Sch. II, C.P. Code. 44A. 523=A. I. R. 1922 All. 133=20 A. L. J. 327=67 Ind. Cas. 739 ; see also A. I. R. 1921 All. 188=19 A. L. J. 823=64 Ind. Cas. 459. Court cannot refuse to make reference to arbitrator or arbitrators nominated by the parties. It can exercise discretion only when parties cannot agree. A. I. R. 1921 Pat. 161=2 Pat. L. T. 277=6 Pat. L. J. 287=(1921) Pat.

170=61 Ind. Cas. 390. On first order of arbitration proving abortive Court cannot make another order of reference without consent of parties. A. I. R. 1921 Pat. 161=2 Pat. L. T. 277=6 Pat. L. J. 287=1921 Pat. 170=61 Ind. Cas. 300. Parties accepting Court's decision to refer and appearing and prosecuting case before arbitration cannot afterwards challenge award on ground of want of jurisdiction in tribunal chosen by themselves. 42 A. 661=18 A. L. J. 644=59 Ind. Cas. 801. Muhammadan mother is not competent to agree to arbitration regarding minor's property though a *de facto* guardian. 26 C. W. N. 246=47 C. 713=57 Ind. Cas. 945. Party entering into agreement to refer under misconception as to authority of mother of minors who are among the other party is entitled to withdraw from agreement if it is found that mother has no authority to enter into such agreement. A. I. R. 1921 Cal. 818=26 C. W. N. 246. Death of some arbitrators before agreement is made rule of Court renders agreement inoperative and it cannot be filed in Court. 71 P. R. 1918=44 Ind. Cas. 866; see also 42 Ind. Cas. 911=11 Bur. L. T. 160. But where there is distinct provision that party selecting arbitrators would be competent to appoint another in case of disability, resignation or death of arbitrator agreement is rendered void by resignation of one of them nor is it sufficient to justify refusal to file it in Court. 3 Lah. 276; see also 51 Ind. Cas. 636=155 P. W. R. 1919=55 P. W. R. 1919. Agreement to refer is cancelled by conduct of parties coupled with long and unexplained delay of six years and it cannot be filed. 54 Ind. Cas. 126. Party induced to refer by misrepresentation is at liberty to revoke reference, and such an agreement cannot be filed in Court. 50 Ind. Cas. 637. Schedule II, para 20 applies to application for filing award already made and not for filing one which has been passed even till date of application. To the latter case para 17 applies; 90 P. W. R. 1918=45 Ind. Cas. 647. The use of the word "may" to the rule shows that the provisions of the second schedule are permissive and not mandatory. A. I. R. 1931 Oudh 127=8 O. W. N. 71=14 O. L. J. 181=131 Ind. Cas. 443. There is no authority for holding that ss. 16 to 20 of the Code are not to be considered in determining which Court had jurisdiction in the matter to which agreement relates for the purpose of para 17 of the Second Schedule. 32 P. L. R. 464=132 Ind. Cas. 218=A. I. R. 1931 Lah. 673; see also A. I. R. 1933 Lah. 18. If in a reference to arbitration of three specified persons, one of them dies, the Court cannot refer the matters to the arbitrators as provided by the parties. The Court has no power itself to appoint an arbitrator in such a case in the place of one who is dead. The suit filed by one of the parties cannot be stayed. A. I. R. 1931 Mad. 28=60 M. L. J. 676=129 Ind. Cas. 638=54 M. 469=1930 M. W. N. 1028.

**Sub-para (3).**—Where a party to an agreement for reference to arbitration is called upon to show cause why the agreement should not be filed, it is necessary for him to show what cause he has there and then. It would be absurd for him to sit silent and to say nothing. If there is sufficient ground for setting aside the award when made, there can be no reason why the arbitrator should waste his time by going on with proceedings foredoomed to futility. A. L. R. 1933 Sind 449. The cause for revoking submission should be urged when a notice is issued under para 17 and need not be deferred till the award is completed. 143 Ind. Cas. 635=A. I. R. 1933 Sind 68.

**Sub-para (4).**—It is not open to a party to an agreement of reference to revoke the submission to arbitration except for good cause. The words "sufficient cause" should not be confined within the narrow compass of the fraud, coercion, and undue influence. There are other causes besides these, which may be sufficient for the reversal of an order under Sch. II, para 17, C. P. Code. A. L. R. 1933 Sind 449=A. I. R. 1933 Sind 68=143 Ind. Cas. 635. The death of the parties may itself be enough to bring their agreement to refer to arbitration to an end. A. L. R. 1933 Sind 449. When good cause is shown, revocation should be allowed. *Ibid*; see A. I. R. 1933 Rang. 331. As regards the effect of the death of an arbitrator, *vide* A. I. R. 1933 Lah. 18. Where plaintiff seeks to file in Court an agreement of reference nearly three years after its date, after having done nothing whatever in the meanwhile to get it carried into effect, the agreement of reference should be considered to have lapsed and the Court has no power to make it a rule of Court. 33 Bom. L. R. 1022=A. I. R. 1931 Bom. 529=134 Ind. Cas. 733; but see A. I. R. 1933 Lah. 18. Agreement referred the dispute between the parties to two persons and in case of difference between the arbitrators an umpire was appointed to give the final decision. On one of the arbitrator's refusing to act the Court appointed the umpire as the sole arbitrator. Objection being taken to such appointment *held* that (1) Sch. II, para 17 (4) was not intended to meet the case of an arbitrator named

in the agreement refusing to act. Para 5 of the Schedule being expressly framed to meet cases of that kind; (2) that the Court had no power under Sch. II, para 17 (4) to appoint the umpire sole arbitrator inasmuch as the appointment was not in accordance with the provisions of the agreement and it could not be said that there was no such provision in the agreement for the appointment, of the arbitrators. 33 Bom. L. R. 1022=A.I.R. 1931 Bom. 529=134 Ind. Cas. 733. If sole arbitrator dies, Court can appoint a new arbitrator if that be the intention of the parties. A.I.R. 1933 Lah. 18; see also A. I. R. 1934 Oudh 67. In case of refusal of one of the arbitrators where there is an agreed reference to named arbitrators, Court cannot pass an order under this para. 147 I. C. 1093=A. I. R. 1934 Oudh 67.

**18.** Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration may make an order staying the suit.

**Scope.**—Where parties refer disputes to arbitration but subsequently one of them files suit in respect of that dispute the arbitrators lose their authority. Defendant still desiring arbitration, must obtain stay of the suit under para 18. On refusal to stay the remedy by arbitration ceases to be available. If the suit is stayed and the arbitrators have not yet made an award they are free to bring their proceedings to a termination and make an award in accordance with law. If they have made an award after the institution of the suit, the award can not be pleaded as bar to the suit. The award so made should be brought up before the Court under para 20: the Court will refuse to enforce it under para 21 read with para 14 (c); and as the award will thus stand cancelled because without jurisdiction, the arbitrators will be left free thereafter to resume their proceedings on the basis of the original reference. A. I. R. 1923 Cal. 135=35 C. L. J. 482=26 C. W. N. 967=69 Ind. Cas. 863; see also I. R. 1932 Lah. 669. Stay should be granted unless plaintiff shows absence of sufficient reason. 3 U. P. L. R. Lah. 48=61 Ind. Cas. 322. Burden of showing reason against stay is on plaintiff and not on defendant. A. I. R. 1922 Lah. 97=2 Lah. 19=3 Lah. L. J. 61=69 P. L. R. 621=60 Ind. Cas. 776. Stay of suit can be removed if arbitrator refuses to act. 23 Bom. L. R. 511=45 B. 1181=64 Ind. Cas. 289. Where there is suit by a party against other subsequent to the reference, if the later party deliberately has refrained from applying for stay of suit he must be deemed to have waived right to arbitration. A. I. R. 1922 All. 48=44 A. 292=L. R. 3 A. 96=20 A. L. J. 128=65 Ind. Cas. 795. Award does not bar a suit if application for stay under para 18 or s. 19 of the Arbitration Act is not filed in proper time, or is dismissed. A. I. R. 1926 Sind 86=95 Ind. Cas. 481. Schedule II is applicable to the Bombay Court of Small Causes and therefore stay of suit can be ordered under para 18, Sch. III. 1928 Bom. 275=52 B. 420=30 Bom. L. R. 661. In order to entitle a party to a stay order, the subject before the arbitrators and the Court must be the same. A. I. R. 1927 Lah. 465=101 Ind. Cas. 786. Institution of suit has not *ipso facto* the effect of superseding previous reference to arbitration dealing with same subject-matter. But if either party fails to apply for stay of the suit the effect is to supersede arbitration for good and the arbitrator becomes *functus officio*. If no application for stay is made within limitation, effect of institution and decision of a suit would be to supersede the arbitration and render award unenforceable. A. I. R. 1922 Oudh 158=25 O. C. 63=68 Ind. Cas. 235. The existence of the award is a complete bar to the suit. 3 U. B. R. (1920) 210=57 Ind. Cas. 894. But an agreement to refer is not bar to a suit but Court has discretion to stay suit. 46 C. 1041=23 C. W. N. 716=29 C. L. J. 399=51 Ind. Cas. 80. Arbitration proceeding should be stayed if agreement to refer is challenged in separate suit. 22 C. W. N. 535=46 Ind. Cas. 173. Refusal by one arbitrator to act vacates stay order. 23 C. W. N. 293=50 Ind. Cas. 879. Where parties have agreed to refer their disputes to arbitration, the fact that a small portion

of the relief claimed is not within the scope of the arbitration clause is not itself sufficient reason for refusing to stay proceedings when the main subject of the action is within the arbitration clause; in such a case the claim may be split up. 35 C. W. N. 514 = 58 C. 1107 = 134 Ind. Cas. 529 = 13 C. L. J. 321 = A. I. R. 1931 Cal. 772. The Court will be competent to decide the dispute until and unless it chooses to stay the action under this para. 157 I. C. 867 = A. I. R. 1905 Lah. 916.

**19. [S. 524.]** The foregoing provisions, so far as they are consistent with any agreement filed under paragraph 17, shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decree following thereon.

**Notes.**—The words “so far as they are consistent with any agreement so filed” do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act in order that the judge may act in conformity to it, and that para 5 has otherwise no application. The reasonable construction is that the action of the judge under para 5 should not be inconsistent with the agreement, if it contains any special provision on the subject. 17 M. 498. The Court is competent to set aside award on the ground of misconduct. 6 M. 368. No appeal lies against an order passed under this para setting aside an award. 8 S. L. R. 260. This para comes only into operation where an order of reference has already been made under para 17. 151 I. C. 1001 = 110 W. N. 1118.

*Arbitration without the intervention of a Court.*

**20. [S. 525.]** (1) Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between the applicant as a plaintiff and the other parties as defendants.

(3) The Court shall direct notice to be given to the parties to the arbitration, other than the applicant requiring them to show cause, within a time specified, why the award should not be filed.

**Scope.**—This para enables parties who have agreed to refer their differences to arbitration and have obtained an award to have that award filed in Court. 27 A. 53 = 1 A. L. J. 398. Upon an application made to Court under this para, the Court has jurisdiction to and is bound to, enquire into the question whether the parties had or had not referred the matter in question to arbitration. A. W. N. 1906, 126 = 28 A. 621. The Court has full power to enter into the question of the validity of the cause showing against the filing in Court of an award. 9 C. 597. This para does not lay down that no award shall be binding upon the parties unless filed in Court, nor is there anything in them to bar a regular suit on the basis of an award which has never been filed in Court. This para is purely optional and is intended to allow parties to arbitration awards to avail themselves of a summary procedure for obtaining the sanction of a decree of a Court for such arbitration award as have been made under a private agreement without the intervention of a Court of justice. A. W. N. 1884, 148. Where an application is made under this para the jurisdiction of the Court, to order the award to be filed and to allow proceedings to be taken under it, is not taken away by a mere denial of the reference to arbitration, on an objection to the validity of the reference. 29 C. 278 = 6 C. W. N. 235. Where an application has been made for filing an award notice must be given to the parties to the arbitration. 149 I. C. 324 = A. I. R. 1934 Bom. 6 = 35 Bom. L. R. 1101.

An award which is provisional, that is to say, which does not completely and once for all determine the dispute between the parties, can not be filed under this para and it cannot be made rule of the Court. 6 A. L. J. 467 = 2 Ind. Cas. 304. If a person objects to the filing of the award on the ground that there has been no reference to arbitration, the Court has jurisdiction as to the genuineness and validity



of the award. 16 M. L. J. 474 ; see also 7 Ind. Cas. 31. It is no part of the duty of Court acting under this para to enter into the merits of the award. 7 Ind. Cas. 333. An award partitioning joint family property on reference by only some members of family is invalid and is binding on members joining reference. A. I. R. 1936 Peshwar 96.

Suit to enforce only favourable part of award can not lie. 22 C. W. N. 66=27 C. L. J. 486=42 Ind. Cas. 590. In a suit on private award, Court must determine validity of award and pass decree in its terms if it is found to be valid or decide on original cause of action if award is found to be invalid. 68 P. W. R. 1916=33 Ind. Cas. 494. Proceedings under paras 20 and 21 are not proceedings in suit. A. I. R. 1921 Bom. 389=45 B. 329=59 Ind. Cas. 755. Award made after commencement of suit is invalid if it deals with question in controversy in suit. A. I. R. 1922 Lah. 369=3 Lah. 295=69 Ind. Cas. 583. Award made prior to decision of suit can be recorded under r. 3, Order XXIII. A. I. R. 1921 Bom. 310=45 B. 245=59 Ind. Cas. 53. This para has no application where the award after being reduced to writing has been lost. 1 Lah. 45=63 P. L. R. 1920=59 P. W. R. 1921=55 Ind. Cas. 845. Civil Court can file award regarding dispute of boundaries. 6 O. L. J. 81=58 Ind. Cas. 193. Small Cause Court is not competent to file award which goes on to declare dissolution of marriage between parties. 10 L. W. 57=51 Ind. Cas. 53. Civil Court is competent to file private award not partitioning agricultural land but only stating shares of parties. 81 P. W. R. 1918=79 P. L. R. 1918=45 Ind. Cas. 166 ; 34 P. L. R. 454=A. I. R. 1933 Lah. 732. Court's powers come to end when it decides either to file award or refuse to file it. 5 O. L. J. 471=47 Ind. Cas. 950. Rejection of petition to file award does not amount to decision that award is illegal. 43 A. 108=2 U. P. L. R. (All.) 310=18 A. L. J. 950=60 Ind. Cas. 626. Decision of arbitrators cannot be re-opened to point out mistake in account in the absence of fraud. 38 M. L. J. 247=27 M. L. T. 242=(1920) M. W. N. 270=11 L. W. 405=43 M. 439=56 Ind. Cas. 358. Arbitrator's award must be final. A. I. R. 1928 Sind 144=108 Ind. Cas. 791. Court cannot go into the question of reasonableness of award ; it is no ground of setting aside award. A. I. R. 1930 Lah. 22=119 Ind. Cas. 726. It can not be said that the award as omitting certain items of property is incomplete. A. I. R. 1934 Lah. 305=150 I. C. 288.

Subject-matter of award must be within the jurisdiction of Court entertaining application under para 20. A. I. R. 1929 Lah. 24=10 Lah. L. J. 500=113 Ind. Cas. 899 ; see also A. I. R. 1931 Sind 47=131 Ind. Cas. 182 ; A. I. R. 1933 All. 151=144 Ind. Cas. 701 ; 55 A. 542. Award relating to caste question for which no suit lies can not be enforced. A. I. R. 1929 Sind 1=23 S. L. R. 299=111 Ind. Cas. 425. This para does not apply to arbitration pending suit. A. I. R. 1927 Bom. 565=51 B. 908=29 Bom. L. R. 1254=105 Ind. Cas. 516. Decree on invalid award is nullity and cannot be executed. A. I. R. 1930 Rang. 337=8 Rang. 544=129 Ind. Cas. 519. Award accepted and signed by parties should be filed. A. I. R. 1930 Lah. 860=31 P. L. R. 225=127 Ind. Cas. 705. Agreement to refer entered into after decree and before filing appeal is not in pending suit. A. I. R. 1930 Oudh 433=7 O. W. N. 815=128 Ind. Cas. 748. Effect of signing award in arbitration pending suit must be considered. A. I. R. 1939 Lah. 860=127 Ind. Cas. 705. An award regarding money obtained by unlawful means cannot be filed in Court. A. I. R. 1934 All. 493=149 I. C. 396.

Section 10 does not apply to application under para 20 as not being a suit. A. I. R. 1929 Lah. 533=30 P. L. R. 395=117 Ind. Cas. 94. Filing of award is not necessary to make it valid. A. I. R. 1927 All. 733=100 Ind. Cas. 762. Arbitration Act does not require judgment and decree on award to make it executable as under para 20. A. I. R. 1926 Cal. 562=31 C. W. N. 517=45 C. L. J. 597=102 Ind. Cas. 108 ; see also A. I. R. 1928 Mad. 107=39 M. L. T. 569. Award on reference to arbitration pending suit though not enforceable under para 20 is so under Order XXIII, rule 3 as adjustment. A. I. R. 1928 Nag. 173=24 N. L. R. 55=107 Ind. Cas. 525 ; see also A. I. R. 1926 Nag. 405=23 N. L. R. 100=9 N. L. J. 97=95 Ind. Cas. 89 ; A. I. R. 1926 All. 50=48 A. 475=24 A. L. J. 480=95 Ind. Cas. 419.

Umpire has no *locus standi* and he can not apply to file award. A. I. R. 1922 Oudh 276=9 O. L. J. 410=26 O. C. 1=69 Ind. Cas. 714. Secretary usurping power of association is not competent to file award. A. I. R. 1929 Lah. 826=11 Lah. L. J. 366=123 Ind. Cas. 871 ; an application under para 20 when numbered and registered becomes a suit for purposes of Order XXXVIII. A. I. R. 1927 Bom. 259=

29 Bom. L. R. 342. For the purpose of Order IX, rule 13, proceedings under para 20 are suits. A. I. R. 1928 Mad. 969=20 L. W. 490=112 Ind. Cas. 691. Separable portion of award in excess of authority can be expunged. A. I. R. 1929 Sind 200=119 Ind. Cas. 529. Award can be requested to be filed in part. A. I. R. 1929 Bom. 193=31 Bom. L. R. 349=117 Ind. Cas. 523. Pendency of probate proceedings does not affect validity of arbitration in respect of the same estate. A. I. R. 1923 Bom. 365=25 Bom. L. R. 437. Before filing award Court must satisfy itself about existence of dispute and arbitration. A. I. R. 1921 Sind 61=17 S. L. R. 211=83 Ind. Cas. 913. Where portion of award on private reference in excess of authority is separable from the rest award with respect to other portion can be filed. A. I. R. 1925 Pat. 810=4 Pat. 670=7 P. L. T. 644=93 Ind. Cas. 261. Court can decide about fact of reference and existence of dispute. A. I. R. 1926 Lah. 91=7 Lah. L. J. 603=92 Ind. Cas. 705. Where award related not to property but family questions residence of the members beyond the jurisdiction of Court filing award, whole proceeding is vitiated. A. I. R. 1924 P. C. 95=7 N. L. J. 62=(1924) M. W. N. 79=34 M. L. T. 62=19 L. W. 549=20 N. L. R. 33=51 I. A. 72=22 A. L. J. 386=51 C. 361=46 M. L. J. 628=26 Bom. L. R. 586=28 C. W. N. 977 (P. C.)=83 Ind. Cas. 531. Institution of a suit deprives private arbitrators of their jurisdiction. Their knowledge is not essential. A. I. R. 1928 Mad. 371=111 Ind. Cas. 555. Award on private reference cannot be corrected. It must either be filed or refused to be filed. A. I. R. 1926 Lah. 570=7 Lah. L. J. 463=26 P. L. R. 706=88 Ind. Cas. 161. Absence of application under para 20 is no bar to suit to enforce award. A. I. R. 1925 Bom. 418=27 Bom. L. R. 652=89 Ind. Cas. 68. The power given by para 20 to any person interested to apply to a Court is not to be understood as overriding the general power given to parties under Order XXIII, rule 3, to adjust their disputes. A. I. R. 1925 Mad. 50=76 Ind. Cas. 502. Para 20 of the second schedule prohibits only an adjudication of the same matter by two different tribunals of co-ordinate jurisdiction. A. I. R. 1933 Pesh. 18=141 Ind. Cas. 83. Where the reference to arbitration was made during the pendency of the suits in which the matters were *sub-judice* but without the intervention of the Courts concerned, the award cannot be filed under para 20. 34 P. L. R. 340=A. I. R. 1933 Lah. 746=142 Ind. Cas. 195. There is no provision in the Land Revenue Act or in the C. P. Code, which would give a Court hearing cases under the Land Revenue Act jurisdiction to entertain an application under para 20. 14 L. R. 35 (Rev.)=17 R. D. 36. Where the dispute is regarding money obtained by bribes taken dishonestly from public, award thereon can not be field in Court nor decree can be passed thereon. A. I. R. 1934 All. 493. Subsequent suit not barred by application to file award under Schedule II, para 20. A. I. R. 1934 Mad. 68. Application under para 20 does not become suit to enforce award by mere fact of being brought under order 5, rule 1. A. I. R. 1934 Mad. 68. Where procedure is agreed to by parties and property has not been partitioned, the award cannot be said to be incomplete. A. I. R. 1934 Lah. 305. In case of application for filing abbitration award, where arbitration is without intervention of Court in representative action, two separate notices under Order 1, rule 8 and Sch. II, para 20 (3) are not necessary. A. I. R. 1934 Bom. 6. The rejection of an application to have an award filed in Court is no bar to a regular suit to enforce the rights created by the award. 55 M. 689=139 Ind. Cas. 877=1932 M. W. N. 234=35 L. W. 565=A. I. R. 1932 Mad. 462=62 M. L. J. 550. The Court to which the application should be made under para 20, Schedule II should be one having jurisdiction in respect of the whole subject-matter of the award. 55 M. 689=139 Ind. Cas. 877=1932 M. W. N. 234=35 L. W. 565=A. I. R. 1932 Mad. 462=62 M. L. J. 550. There is nothing illegal in two or more persons agreeing to refer future disputes to arbitration in pending suit. 137 Ind. Cas. 807=38 P. L. R. 934=A. I. R. 1933 Lah. 459. In the case of a decree passed by a British Indian Court in terms of an award, where the subject-matter of the award is partly in Burma, partly in Madras and partly in French territories and the case being one of partition it is impracticable to regard partition affecting properties in British India as valid without bringing into consideration the affecting properties in the French territories, the decree is without jurisdiction as regards both the property over which the Court has jurisdiction and that over which the Court has no jurisdiction. A. I. R. 1931 Rang. 252=9 Rang. 480 (F. B.); see also 25 S. L. R. 204=131 Ind. Cas. 182. The parties consenting to an award cannot be allowed to object to its being filed on the ground that the award is partial and incomplete. 32 P. L. R. 754. Arbitrators must not be made parties in an application under this para. 14 Pat. 855. The arbitrator is not a "person in interested in the award" within the meaning of this para. A. I. R. 1935 Lah. 134.

**Appeal.**—Where parties file petition for decree on award as modified by lawful compromise, no appeal lies from such decree. A. I. R. 1922 Oudh 189=9 O. L. J. 219=25 O. C. 213=68 Ind. Cas. 209. *Ex-parte* decree under para 20 is appealable. A. I. R. 1928 Mad. 699=55 M. L. J. 262=29 L. W. 490=112 Ind. Cas. 691. Order under para 20 can be appealed against even though passed along with the decree on the award. A. I. R. 1928 Mad. 969=53 M. L. J. 262=29 L. W. 490=112 Ind. Cas. 691.

**Limitation.**—Application under para 20 is not a suit for the purpose of s. 6, Limitation Act. A. I. R. 1923 Rang. 226=76 Ind. Cas. 493. Petition for filing award under para 20 beyond six months after date of award is time-barred by Art. 178, Sch. I of Limitation Act. 31 A. 85=13 A. L. J. 1115=31 Ind. Cas. 899.

**21. [S. 526.]** (1) Where the Court is satisfied that the matter has been

Filing and enforcement of such award. referred to arbitration and that an award has been made thereon, and where no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shall order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award.

**Scope.**—Court is not competent to go behind conditions in para 21 (1) in refusing filing of award. (1916) I. M. W. N. 203=19 M. L. T. 228=33 Ind. Cas. 67. Where award is partly valid, valid portion can be separated from bad one subsequently if parties ask for reconsideration. 53 Ind. Cas. 992. Award is not illegal because of error in law. A. I. R. 1931 Oudh. 6=7 O. W. N. 1095=129 Ind. Cas. 322. Award has binding effect on parties though it interferes with stranger's rights. A. I. R. 1928 Cal. 275=32 C. W. N. 108=107 Ind. Cas. 70. Validity of award is not necessarily affected by failure to dispose all matters. A. I. R. 1928 Pat. 7=6 Pat. 556=109 Ind. Cas. 821. Award deciding matters outside reference cannot be filed. 110 Ind. Cas. 745. Petition to set aside award need not be within 10 days after notice of filing award. A. I. R. 1928 Mad. 371=111 Ind. Cas. 555. The Arbitration Act does not contain any provision for making a decree on an award such as is contained in Schedule II, para 21, C. P. Code and if such a decree is made it is one without jurisdiction and therefore a nullity. 60 I. A. 71=60 C. 670=142 Ind. Cas. 324=35 Bom. L. R. 327=57 C. L. J. 143=1933 A. L. J. 343=1933 M. W. N. 178=37 C. W. N. 401=A. I. R. 1933 P. C. 61=64 M. L. J. 314 (P. C.). Where a separable portion of an award is bad, the remainder of the award, if good, can be maintained. 158 I. C. 812=1935 O. W. N. 1141.

When under para 21 the Court is satisfied that the matter in dispute has been referred to arbitration and that an award has been made thereon and that no grounds are mentioned or referred to in para 14 or para 15 exists, the Court should in the first instance order that the award be filed and then pronounce judgment according to the award. A decree should also be passed accordingly. A. I. R. 1933 All. 166=1933 A. L. J. 40.

In case of uneven number of arbitrators parties are presumed to abide by the decisions of the majority unless otherwise settled 42 B. 669=19 Bom. L. R. 618=41 Ind. Cas. 264. Oral award has same effect as award in writing. 34 M. L. J. 184=45 Ind. Cas. 813. In question of partition where all members of joint families are not parties, the award is illegal. (1919) Pat. 141=48 Ind. Cas. 953. A person who is a party to the award but not to the decree based on it, cannot enforce the decree. 6 O. L. J. 322=52 Ind. Cas. 849. Validity of award is condition precedent before Court should enforce award. 42 A. 525=18 A. L. J. 652=59 Ind. Cas. 75. Finality of award must be presumed by Court. A. I. R. 1928 Sind 144=108 Ind. Cas. 791. No suit lies to set aside an award. 26 C. W. N. 940=70 Ind. Cas. 985. Where one of the parties dies during award, award is binding on his legal representative even though not substituted. A. I. R. 1922 Cal. 226=26 C. W. N. 804=70 Ind. Cas. 459. Arbitrators are empowered to decide existence of contract. 24 C. W. N. 597=59 Ind. Cas. 439. Where filing of award is rejected by Appellate Court, suit can be brought to enforce award. A. I. R. 1921 All. 384=43 A. 108=60 Ind. Cas. 626. Award may be modified by compromise and decree may be passed accord-

C. P. Code.—115.

ingly. A. I. R. 1921 Lah. 34=2 Lah. 114=3 Lah. L. J. 349=73 P. L. R. 1921=61 Ind. Cas. 628. Decree under para 21 (2) is decree under s. 2 (2) and provisions of r. 13, Order IX are applicable to it. A. I. R. 1922 Pat. 376=3 P. L. T. 29=1 Pat. 48=62 Ind. Cas. 927. An arbitrator has very wide powers and even an error of law made by an arbitrator does not invalidate the award. A. I. R. 1931 Oudh 6=129 Ind. Cas. 322. A matter clearly outside the power of an arbitrator would render the award invalid, unless portion is separable from the rest. 1931 A. L. J. 1087. In case of awards made by arbitrators appointed without intervention of Court, on writing is required, nor need they be signed by the arbitrators. All that is required is (i) that the Court should be satisfied that the matter has been referred to arbitration on which an award has been made : and (ii) that the award is not liable to be attacked on grounds set out in paras 14 or 15 of Schedule II, 12 P. L. T. 733. Subsequent oral agreement cannot modify the effect of written agreement to refer to arbitration. 1931 A. L. J. 1087. The award which follows as a suit of a reference made outside Courts in respect of matters which are the subject-matter of a pending suit can not be filed. 158 I. C. 60=A. I. R. 1935 Sind 184

**Appeal.**—Where decree is, according to award it can not be appealed against on ground of fraud. Remedy is by separate suit. A. I. R. 1929 Nag. 111=118 Ind. Cas. 61. Where decree differs from award, entire case cannot be re-opened in appeal. A. I. R. 1928 Lah. 848=110 Ind. Cas. 298. Appeal lies from order filing or refusing to file an award. But no appeal lies from award lawfully made. A. I. R. 1923 Rang. 199=1 Rang. 265=76 Ind. Cas. 504 ; see also 73 Ind. Cas. 820=A. I. R. 1924 Lah. 231 ; 60 Ind. Cas. 590. Appeal lies against one single order combining order directing an award and also decree on it. A. I. R. 1925 All. 404=23 A. L. J. 440=47 A. 743=88 Ind. Cas. 76. Order filing or refusing to file private award is not a decree. A. I. R. 1928 Lah. 137=9 Lah. 380=107 Ind. Cas. 756. Appeal lies against order refusing to set aside *ex parte* decree in accordance with the award. 38. A. 297=14 A. L. J. 332=33 Ind. Cas. 80.

Exclusion of certain words in the Specific Relief Act, 1877.

22. The last thirty-seven words of section 21 of the Specific Relief Act, 1877,\* shall no apply to any agreement to refer to arbitration or to any award, to which the provisions of this

schedule apply.

23. The forms set forth in the Appendix, with such variations as the circumstances of each case require, shall be used for the respective purposes therein mentioned

## APPENDIX TO SCHEDULE II.

### No. 1.

#### APPLICATION FOR AN ORDER OF REFERENCE.

(Title of suit.)

1. This suit is instituted for (*state nature of claim*).
2. The matter in difference between the parties is (*state matter of difference*).
3. The applicants being all the parties interested have agreed that the matter in difference between them shall be referred to arbitration.
4. The applicants therefore apply for an order of reference.

A. B.  
C. D.

Dated the            day of            19   .

NOTE :—If the parties are agreed as to the arbitrators, it should be so stated.

## No. 2.

## ORDER OF REFERENCE.

(Title of suit.)

UPON reading the application presented on the                      day of                      19                      , it is ordered that the following matter in difference arising in this suit, namely :—

be referred for determination to *X* and *Y*, or in case of their not agreeing then to the determination of *Z*, who is hereby appointed to be umpire ; and such arbitrators are to make their award in writing on or before the                      day of                      19                      , and in case of the said arbitrators not agreeing in an award the said umpire is to make his award in writing within                      months after the time during which it is within the power of the arbitrators to make an award shall have ceased.

Liberty to apply.

GIVEN under my hand and the seal of the Court, this                      day of                      19                      .  
Judge.

## No. 3.

## ORDER FOR APPOINTMENT OF NEW ARBITRATOR.

(Title of suit.)

WHEREAS by an order, dated the                      day of                      19                      , [*state order of reference and death, refusal, etc., of arbitrator*], it is by consent order that *Z* be appointed in the place of *X* (decease, or as the case may be) to act as arbitrator, with *Y*, the surviving arbitrator under the said order ; and it is ordered that the award of the said arbitrators be made on or before the                      day of                      19                      .

GIVEN under my hand and the seal of the Court, this                      day of                      19                      .  
Judge.

## No. 4.

## SPECIAL CASE.

(Title of suit.)

In the matter of an arbitration between *A. B.* of                      and *C. D.* of                      the following special case is stated for the opinion of the Court :—

[*Here state the facts concisely in numbered paragraphs.*]

The questions of law for the opinion of the Court are :—

First, whether

Secondly, whether

Dated the                      day of                      19                      .

*X*  
*Y*

## No. 5.

## AWARD.

(Title of suit.)

In the matter of an arbitration between *A. B.* of                      and *C. D.* of :—

WHEREAS in pursuance of an order of reference made by the Court of                      and dated the                      day of                      19                      , the following matter in difference between *A. B.* and *C. D.*, namely,

has been referred to us for determination ;

Now we, having duly considered the matter referred to us do hereby make our award as follows :—

We award

(1) that—

(2) that

Dated the

day of 19 ,

X  
Y

### THE THIRD SCHEDULE.

#### EXECUTION OF DECREES BY COLLECTORS.

Powers of Collector.

1. [S. 321.] Where the execution of a decree has been transferred to the Collector under section 68, he may—

- (a) proceed as the Court would proceed when the sale of immovable property is postponed in order to enable the judgment-debtor to raise the amount of the decree ; or
- (b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold ; or
- (c) sell the property ordered to be sold or so much thereof as may be necessary,

**Notes.**—Where a decree is sent to Collector for execution under s. 68 he should let the land on premium so that the decretal amount may be raised. As regards the transferred decree, the civil Court is not competent to interfere. 35 Bom. L. R. 761=A. I. R. 1933 Bom. 369. The Collector is to consider the proper mode in which a decree may be satisfied. 26 S. L. R. 505=A. I. R. 1933 Sind 112=142 Ind. Cas. 579. The Collector's power over property he has attached in execution of a decree terminates on the satisfaction of a decree. 15 N. L. J. 173=A. L. R. 1933 Nag. 26. Alienation of property under control of Collector is illegal. A. I. R. 1928 Nag. 128=106 Ind. Cas. 14. Sale with permission of Collector is not tantamount to sale by Collector. A. I. R. 1925 Nag. 341=87 Ind. Cas. 996. Executing authority is empowered to mortgaged property for satisfying mortgage decree. A. I. R. 1925 Bom. 277=27 Bom. L. R. 217=86 Ind. Cas. 846. When the Collector being unable to sale property returns the decree, civil Court can again return the decree for execution. 42 A. 12=11 L. W. 384=24 C. W. N. 394=38 M. L. J. 259=22 Bom. L. R. 451=18 A. L. J. 235=55 Ind. Cas. 487. Where the property is in charge of the Collector under Schedule III of C. P. Code any mortgage by the judgment-debtor without the permission of the Collector is inoperative and void. 1931 A. L. J. 400=A. I. R. 1931 All. 541=135 Ind. Cas. 568. Collector withholding one item of attached property from sale is not competent at a later stage to exercise power in respect of it. A. I. R. 1934. Nag. 285. A Collector executing a decree cannot go behind decree. A. I. R. 1936 Bom. 227.

2. [S. 322.] Where the execution of a decree, not being a decree ordering

Procedure of Collector in special cases.

the sale of immovable property in pursuance of a contract specifically affecting the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immovable property, has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to believe that all the liabilities of the judgment debtor can be discharged without a sale of the whole of his available immovable property, may proceed as hereinafter provided.

Notice to be given to decree-holders and to persons having claims on property.

pliance and calling upon—

3. [S. 322A.] (1) In any such case as is referred to in paragraph 2, the Collector shall publish a notice, allowing a period of sixty days from the date of its publication for com-

(a) every person holding a decree for the payment of money against

the judgment-debtor capable of execution by sale of his immovable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree and a certificate from the Court which passed or is executing the same, declaring the amount recoverable thereunder ;

(b) every person having any claim on the said property to submit to the Collector a statement of such claim, and to produce the documents (if any) by which it is evidenced.

(2) Such notice shall be published by being affixed on a conspicuous part of the Court-house of the Court which made the original order for sale and in such other places (if any) as the Collector thinks fit ; and where the address of any such decree-holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise.

4. [S. 322 B.] (1) Upon the expiration of the said period, the Collector

Amount of decrees for payment of money to be ascertained, and immovable property available for their satisfaction.

shall appoint a day for hearing any representations which the judgment-debtor and the decree-holder's or claimants (if any) may desire to make, and for holding such inquiry as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of

the judgment-debtor's immovable property, and may, from time to time adjourn such hearing and inquiry.

(2) Where there is no dispute as to the fact or extent of the liability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the relative priorities of such decrees or claims, or as to the liability of any such property for the satisfaction of such decrees or claims, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immovable property available for that purpose.

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision.

**Notes.**—Where after an attachment of a property, the execution proceedings are transferred to the Collector and an objection is raised by a person the Collector should proceed under para 4 (3). A. I. R. 1936 Oudh 195 ; 1935 O. W. N. 879.

5. [S. 322 C.] The Collector may, instead of himself issuing the notices and holding the inquiry required by paragraphs 3 and 4 draw up a statement specifying the circumstances of the judgment-debtor and of his immovable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court ; and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs 3 and 4 and transmit such statement to the Collector.

6. [S. 322 D.] The decision by the Court of any dispute arising under paragraph 4 or paragraph 5 shall, as between the parties thereto, have the force of and be appealable as a decree.

Scheme for liquidation of decrees for payment of money.

7. [S. 323.] (1) Where the amount to be recovered and the property available have been determined as provided in paragraph 4, or paragraph 5, the Collector may,—

(a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed to sell such property ; or,

(b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding the original order for sale)—

(i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said property ; or

(ii) by mortgaging the whole or any part of such property ; or

(iii) by selling part of such property ;

(iv) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale ; or

(v) partly by one of such modes, and partly by another or others of such modes.

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any incumbrancer which has become payable or compound the claim of any incumbrancer whether it has become payable or not and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any incumbrance with which the Collector proposes to deal under this clause, he may institute a suit in the proper Court, either in his own name or the name of the judgment-debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an umpire to be named by such arbitrators.

(4) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to time, be made in this behalf by the Local Government.

**Notes.**—Insolvency Court has jurisdiction to alienate insolvent's lands. A. I. R. 1929 Lah. 66=29 P. L. R. 606=117 Ind. Cas 669.

8. [S. 324.] Where, on the expiration of the letting or management under paragraph 7, the amount to be recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representatives in interest, stating at the same time that, if the balance necessary to make up the said amount is not paid to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property ; and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.

9. [S. 324 A.] (1) The Collector shall, from time to time, render to the Court which made the original order for sale an account of all monies which come to his hands and of all charges incurred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this schedule, and shall hold the balance at the disposal of the Court.



(2) Such charges shall include all debts and liabilities from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a superior holder in respect of such property or part, and, if the Collector so directs, the expense of any witnesses summoned by him.

(3) The balance shall be applied by the Court—

(a) in providing for the maintenance of such members of the judgment-debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of such member as the Court thinks fit; and

(b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immovable property, or otherwise as the Court may under section 73 direct; or

(c) where the Collector has proceeded under paragraph 2,—

(i) in keeping down the interest on incumbrances on the property;

(ii) where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit; and

(iii) in discharging rateably the claims of the original decree-holder and any other decree-holders who have complied with the said notice, and whose claims were included in the amount ordered to be recovered.

(4) No other holder of a decree for the payment of money shall be entitled to be paid out of such property or balance until the decree-holders who have obtained such order have been satisfied, and the residue (if any) shall be paid to the judgment debtor or such other person as the Court directs.

**Notes.**—Revenue authority is competent to recover sale expenses. A. I. R. 1927 Bom. 17=28 Bom. L. R. 1191=99 Ind. Cas. 289. Sale expenses can not be deducted from poundage. A. I. R. 1926 Bom. 335=28 Bom. L. R. 590=95 Ind. Cas. 363. Where a decree relating to ancestral property is transferred to the Collector for execution and the property is sold and the decree holder paid the amount for which execution is taken, the Collector has no power to dispose of the balance as he liked without instruction from the civil Court. 1931 A. L. J. 1064=A. I. R. 1931 All. 700=130 Ind. Cas. 423.

**10. [S. 325.]** Where the Collector sells any property under this schedule,

Sales how to be conducted. he shall put it up to public auction in one or more lots, as he thinks fit, and may—

(a) fix a reasonable reserved price for each lot;

(b) adjourn the sale for a reasonable time whenever, for reasons to be recorded, he deems the adjournment necessary for the purpose of obtaining a fair price for the property;

(c) buy in the property offered for sale, and re-sell the same by public auction or private contract, as he thinks fit.

**11. [S. 325 A.]** (1) So long as the Collector can exercise or perform in

Restrictions as to alienation by judgment debtor or his representative, and prosecution or remedies by decree-holder.

respect of the judgment-debtor's immovable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraph 1 to 10, the judgment-debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any civil Court issue any process against such property or part in execution of a decree for the payment of money.

(2) During the same period no civil Court shall issue any process of execution either against the judgment debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph 7.

(3) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree-holder has been temporarily deprived.

**Scope**—The property can be the subject of transfer with the permission of the Collector. 144 Ind. Cas. 373=1933 A. L. J. 1522=A. I. R. 1933 All. 468. So long as the property is under attachment in Collector's proceedings, a mortgage of the property by the debtor would be invalid. 144 Ind. Cas. 267=15 N. L. J. 173; see also 1933 A. L. J. 564=A. I. R. 1933 All. 908; 144 Ind. Cas. 373=1933 A. L. J. 1822=A. I. R. 1933 All. 468; A. I. R. 1933 Nag. 238; A. L. R. 1933 All. 830. As alienation is illegal therefore payment of previous encumbrances does not create charge in favour of transferee. A. I. R. 1924 Oudh 302=27 O. C. 56=83 Ind. Cas. 854; see also 48 Ind. Cas. 312=46 C. 183=23 C. W. N. 350 (P. C.). Alienation does not preclude transfer of future interest. A. I. R. 1927 Nag. 177=103 Ind. Cas. 863. Provisions of para 11 must be strictly construed. A. I. R. 1929 Oudh 441=6 O. W. N. 750=121 Ind. Cas. 888; 6 O. W. N. 843=A. I. R. 1929 Oudh 435. Collector's power over property comes to an end with satisfaction of decree. A. I. R. 1930 Nag. 220=122 Ind. Cas. 371. Prohibition of sale in para 11 relates to money decree only and not to cases where sale of specific property is ordered. A. I. R. 1931 All. 38=1930 A. L. J. 1594. Whilst the property is under Collector Civil Court is barred from issuing process against property. A. I. R. 1921 Oudh 176=8 O. L. J. 358=66 Ind. Cas. 642. Collector's power does not terminate until sale is confirmed. 16 N. L. R. 194=60 Ind. Cas. 510. When some property is under the Collector, the rest can be mortgaged. A. I. R. 1930 Nag. 237=13 N. L. J. 36=122 Ind. Cas. 369. Collector's written permission is essential if property to be gifted is under him. A. I. R. 1929 Oudh 435=6 O. W. N. 843=124 Ind. Cas. 354. Inference from correspondence about permission amounts to written permission. A. I. R. 1930 Oudh 510=7 O. W. N. 988=130 Ind. Cas. 65. Leave by sale-officer to deposit amount in satisfaction of money decree is not implied permission by Collector. A. I. R. 1929 Oudh 441=6 O. W. N. 750=121 Ind. Cas. 888. Where property is under Collector under s. 68, Court should not appoint receiver to receive annual income. A. I. R. 1925 Oudh 448=19 O. L. J. 146=2 O. W. N. 73=87 Ind. Cas. 21. From the time of its order of transfer of decree the Court ceases to have jurisdiction. A. I. R. 1926 Nag. 246=92 Ind. Cas. 44. Attachment before judgment is not void under para. 11. A. I. R. 1922. Nag. 238=68 Ind. Cas. 188. When payment of full amount with Collector's permission is made Collectors' power over property attached immediately terminates. Subsequent alienation is not therefore invalid though proceedings formally continue. A. I. R. 1934 Nag. 33. If on sale of two properties, Collector accepts 5 P. C. for payment to auction purchaser of one property and upholds the sale of the other property, the Collector is virtually deprived of his powers and paras 1 to 10 of this Schedule in consequence of which the disability of the judgment-debtor under para 11 comes to an end. A. I. R. 1934 Nag. 285. Collector has seisin of case from the date of the order. A. I. R. 1936 Oudh 280. This para does not apply to the case of non-ancestral property comprised in a decree for sale. 153 I. C. 612=A. I. R. 1935 Oudh 156=11 O. W. N. 1626. A family settlement entered into by judgment debtor when execution is pending before Collector does not contravene this para. 254 I. C. 267=A. I. R. 1935 Oudh 245. A Collector acting under this para is not competent to delegate his power to permit an alienation of the property by the judgment debtor. 153 I. C. 612=A. I. R. 1935 Oudh 156; A. I. R. 1935 Oudh 121. The decree, being recorded as satisfied, there is a presumption on that permission of the Collector has been obtained for the transfer. A. L. R. 1935 Nag. 45. This para applies to all cases in which the Collector is making arrangements for the sale of the property of the judgment-debtor in execution of the decree. A. L. R. 1935 Nag. 52 (1).

**12. [S. 325 B.]** Where the property of which the sale has been ordered

is situate in more districts than one, the powers and duties conferred and imposed on the Collector by paragraphs 1 to 10 shall be exercised and

Provision where property is in several districts.

performed by such one of the Collectors of the said districts as the Local Government may by general rule or special order direct.

13. [S. 325 C.] In exercising the powers conferred on him by paragraphs 1 to 10 the Collector shall have the powers of a civil Court to compel the attendance of parties and witnesses and the production of documents.

## THE FOURTH SCHEDULE.

(See section 155.)

### ENACTMENTS AMENDED.

1	2	3	4
Year.	No.	Short title.	Amendment.
1870	VII.	The Court-fees Act, 1870.	In article 1 of Schedule I, after the word "plaint" the words "written statement pleading a set-off or counter-claim" and after the word "Act" the words "or of cross-objection" shall be inserted. From article 11 of Schedule II the words "from an order rejecting a plaint or" shall be omitted. For the entry in the first column of Schedule II relating to article 19 the following entry shall be substituted, namely :— "Agreement in writing stating a question for the opinion of the Code under the Code of Civil Procedure, 1908."

## THE FIFTH SCHEDULE.

[*Enactment repealed*] Repealed by s. 3 and Schedule II of the Second Repealing and Amending Act, 1914 (XVII of 1914.)



## APPENDIX I.

### Amendments by Local High Courts under S. 122 of the C. P. Code.

#### RULES MADE BY THE HIGH COURT ALLAHABAD.

##### ORDER IV.

Rule 1. (1) *For* rule 1 (1) *substitute* the following :—

"Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint, together with a true copy, for service, with the summons upon each defendant, unless the Court for good cause shown allows time for filing such copies."

(2) "The court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed and in the case of all other proceedings when the process is applied for."

and *re-number* the present sub-rule (2) as sub-rule (3).

##### ORDER V.

Rule 2. *Omit* the words "or, if so permitted, by a concise statement."

*Add* the following rule 4 A :—

"4A. Except as otherwise provided, in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement."

Rule 15. *For* the words "Where in any suit the defendant cannot be found" *read* "When the defendant is absent or cannot be personally served."

Rule 25. *For* the word "shall" in the third line *read* the word "may".

*Add* the following as rule 25A :—

"25A. When the defendant resides in British India but outside the limits of the United Provinces of Agra and Oudh, the Court may, in addition to, or in substitution for any other mode of service, send the summons by post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be *prima facie* proof of service."

Rule 26. *After* the words "the summons may" *insert* the words "in addition to, or in substitution for the method permitted by rule 25".

Rule 27. To order V, rule 27, add the following as notes 1 and 2 :—

1. A list of heads of officers to whom summonses shall be sent for service on the servants of Railway companies working in whole or in part in these provinces is given in Appendix (2) to the general Rules (civil) of 1911.

2. In every case where a Court sees fit to issue a summons direct to any public servant other than a soldier under Order XVI, simultaneously with the issue of the summons notice shall be sent to the head of the office in which the person concerned is employed in order that arrangements may be made for the performance of the duties of such person.

*Illustration* : If the Court sees fit to issue a summons to a *Kanungo* or *patwari* it shall inform the Collector of the district, and if to a sub-registrar it shall inform the District Registrar to whom the sub-registrar is subordinate—

Rule 28.—The present rule 28 shall be numbered 28 (1). Add the following as rule 28 (2) :—

(2) Where the address of such commanding officer is not known, the Court may apply to the officer commanding the station in which the defendant was serving when the cause of action arose to supply such address, in the manner prescribed in sub-rule (4) of this rule. Add the following as sub-rules (3), (4) and 5 :—

"(3) Where the defendant is an officer of His Majesty's military forces, wherever it is practicable, service shall be made on the defendant in person.

(4) Where such defendant resides outside the jurisdiction of the Court in which the suit is instituted, or outside British India, the Court may apply over the seal and signature of the Court to the officer commanding the station in which the defendant was residing when the cause of action arose, for the address of such defendant, and

the officer commanding to whom such application is made shall supply the address of the defendant or all such information that it is in his power to give, as may lead to the discovery of his address.

(5) Where personal service is not practicable, the Court shall issue the summons to the defendant at the address so supplied by registered post.

Rule 29—In rule 29, sub-rule (1), line 2 for the word and figures "rule 28" read rule 28 (1)."

*Insert* the following rules at the end of O. 5 :—

31. An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose. No other forms shall be received by the Court.

32. Ordinarily every process, except those that are to be served on Europeans shall be written in the Court vernacular. But where a process is sent for execution to the Court of a district where a different language is in ordinary use, it shall be written in English and shall be accompanied by a letter in English requesting its execution.

In cases where the return of service is in a language different from that of the district from which it is issued, it shall be accompanied by an English translation.

#### ORDER VII.

Rule 9.—In rule 9(a) for the semicolon after "it" in clause (1), substitute a full stop and delete the rest of this clause as well as clauses (2) and (3); and (b) Renumber clause (4) as clause (2), deleting the words "or statements" therein.

Rule 17.—At the end of clause (2) add the following proviso :—"Provided that, if the copy is not written in English or is written in a character other than the ordinary Persian or Nagri character in use the procedure laid down in Order XIII, rule 12, as to verification shall be followed and in that case the Court or its officer need not examine or compare the copy with the original."

*Insert* the following at the end of order VII.

19. Every plaint or original petition shall be accompanied by a proceeding giving an address written in English in block letters at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, is present, a copy of the notice or process shall be affixed to the outer doors of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. Where a party engages a pleader, notices or processes for service on him shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice or such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner, if for any reasons, it thinks fit to do so.

26. \* [Deleted.]

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\* Rule 26 of VII has been deleted by Notification No. 4084/35a—3(7) *Vide* Allahabad Gazette, Part II, p. 611, dated 24th July, 1926.

## ORDER VIII.

*Insert* the following rules at the end of Order VIII :—

11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service, written in English in block letters and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24, 25 and 26 \* of Order VII shall apply, so far as may be to addresses for service filed under the preceding rule.

## ORDER IX.

Rule 2. *After* the words in the fourth line, "for such service" *insert* the words "or that the plaintiff has failed to comply with the rules for filing the copy of the plaint for service on the defendant."

Rule 13. *Add* the following proviso :—

"Provided also that no such decree shall be set aside merely on the ground of irregularity in the service of summons, if the Court is satisfied that the defendant knew or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim."

## ORDER XIII.

*Insert* the following rules at the end of Order XIII :—

"12. Every document not written in the Court vernacular or in English, which is produced (a) with a plaint or (b) at the first hearing or (c) at any other time tendered in evidence in any suit, appeal or proceeding, shall be accompanied by a correct translation of the document into the Court vernacular. If any such document is written in the Court vernacular but in characters other than the ordinary Persian or Nagri characters in use, it shall be accompanied by a correct transliteration of its contents into the Persian or Nagri character.

The person making the translation or transliteration shall give his name and address and verify that the translation or transliteration is correct. In case of a document written in a script or language not known to the translator or to the person making the transliteration, the person who reads out the original document for the benefit of the translator or the person making the transliteration shall also verify the translation and the transliteration by giving his name and address and stating that he has correctly read out the original document.

13. When a document included in the list prescribed by rule 1, has been admitted in evidence, the Court shall, in addition to making the endorsement prescribed in rule 4 (1) mark such document with serial figures in the case of documents admitted as evidence for a plaintiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants, the documents of the first party defendant may be marked A 1, B 1, C 1, etc. AA 1, BB 1, etc., and those of the second A 2, B 2, C 2, etc. AA 2, BB 2, etc. When a number of documents of the same nature is admitted, as for example, a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or a small letter shall be added to distinguish each paper of the series.

## ORDER XVI.

Rule 1. The following proviso to be added to rule (1) :—

"Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to call any witness not named in a list, which must be filed in Court before the hearing of evidence on his behalf has commenced, without an order of the Judge made in writing and stating the reasons therefor,"

Rule 2. (4) This rule shall not apply, in cases in which Government is a party, in the case of witnesses who are Government servants whose salary exceeds Rs. 10 per mensem and who are summoned to give evidence in their public capacity at a Court situated more than five miles from their head quarters.

\* Rule 26 of VII has been deleted by Notification No. 4084-35a-3(7) *Vide* Allahabad Gazette, Part II, p. 611, dated 24th July, 1926.

Rule 8. *For the words in line 1 under this order shall be served" read "under this order may by leave of the Court be served by the party or his agent, applying for the same, by personal service, and failing such service shall be served."*

Rule 22. (1) *Save as provided in this rule and in rule 2, the Court shall allow travelling and other expenses on the following scale :—*

- (a) *In the case of witnesses of the class of cultivators, labourers and menials, six annas a day ;*
  - (b) *In the case of witnesses of a better class, such as zamindars, traders, pleaders and persons of corresponding rank, from eight annas to two rupees a day, as the Court may direct : and*
  - (c) *In the case of witnesses of superior rank including officers of Government in receipt of a salary of less than Rs. 200 a month, from three to five rupees a day.*
- (2) *If a witness demands any sum in excess of what has been paid to him such sum shall be allowed if he satisfies the Court that he has actually and necessarily incurred the additional expense.*

#### *Illustration.*

A Post Office employee summoned to give evidence is entitled to demand from the party, on whose behalf or at whose instance he is summoned the travelling and other expenses allowed to witnesses of the class or rank to which he belongs and in addition the sum for which he is liable as payment to the substitute officiating during his absence from duty. The sum so payable in respect of the substitute will be certified by the official superior of the witness on a slip, which the witness will present to the Court from which the summons issued.

(3) *If a witness be detained for a longer period than one day the expenses of his detention shall be allowed at such rate, not usually exceeding that payable under clause (1) of this rule, as may seem to the Court to be reasonable and proper :*

*Provided that the Court may, for reasons stated in writing, allow expenses on a higher scale than that hereinbefore prescribed.*

*Add the following after rule 22 :—*

23. *In cases to which Government is a party, Government servants whose salary exceeds Rs. 10 per mensem and all police constables whatever their salary may be who are summoned to give evidence in their official capacity at a Court situated more than five miles from their headquarters, shall be given a certificate of attendance by the Court in lieu of travelling and other expenses.*

#### ORDER XVII.

Rule 1. (2) *Add the following further proviso :—*

*"Provided further that no such adjournment shall be granted for the purpose of calling a witness not previously summoned or named, nor shall any adjournment be utilised by any party for such purpose, unless the Judge has made an order in writing under the proviso to Order XVI, rule 1."*

Rule 2. *Add to rule 2 :—*

*"Where on any such day the evidence, or a substantial portion of the evidence of any party has been recorded and such party fails to appear, the Court may in its discretion proceed with the case as if such party were present, and may dispose of it on its merits."*

*Explanation.*—*No party shall be deemed to have failed to appear if he is either present or is represented in Court by an agent or pleader, though engaged only for the purpose of making an application.*

Rule 3. *Amend rule 3 :—*

*"Where any party to a suit to whom time has been granted, fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order, or to perform any other act, necessary to the further progress of the suit for which time has been allowed, the Court may, whether such party is present or not, proceed to decide the suit on the merits."*

#### ORDER XVIII.

*Insert the following rules at the end of Order XVIII :—*

19. (1) *The Judge shall record in his own hand in English all orders passed on applications, other than orders of a purely routine character.*



(2) The Judge shall record in his own hand in English all admissions and denials of documents, and the English proceedings shall show how all documents tendered in evidence have been dealt with from the date of presentation down to the final order admitting them in evidence or rejecting them.

(3) The Judge shall record the issues in his own hand in English, and the issues shall be signed by the Judge and shall form part of the English proceedings.

#### ORDER XIX.

Insert the following rules at the end of Order XIX :—

4. Affidavit shall be entitled in the Court of \_\_\_\_\_ at (naming such Court). If the affidavit be in support of, or in opposition to, an application respecting any case in the Court, it shall also be entitled in such case. If there be no such case, it shall be entitled *in the matter of the petition of*

5. Affidavits shall be divided into paragraphs, and every paragraph shall be numbered consecutively and as nearly as may be, shall be confined to a distinct portion of the subject.

6. Every person making any affidavit shall be described therein in such manner as shall serve to identify him clearly ; and where necessary for this purpose, it shall contain the full name, the name of his father, of his caste or religious persuasion, his rank or degree in life, his profession, calling, occupation or trade, and the true place of his residence.

7. Unless it be otherwise provided, an affidavit may be made by any person having cognizance of the facts deposed to. Two or more persons may join in an affidavit : each shall depose separately to those facts which are within his own knowledge and such facts shall be stated in separate paragraphs.

8. When the declarant in any affidavit speaks to any fact within his own knowledge he must do so directly and positively, using the words "I affirm" "or I make oath and say".

9. Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression "I am informed", and if such be the case "and verily believe it to be true", and shall state the name and address of, and, sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of Justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed in such document.

10. When any place is referred to in an affidavit, it shall be correctly described. When in an affidavit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the identification of such person, shall be given in the affidavit.

11. Every person making an affidavit for use in a civil Court shall, if not personally known to the person before whom the affidavit is made, be identified to that person by some one known to him, and the person before whom the affidavit is made shall state at the foot of the affidavit the name, address, and description of him by whom the identification was made as well as the time and place of such identification.

11A. Such identification may be made by a person—

(a) Personally acquainted with the person to be identified ; or

(b) Satisfied from papers in that person's possession or otherwise, of his identity :

Provided that in case (b) the person so identifying shall sign on the petition or affidavit a declaration in the following form, after there has been affixed to such declaration in his presence the thumb impression of the person so identified :—

Form.

I (name, address and description) declare that the person verifying this petition (or making this affidavit) and alleging himself to be A. B. has satisfied me (here state by what means *e. g.*, from papers in his possession or otherwise) that he is A. B.

12. No verification of a petition and no affidavit purporting to have been made by a *pardahnashin* woman who has not appeared unveiled before the person before whom the verification or affidavit was made, shall be used unless she has been

identified in the manner already specified and unless such petition or affidavit be accompanied by an affidavit of identification of such woman made at the time by the person who identified her.

13. The person before whom an affidavit is about to be made shall, before the same is made ask the person proposing to make such affidavit if he has read the affidavit and understands the contents thereof, and if the person proposing to make such affidavit state that he has not read the affidavit or appears not to understand the contents thereof, or appears to be illiterate, the person before whom the affidavit is about to be made shall read and explain, or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make such affidavit understands the contents thereof, the affidavit may be made.

14. The person before whom an affidavit is made, shall certify at the foot of the affidavit the fact of the making of the affidavit before him and the time and place when and where it was made, and shall for the purpose of identification mark and initial any exhibits referred to in the affidavit.

15. If it be found necessary to correct any clerical error in any affidavit, such correction may be made in the presence of the person before whom the affidavit is about to be made, and before, but not after, the affidavit is made. Every correction so made shall be initialled by the person before whom the affidavit is made and shall be made in such manner as not to render it impossible or difficult to read the original word or words, figure or figures, in respect of which the correction may have been made.

#### ORDER XX.

Insert the following at the end of Order XX :—

21 (1) Every decree and order as defined in section 2, other than a decree or order of a Court of Small Causes or of a Court in the exercise of the jurisdiction of a Court of Small Causes, shall be drawn up, in the Court vernacular. As soon as such decree or order has been drawn up and before it is signed, the Munsarim shall cause a notice to be posted on the notice-board stating the decree or order has been drawn up, and that any party or the pleader of any party may, within six working days from the date of such notice, peruse the draft decree or order and may sign it, or may file with the Munsarim an objection to it on the ground that there is in the judgment a verbal error or some accidental defect not affecting a material part of the case, or that such decree or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly what is the error, defect or variance alleged, and shall be signed and dated by the person making it.

(2) If any such objection be filed on or before the date specified in the notice the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judge who pronounced the judgment, or, if such Judge has ceased to be the Judge of the Court, before the Judge then presiding.

(3) If no objection has been filed on or before the date specified in the notice, if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(4) If an objection has been duly filed and has been allowed, the correction or alteration directed by the Judge shall be made. Every such correction or alteration in the judgment shall be made by the Judge in his own handwriting. A decree amended in accordance with the correction or alteration directed by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance with the provisions of rules 7 and 8.

(5) When the Judge signs the decree he shall make an autograph note stating the date on which the decree was signed.

#### ORDER XXI.

Rule 5. For the word "District," where it occurs *after* the words "same" and "different" read "Province."

Rule 6. Rule 6 be re-numbered 6 (1) and the following sub-rule 6 (2) be added :—  
 "(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints, in a sealed cover to be taken to the Court to which they are to be sent."

Rule 11. *For* clause (f) of sub-rule (2) of this rule *substitute* the following :—  
“(f) The date of the last application, if any.” And *add* the following proviso to sub-rule (2) :—

“Provided that when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application.”

Rule 17. Between the words “been complied with” and “the Court may” *insert* the words, “and if the decree-holder fails to remedy the defect within a time to be fixed by the Court.”

Rule 22. *For* the words “one year” wherever they occur in this rule, *read* the words “three years.”

To sub-rule (2) of this rule shall be *added* the following proviso :—

“Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule, unless the judgment-debtor has sustained substantial injury by reason of such omission.”

Rule 24 (3). *After* the words at the end of the sub-rule, “be executed.” *add* the words, “and a day shall be specified on or before which it shall be returned to Court.”

Substitute the following for paragraph (2) in rule 25 :—

“2. Where the endorsement is to the effect that such officer is unable to execute the process, the Court may examine him personally or upon affidavit touching his alleged inability, and may, if it thinks fit, summon and examine witnesses to such inability, and shall record the result.”

Rule 26 (3). *For* the words “the Court may” *read* the words “the Court shall, unless good cause to the contrary is shown.”

Rule 29. *After* the words “the person against whom the decree was passed,” *insert* the words, “or any person whose interests are affected by the decree, or by any order made in execution thereof.”

Rule 31 (2) and (3). *For* the words wherever they occur in each sub-rule “six months” *read* the words, “three months, or such extended time as the Court may for good cause direct.”

Rule 32 (3). *For* the words “one year” *read* the words “three months” and *after* the words at the end of the sub-rule, “on his application,” *add* the words “the Court may for good cause extend the time.”

Rule 39 (5). *Delete* the words “in the Civil Prison.”

Rule 40 (5). *Add* the following proviso :—

“Provided that, in order to give the judgment-debtor an opportunity of satisfying the decree ; the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for specified period not exceeding 10 days, or release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period, if the decree be not sooner satisfied. Where the Court sees fit to leave a judgment-debtor in the custody of an officer of the Court and the judgment-debtor does not pay the costs incidental to such intermediate custody it shall be competent for the Court to require the decree-holder on pain of his application for arrest, being disallowed to pay into Court such sums as the Judge deems sufficient to cover such costs including fees for process-server subsistence of the judgment-debtor and costs of conveyance, if any ; and sums disbursed by the decree-holder under this proviso shall be deemed to be costs in the suit.”

Rule 53. In sub-rule (1) (h) in the third line, and in sub-rule (4) in the eighth line, *after* the words “to such other Court,” *add* the words “and to any other Court to which the decree has been transferred for execution.”

And in sub-rule (6) *for* the words, “after receipt of notice thereof” *read* the words “after receipt of notice, or with the knowledge thereof.”

Rule 54. *Add* the following sub-rule (54) (3) :—

“The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made.”

Substitute the following for rule 55 :—

55 (1). Notice shall be sent to the sale officer executing a decree of all applications for rateable distribution of assets made under section 27 (1) in respect of the property or the same judgment-debtor by persons other than the holder of the decree for the execution of which the original order was passed.

## (2) Where—

(a) The amount decreed (which shall include the amount of any decree passed against the same judgment-debtor), notice of which has been sent to the sale officer under sub-section (1), with costs and all charges and expenses resulting from the attachment of any property are paid into Court, or,

(b) satisfaction of the decree (including any decree passed against the same judgment-debtor) notice of which has been sent to the sale officer under sub-section (1), is otherwise made through the Court or certified to the Court, or

(c) the decree (including any decree passed against the same judgment-debtor) notice of which has been sent to the sale officer under sub-section (1), is set aside or reversed,

the attachment shall be deemed to be withdrawn, and, in the case of immovable property, the withdrawal shall, if the judgment-debtor so desire, be proclaimed at his expense and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

Rule 58. *Add* the following words to sub-rule (58) (2) :—

"(or objection), or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided."

Rule 68. *For* the words "fifteen days" *read* the words "seven days."

Rule 69 (2). *For* the word "seven" *read* the word "fourteen," and *add* the following proviso :—

"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under rule 66."

Rule 72. In sub-rule (2) *for* the words "with such permission" *read* the words "property sold," and *re-number* this sub-rule '72," and *delete* sub-rules (1) and (3).

Rule 89. In sub-rule (1) of this rule *for* the words "any person . . . before such sale" *read* the words "the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property."

Rule 90. *For* the words "Provided that no" *read* the words "provided that—

(a) no" . . . . .

and *add* the following proviso :—

"(b) no such application shall be entertained upon any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up."

Rule 92. In sub-rule (1) *after* the words "the Court shall," *insert* the words "subject to the provisions of rules 58 (2)."

Rule 98. *After* the words "at his instigation," wherever they occur, *add* the words "or on his behalf," and *after* the words at the end of the rule, "thirty days" *add* the words "(thirty days), and may order the person or persons whom it holds responsible for such resistance or obstruction to pay jointly or severally in addition to costs, reasonable compensation to the decreeholder for the delay and expense caused to him in obtaining possession. The order to pay costs and compensations made thereon shall have the same force and be subjected to the same conditions as to appeal or otherwise as if it were a decree."

Rule 99. *For* the words in brackets "(other than the judgment-debtor)" *read* the words in brackets, "(other than the persons mentioned in rules 95 and 98 hereof.)"

*Insert* the following rules at the end of Order XXI :—

104. When the certificate prescribed by section 41 is received by the Court which sent the decree for execution, it shall cause the necessary details as to the result of execution to be entered in its register of civil suits before the papers are transmitted to the record room.

105. Every attachment of movable property under rule 43, of Negotiable Instruments under rule 51 and of immovable property under rule 54, shall be made through a civil Court Amin, or bailiff, unless special reasons render it necessary that any other agency should be employed, in which case those reasons shall be stated in the handwriting of the presiding Judge himself in the order for attachment.

106. When the property which it is sought to bring to sale is immovable, property within the definition of the same contained in the law for the time being in force relating to the registration of documents, the decreeholder shall file with his application a certificate from the sub-registrar within whose sub-district such property is situated; showing that the sub-registrar has searched his book Nos. I and II and their indices for the past twelve years and stating the encumbrances, if any, which he has found on the property.

107. When an application is made for the sale of land or of any interest in land, the Court shall, before ordering sale thereof, call upon the parties to state whether such land is or is not ancestral land within the meaning of Notification No. 1887—1—238—10, dated 7th October, 1911, of the Local Government, and shall fix a date for determining the said question.

On the day so fixed, or on any date to which the enquiry may have been adjourned, the Court may take such evidence, by affidavit or otherwise, as it may deem necessary, and may also call for a report from the Collector of the district as to whether such land or any portion thereof is ancestral land.

After considering the evidence and the report, if any, the Court shall determine whether such land, or any, or what part of it, is ancestral land.

The result of the enquiry shall be noted in an order made for the purpose by the presiding Judge in his own handwriting.

108. When the property which it is sought to bring to sale is revenue-paying or revenue-free land or any interest in such land, and the decree is not sent to the Collector for execution under section 68, the Court, before ordering a sale, shall also call upon the Collector in whose district such property is subject to any (and, if so, to what) outstanding claims on the part of Government.

109. The certificate of the sub-registrar and the report of the Collector shall be open to the inspection of the parties or their pleaders, free of charge, between the time of the receipt by the Court and the declaration of the result of the enquiry.

No fees are payable in respect of the report by the Collector.

110. The result of the enquiry under rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The Court may, in its discretion, adjourn the enquiry, provided that the reasons for the adjournment are stated in writing, and that no more adjournments are made than are necessary for the purposes of the enquiry.

111. If after proclamation of the intended sale has been made, any matter is brought to the notice of the Court which it considers material for purchasers to know, the Court shall cause the same to be notified to intending purchasers when the property is put up for sale.

112. The costs of the proceedings under rules 66, 106 and 108 shall be paid in the first instance by the decree-holder; but they shall be charged as part of the cost of the execution, unless the Court, for reasons to be specified in writing, shall consider that they shall either wholly or in part be omitted therefrom.

113. Whenever any civil Court has sold, in execution of a decree or other order, any house or other building situated within the limits of a Military cantonment or station, it shall, as soon as the sale has been confirmed, forward to the commanding officer of such cantonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place; and such notice shall contain full particulars of the property sold and of the name and address of the purchaser.

114. Whenever guns or other arms in respect of which licenses have to be taken by purchaser under the Indian Arms Act (Act No. XI of 1878) are sold by public auction in execution of decrees by order of a civil Court, the Court directing the sale shall give due notice to the magistrate of the district of the names and the addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

115. When an application is made for the attachment of livestock or other movable property, the decreeholder shall pay into Court in cash such sum as will cover the costs of the maintenance and custody of the property for fifteen days. If within three clear days before the expiry of any such period of fifteen days the amount of such costs for such further period as the Court may direct be not paid into Court the Court, on receiving a report thereof from the proper officer may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

116. Live-stock which has been attached in execution of a decree shall ordinarily be left at the place where the attachment is made either in custody of the judgment-debtor on his furnishing security or in that of some landholder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the Court.

117. If the custody of live-stock cannot be provided for in the manner described in the last preceding rule the animals attached shall be removed to the nearest pound established under the Cattle Trespass Act, 1871 and committed to the custody of the pound-keeper, who shall enter in a register—

(a) the number and description of the animals ;  
 (b) the day and hour on and at which they were committed to his custody ;  
 (c) the name of the attaching officer or his subordinate by whom they were committed to his custody ; and shall give such attaching officer or subordinate a copy of the entry.

118. For every animal committed to the custody of the pound-keeper as aforesaid, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues, according to the scale prescribed under section 12 of Act No. 1 of 1871.

And the sum so levied shall be sent to the Treasury for credit to the Municipal or District Board, as the case may be, under whose jurisdiction the pound is. All such sum shall be applied in the same manner as fines levied under section 12 of the said Cattle Trespass Act.

119. The pound-keeper shall take charge of feed and water, animals attached and committed as aforesaid until they are withdrawn from his custody as hereinafter provided and he shall be entitled to be paid for their maintenance at such rates as may be from time to time, prescribed under proper authority. Such rates shall, for animals specified in the section mentioned in the last preceding rule not exceed the rates for the time being fixed under section 5 of the same Act. In any case, for special reasons to be recorded in writing, the Court may require payment to be made for maintenance at higher rates than those prescribed.

120. The charges herein authorized for the maintenance of live-stock shall be paid to the pound-keeper by the attaching officer for the first fifteen days at the time the animals are committed to his custody, and thereafter for such further period as the Court may direct, at the commencement of such period. Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may be in the custody of the pound-keeper shall be refunded by him to the attaching officer.

121. Animals attached and committed as aforesaid shall not be released from custody by the pound-keeper except on the written order of the Court, or of the attaching officer, or of the officer appointed to conduct the sale ; the person receiving the animals, on their being so released, shall sign a receipt for them in the register mentioned in rule 118.

122. For the safe custody of movable property other than live-stock while under attachment, the attaching officer shall, subject to approval by the Court, make such arrangements as may be most convenient and economical.

123. With the permission of the Court the attaching officer may place one or more persons in special charge of such property.

124. The fee for the services of each such person shall be payable in the manner prescribed in rule 116. It shall not be less than four annas, and shall ordinarily not be more than six annas per diem. The Court may, at its discretion, allow a higher fee ; but if it do so, it shall state in writing its reasons for allowing an exceptional rate.

125. When the services of such persons are no longer required the attaching officer shall give him a certificate on a counterfoil form of the number of days he has served and of the amount due to him ; and on the presentation of such certificate to the Court which ordered the attachment, the amount shall be paid to him in the presence of the presiding Judge : provided that where the amount does not exceed Rs. 5, it may be paid to the *sahna* by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with.

126. When in consequence of an order of attachment being withdrawn or for some other reason, the person has not been employed or has remained in charge of the property for a shorter time than that for which payment has been made in respect of his services, the fee paid shall be refunded in whole or in part, as the case may be.

127. Fees paid into Court under the foregoing rules shall be entered in the Register of Petty Receipts and Repayments.

128. When any sum levied under rule 119 is remitted to the Treasury, it shall be accompanied by an order in triplicate (in the form given as form 9 of the Municipal Account Code), of which one part will be forwarded by the Treasury

officials to the District or Municipal Board as the case may be. A note that the same has been paid into the Treasury as rent for the use of the pound, will be recorded on the extract from the pass book.

129. The cost of repairing attached property for sale, or of conveying it to the place where it is to be kept or sold, shall be payable by the decreeholder to the attaching officer. In the event of the decreeholder failing to provide the necessary funds, the attaching officer shall report his default to the Court, and the Court may thereupon issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

130. Nothing in these rules shall be deemed to prevent the Court from issuing and serving on the judgment-debtor simultaneously the notices required by Order XXI, rules 22, 66 and 107.

*"Garnishee Orders."*

"131. The Court may, in the case of any debt, due to the judgment-debtor (other than a debt secured by a mortgage or a charge or a negotiable instrument, or a debt recoverable only in a revenue Court), or any movable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee) liable to pay such debt, or to deliver or account for such movable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into the Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution

132. If the garnishee does not forthwith or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution, and does not dispute his liability to pay such debt or deliver such movable property, or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

133. If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit ; and upon the determination of such issue shall pass such order upon the notice as shall be just.

134. Whenever in any proceedings under these rules it is alleged, or appears to the Court to be probable that the debt or property attached or sought to be attached belongs to some third person or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

135. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

136. Payment or delivery made by the garnishee whether in execution of an order under these rules or otherwise shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realized although such order or the judgment may be set aside or reversed.

137. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction : provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order. An appearance by any member pursuant to an order shall be a sufficient appearance by the firm.

138. The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto, or any order made thereon, shall be in the discretion of the Court.

139. (1) Where the liability of any garnishee has been tried and determined under these rules, the order shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by clause (1) shall be appealable as orders made in execution.

*Illustration.*—"An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution."

Add the following rule 140 :—

140. All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under Order VII or Order VIII shall apply to all proceedings taken under Order XXI or section 47."

The following form shall be used under the provisions of rule 131 of Order XXI :—

SUIT No.                      of 19                      .

*Plaintiff*

versus.

*Defendant*

To

WHEREAS it is alleged that a debt of Rs.                      is due from you to  
the judgment-debtor :

Or that you are liable to deliver to the above-named judgment-debtor the property set forth in the schedule hereto attached : Take notice that you are hereby required on or before the                      day of                      19                      , to pay into this Court the said sum of Rs

Or

to deliver, or account to the *amin* of this Court for the movable property detailed in the attached schedule, or otherwise to appear in person or by advocate, vakil or authorized agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

"Dated this                      day of                      19                      .

*Munsif*

*Subordinate Judge*

At

....."

#### ORDER XXII

12. At the end of the rule add the words :—

"Or to proceedings in the original Court taken after the passing of the preliminary decree where a final decree also requires to be passed having regard to the nature of the suit."

#### ORDER XXV.

Rule I. *After* the words in lines 6 and 7, "property in suit" *insert* the words "or that the plaintiff is being financed by a person not a party to the suit."

#### ORDER XXVI.

Rule 18. In clause (1) *after* the words "agents and pleaders" *substitute* a comma for the full-stop and *add* the following words, "and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues."

#### ORDER XXVII.

Insert the following rule at the end of O. 27 :—

9. In every case in which the Government Pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of rule 8 (1), the defence of a suit against an officer of the Government, he shall in lieu of a vakalatnama, file a memorandum on stamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be, as nearly as may be, in the terms of the following form :

Title of the suit, etc.                      .

1. A. B. Government Pleader, appear on behalf of the Secretary of State for India in Council (or the Government of the United Provinces, or as the case may be) respondent (or etc.) in the suit :—

or, on behalf of the Government (which under Order 27, rule 8 (1) of Act No. V of 1908, has undertaken the defence of the suit), respondent (or etc.) in the suit.



## ORDER XXXII.

Rule 3. *Add the following proviso to rule 3(4) :—*

"Provided that if the minor is under ten years of age no such notice shall be issued to him."

*Substitute the following for rule 4 :—*

"4. (1) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as next friend, except by leave of the Court."

"(2) Subject to the provisions of sub-rule (1) any person who is of sound mind and has attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor or he is a defendant, or the Court for other reasons to be recorded considers him unfit to act."

"(3) Every next friend shall, except as otherwise provided by clause (5) of this rule be entitled to be reimbursed from the estate of the minor any expenses incurred by him while acting for the minor."

"(4) The Court may in its discretion for reason to be recorded, award costs of the suit, or compensation under section 35A or section 95 against the next friend personally as if he were a plaintiff."

"(5) Costs or compensation awarded under clause (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable."

*Add the following rule 4A :—*

"4A. (1) Where a minor has a guardian appointed by competent authority, no person other than such guardian shall be appointed his guardian for the suit unless the Court considers for reasons to be recorded that it is for the minor's welfare that another person be appointed."

(2) Where there is no such guardian, or where the Court considers that such guardian should not be appointed, it shall appoint as guardian for the suit the natural guardian of the minor, if qualified, or where there is no such guardian the person in whose care the minor is, or any other suitable person who has notified the Court of his willingness to act or failing any such person, an officer of the Court."

*Explanation.*—An officer of the Court shall for the purposes of this sub-rule include a legal practitioner on the roll of the Court."

(3) No person shall without his consent be appointed guardian for the suit : provided that in all cases the consent of such person shall be presumed, unless within fifteen days of receipt of notice from the Court, he notifies to the Court his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to act."

(4) Where an officer of the Court is appointed guardian for the suit under sub-rule (2), the Court may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in which the minor is interested, and may give directions for the repayment or allowance of such costs as justice and the circumstances of the case may require."

## ORDER XXXIII.

Rule 5. In rule 5 (a) add the words "and the applicant on being required by the Court to make any amendment within a time to be fixed by the Court, fails to do so" *between the figure 3 and the word "or,"* add the following explanation to rule 5 at the end :—

*Explanation :—*An application shall not be rejected under clause (d) merely on the ground that the proposed suit appears to be barred by any law."

## ORDER XXXIV.

Rule 4 (2). *After the words "the Court may" insert the words "of its own motion, or."*

## ORDER XXXVII.

Rule 1. *Add the following clause (e) :—*

"(e) any Court in the Province of Agra exercising the powers of a Small Cause Court."

## ORDER XXXIX.

Rule 1. In clause (a) *delete* the words "or wrongfully sold in execution of a decree."

and

*Delete* the word "sale" after the words "damaging, alienation."

## ORDER XLI.

Substitute the following for r. 3(1) :—

"3(1) Where the memorandum of appeal is not drawn up in the manner herein-

before prescribed, or accompanied by the copies mentioned in rule 1 (1), it may be rejected or when the memorandum of appeal is not drawn up in the

manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there."

Rule 7.—For the tenth word "and" substitute a comma and between the figure 6 and the word "shall" add the word after figure "and 10."

Rule 10 (1). *Add* the following proviso :—

"Provided also that in case of every appeal from any decree or order passed in appeal by any Court subordinate to the High Court confirming the decree or order of the Court below or modifying it only in favour of the appellant or in respect of costs the appellant shall, within two weeks of the admission of appeal, or within such time as the Court may for special reasons allow, deposit in the appellate Court security for the costs of the appeal, and for all costs ordered by the Courts below to be paid by him, which remain unpaid."

*Add Clause (2)*—

"(2) In the second proviso to clause (1) of this rule costs of the appeal" means advocate's fee calculated on the valuation of the appeal together with a sum of Rs. 2 for Court-fee on vakalatnama to be filed by the respondent, Re. 1 inspection fee, and in case of second appeals outside the jurisdiction of a single Judge a further sum of Rs. 10 for printing charges payable by respondent.

*Original Clause (2)*—of the rule shall be numbered as(3).

Rule 14. *Add* the following sub-rule (3) :—

"14(3). Notwithstanding anything in sub-rule (i) it shall not be necessary to serve notice of any proceeding incidental to an appeal on any respondent, other than a person impleaded for the first time in the appellate Court, unless he has appeared and filed an address for service either in the trial Court or in the case of a second appeal, in the lower appellate Court, or has appeared in the appeal.

Rule 27 (1). Insert the following as clause (b).

"(b) the evidence sought to be adduced by a party to the appeal, which after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order under appeal was passed or made, or"

Rule 37 : *Delete* the words "and shall be filed with the original proceedings in the suit" in lines 4 and 5 of the rule ; and add a new paragraph as follows :—

Where the appellate Court is High Court the copies aforesaid shall be filed with the original proceedings in the suit.

*Insert* the following at the end of the Order XLI :—

38. (1) An address for service filed under VII, rule 19, or Order VIII, rule 11, or subsequently altered under Order VII, rule 24, or Order VIII, rule 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for services given by the opposite parties in the Court below, and notices and processes shall issue from the appellate Court to such addresses.

(3) Rules 21, 22, 23 and 24 of Order VII shall apply, so far as may be, to appellate proceedings.

## ORDER XLII.

*Substitute* the following for rule I :—

Procedure.

1. The rules of Order XLI shall apply, so far as may be, to appeals from appellate decrees, subject

to the following provision :—

It shall not be necessary for an appellant in a second appeal to produce a copy of the judgment of the Court of first instance or any judgment other than the judgment on which the decree appealed against may be founded, and the record of the case shall be sent for at the expense of the appellant.

## ORDER XLIII.

Rule 1 (u). *For* the words "an order under rule 23 of Order XLI" *read* "any order".

*Insert* the following rule at the end of Order XLIII :—

3. In every appeal under rule 1, in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to be paid.

## ORDER XLIV.

Rule 1. To ruler, add another proviso as follows :—

Provided further that no application under this rule shall be allowed unless a notice of the application has been given to the proposed respondents

## ORDER XLV.

Rule 15. For rule 15 (1) substitute :—

15 (1) Whoever desires to obtain :—

(a) execution of any order of Her Majesty in Council, or  
(b) where an appeal has been dismissed by His Majesty in Council for want of prosecution, an order of the Court from which an appeal to his Majesty was preferred terminating proceedings and determining the costs, shall apply to the said Court by a petition, accompanied by a certified copy of the decree passed or order made by His Majesty in Council of which execution is desired or to which effect is to be given and a memorandum of all costs incurred in India that are claimed in pursuance thereof.

## ORDER XLVI.

*Insert* the following rule at the end of Order XLVI :—

8. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this Order.

## ORDER XLVII.

*Insert* the following at the end of Order XLVII :—

10. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under section 115 of the Code.

## ORDER XLVIII.

Rule 1. *Before* the words "Every process issued" *prefix* the words "Except as provided in Order IV, rule 1 (2)."

## ORDER LII (New).

1. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under section 115 of the Code.

## FORMS.

## APPENDIX B.

Form No 7—an order for transmission of summons for service in the jurisdiction of another Court (Order 5, rule 21) is hereby cancelled.

Form No. 10—a form to accompany return of summons of another Court (Order 5, rule 23) is cancelled.

## No. 20.

\*Application for issue of summons to the party or witness.

No. of suit.

Names of parties.

In the Court of the

Date fixed for hearing.

C. P. Code.—118.



## APPENDIX F.

## No. 11.

The security to be furnished under order XXXVIII, rule 9, shall be, as nearly as may be, by a bond in the following form :—

In the Court of \_\_\_\_\_ at \_\_\_\_\_  
 Suit No. \_\_\_\_\_ of 19 \_\_\_\_ .  
 Plaintiff.  
 Defendant.

Amount of suit, Rupees \_\_\_\_\_

WHEREAS in the suit above specified the plaintiff aforesaid, has applied to the said Court that the said defendant \_\_\_\_\_, may be called on to furnish sufficient security to fulfil any decree that may be passed against him in the said suit, or that on his failure so to do, certain property of the said defendant, \_\_\_\_\_ may be attached.

And whereas, on the failure of the said defendant, \_\_\_\_\_ to furnish such security, or, show cause why it should not be furnished, the property aforesaid of the said defendant, \_\_\_\_\_ has been attached by order of the said Court :

Therefore I \_\_\_\_\_, inhabitant of \_\_\_\_\_, have voluntarily become security and hereby bind myself, my heirs and executors, to \_\_\_\_\_ as Judge of the said Court, and his successors in office, that the said defendant, \_\_\_\_\_ shall produce and place at the disposal of the said Court, when required, the property herein-below specified, namely, (*here give description of property or refer to an annexed schedule*) or the value of the same, or such portion thereof as may be sufficient to fulfil such decree and shall when required pay the costs of the attachment, and in default of his so doing I bind myself, my heirs and executors, to pay to \_\_\_\_\_ as Judge of the said Court and his successors in office on its order, such sum to the extent of rupees (*here enter a sufficient sum to cover the amount of suit with costs and the costs of the attachment*) as the said Court may adjudge against the said defendant.

Witness my hand at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_ ,  
 (Signed) \_\_\_\_\_  
 Surety.

Witnesses :

## No. 12.

The security to be furnished under Order XXXIX, rule 2 (2), shall be, as far as may be, by a bond in the following form :—

In the Court of \_\_\_\_\_ at \_\_\_\_\_  
 Suit No. \_\_\_\_\_ of 19 \_\_\_\_ .  
 Plaintiff  
 Defendant.

WHEREAS, in the suit above specified, instituted by the said plaintiff, \_\_\_\_\_, to restrain the said defendant, \_\_\_\_\_, from (here state the breach of contract or other injury) the said Court has, on the application of the said plaintiff, \_\_\_\_\_, granted an injunction to restrain the said defendant from the repetition (or the continuance) of the said breach of contract (or wrongful act complained of,) and required security from the said defendant against such repetition (or continuance) :

Therefore I, \_\_\_\_\_, inhabitant of \_\_\_\_\_, have voluntarily become security and do hereby bind myself, my heirs and executors to \_\_\_\_\_ as Judge of the said Court and his successors in office that the said defendant, \_\_\_\_\_, shall abstain from the repetition (or continuance) of the breach of contract aforesaid (or wrongful act, or from the committal of any breach of contract or injury of a like kind, arising out of the same contract, or relating to the same property or right,) and in default of his so abstaining, I bind myself, my heirs and executors to pay into Court, on the order of the Court, such sum to the extent of rupees \_\_\_\_\_ as the Court shall adjudge against the said defendant.

Witness my hand at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_ .  
 Witnesses : \_\_\_\_\_ (Signed) \_\_\_\_\_  
 Surety.

APPENDIX H.

No. 4.

Notice to show cause, (General Form).

In the Court of  
At

District  
Civil Suit No. of 19 .  
Miscellaneous No. of 19 .  
Resident of

versus

To Resident of

WHEREAS the above-named has made application to this Court that  
; you are hereby warned to appear in this Court in person or by a pleader  
duly instructed on the day of 19 , at  
o'clock in the forenoon, to show cause against the application, failing wherein,  
the said application will be heard and determined *ex parte*, and it will be presumed  
that you consent to be appointed guardian for the suit.

GIVEN under my hand and the seal of this Court this day of  
19 . Judge.

No. 5.

(List of documents produced by plaintiff  
defendant Order 13, rule 1.)

In the Court of at District  
Suit No. of 19 .  
Plaintiff.  
versus  
Defendant.

List of documents produced with the plaint (or at the first hearing) on behalf of  
plaintiff (or defendant) this list was filed by  
day of 19 . this

1	2	3	4
Serial No.	Description and date, if any, of the document.	What became of the document.	Remarks
		If brought on the record the exhibit mark put on the document.	If rejected date of return to party and signature of party or pleader to whom the document was returned.
			If it remains on the record after decision of the case and is enclosed in an envelope, under rule 24, Chapter III, the date of enclosure in the envelope.

Signature of party or pleader producing the list.

No. 11.

Notice to minor defendant and guardian.

In the Court of at district.  
Suit No. of 19

resident of versus Plaintiff.

resident of Defendant.

To—

(1) \_\_\_\_\_ *Minor defendant* ;  
and

(2) \_\_\_\_\_ *Natural\**  
or *Certificated* guardian, the person in whose  
care the minor is alleged to be. Whereas an application has been presented on the part of the plaintiff in the above suit for the appointment of a guardian for the suit to the minor defendant, you, said minor, and you (2) \_\_\_\_\_ the *\*natural*  
\_\_\_\_\_ certificate guardian or the person in  
whose care the minor is alleged to be, are hereby required to take notice that unless within \_\_\_\_\_ days from the service upon you of this notice, an application is made to this Court to show cause why the person named below should not be appointed or for the appointment of any other person willing to act as guardian for the suit, the Court will proceed to appoint the person named below or some other person to act as the guardian of the minor for the purposes of the said suit. *Proposed*  
*guardian* \_\_\_\_\_ son of \_\_\_\_\_ resident  
of \_\_\_\_\_

Given under my hand, and the seal of the Court, this \_\_\_\_\_ day of  
\_\_\_\_\_ 19 \_\_\_\_\_

*Judge.*

Notes.—\*Cut out the word ‘natural’ if the certificated guardian is named ; cut out the word “certificated” if the natural guardian be intended ; and cut out both “natural” and “certificated” and the word “or” if the guardian be of neither class but one with whom the minor lives.

No. 16.

The security to be furnished under Order XXV, rule 1, shall be, as nearly as may be, by bond in the following form :—

In the Court of \_\_\_\_\_ at \_\_\_\_\_  
Suit No. \_\_\_\_\_ of \_\_\_\_\_ 19 \_\_\_\_\_  
... *Plaintiff.*  
*versus*  
... *Defendant.*

Whereas a suit has been instituted in the said Court by the said plaintiff ...  
... to recover from the said defendant \_\_\_\_\_ the sum of rupees  
and the said plaintiff \_\_\_\_\_ is residing out of British India (or is a woman)  
and does not possess any sufficient immovable property within British India independent of the property in the suit :

Therefore, I, \_\_\_\_\_ inhabitant of \_\_\_\_\_, have voluntarily become  
security, and do hereby bind myself, my heirs and executors, to  
as Judge of the said Court and to his successors in office that the said plaintiff  
... his heirs and executors, shall, whenever called on by the said  
Court, pay all costs that may have been or may be incurred by the said defendant  
... in the said suit, and in default of such payment I bind myself, my heirs and executors, to pay all such costs to the said Court on its order.

Witness my hand at \_\_\_\_\_ this \_\_\_\_\_ day of  
19 \_\_\_\_\_  
Witnesses,

(Signed)  
Surety.

No. 17.

*Address for Service*

Under Order VII, rules 19 to 26 ; Order VIII, rules 11 and 12 ; Order XLI, rule 38 ; Order XLVI, rule 8 ; Order XLVII, rule 10 ; Order LII, rule 1.

In the Court of the \_\_\_\_\_ of

Original \_\_\_\_\_ Suit \_\_\_\_\_ No. \_\_\_\_\_ of 192 \_\_\_\_\_  
or case

... *Plaintiff.*

*versus*

... *Defendant.*

This address shall be within the local limits of the District Court within which the suit is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh, but not within the limits of any other province :

Name, parentage and caste.	Residence.	Pargana or tahsil.	Post office.	District..

Dated

Any summons, notice or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is changed I shall forthwith file a notice of change containing all the new particulars.

Signature of party—  
 { Plaintiff.  
 Defendant.  
 Appellant.  
 Respondent.

Or

I file the above address according to the instructions given by my client (name) capacity, (and

Signature of pleader.

N. B.—This form when received by the Court must be stamped with the date of its receipt and filed with the record of the pending suit or matter.

No. 18.

*Notice of change of address for service.*

Under Order VII, rules 19 to 26 ; Order VIII, rules 11 and 12 ; Order XLI, rule 38 ; Order XLVI, rule 8 ; order XLVII, rule 10 ; Order LII, rule 1.

In the Court of the  
 suit  
 of

Original—No.  
 or case

of 19 .

Plaintiff.

Versus.

Defendant.

This address shall be within the local limits of the District Court within which the suit is filed, or of the District Court within which the party ordinarily resides, if within the limits of the United Provinces of Agra and Oudh, but not within the limits of any other province.

Name, parentage and caste.	Residence.	Pargana or tahsil	Post office.	District,

Dated

Any summons, notice, or process in the case may, henceforward, be issued to me at the above address until I file notice of change. If this address is again changed I shall forthwith file a notice of change containing all the new particulars.

Signature of party—  
 { Plaintiff.  
 Defendant.  
 Appellant.  
 Respondent.



Or

I file the above address according to the instructions given by my client, (name)  
(and capacity)

Signature of pleader.

N. B.—This form when received by the Court must be stamped with the date of its receipt filed with the record of the pending-suit or matter.

## APPENDIX II.

*Rules made by the High Court of Bombay.*

### ORDER III.

Rule 2. clause (a)—O. 3, r. 2, cl. (a) be amended to read as follows :—

Persons holding general powers of attorney [or in the case of proceedings on the original side of the Bombay High Court attorneys holding the requisite special powers of attorney] from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, authorising them to make and do such appearances, applications and acts on behalf of such parties.

Rule 4.—In sub-rule (3) the words “or any application relating to such appeal” shall be inserted between the words “order in the suit” and “and any application or act.”

### ORDER V.

The following shall be inserted as Rule 21A :—

21A. Where the plaintiff so desires, the Court may, notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing and sent to him by registered post prepaid for acknowledgment provided that such place is at a town or village in British India which is the head quarters of a District or recognised Sub-Division of a District, such as a taluka, tahsil, or mahal or in which a municipality has been established, or to which the provisions of this rule may from time to time be extended by a Notification by the High Court published in the Bombay Government Gazette. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.

Rule 22.—The following proviso be added to O. 5, r. 22.

Provided that where any such summons is to be served within the limits of the town of Bombay, it may be addressed to the defendant at the place within such limits where he is residing and may be sent to him by the Court by post registered for acknowledgment. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary.

### ORDER VII.

The following shall be added as Rules 19 to 26 in order 7.

“19. Every plaint or original petition shall be accompanied by a memorandum in writing giving an address at which service of notice or summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being added, file a memorandum in writing of this nature.

“20. An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit or petition is filed, or if he can not conveniently give an address as aforesaid, at a place where a party ordinarily resides.

"21. Where a plaintiff or a petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

"22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served, or present a copy of the notice or process shall be affixed to the outdoor of the house. If on the date fixed such party is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post prepaid for acknowledgment and such service shall be deemed to be as effectual as if the notice or proceeds had been personally served.

"23. Where a party engages a pleader, notice or process on him shall be served in the manner prescribed by Order 3, rule 5, unless the Court directs service at the address for service given by the party.

"24. A party who desires to change the address for service given by him as aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly. Notice of such memorandum shall be given to such other parties to the suits as the Court may deem it necessary to inform, and may be served either upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

"25. Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner if, for any reasons it thinks fit to do so.

"26. Nothing in these rules shall apply to the notice prescribed by Order 21, rule 22".

#### ORDER VIII.

The following shall be added as Rules 11 and 12 :—

"11. Every party whether originally added or substituted, who appears in any suit or other proceeding shall, on or before the date fixed in the summons or notice served on him at the date of hearing file in Court a memorandum in writing stating his address for service, and if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks fit :

"Provided that this rule shall not apply to a defendant who has not filed a written statement but who is examined by the Court under section 7 of the Dekkhan Agriculturist's Relief Act, 1879, or otherwise, or in any case where the Court permits the address for service to be given by a party on a date later than that specified in the rule."

12. Rules 20, 22, 23, 24, 25 and 26 of Order VII shall apply, so far as may be, to addresses for service filed under the last proceeding rule.

#### ORDER IX. .

Rule 4—Rule 4 shall be numbered rule 4 (1) and the following sub-rule (2) shall be added to it, namely :—

"(2) The provisions of the section 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule."

Rule 9—The following shall be added as sub-rule (3), namely :—

"(3) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under this rule."

Rule 13—Rule 13 shall be numbered as rule 13 (1) and the following sub-rule shall be added to it, namely :—

"(2) The provisions of section 5 of the Indian Limitation Act (1908) shall apply to applications made under this rule."

Rule 15—The following shall be added as rule 15 :—

"In the application of this order to appeals, so far as it may be, the word, 'plaintiff' shall be held to include an appellant, the word 'defendant' a respondent, and the word 'suit' an appeal."

## ORDER XIII.

Rule 9—Between the first and the second proviso to sub-rule (1) of rule 9 of Order 13, the following proviso shall be inserted, namely :—

Provided also that the copy of the decree and of the judgment filed with the memorandum of appeal under Order XLI, rule 1, may be returned after the appeal has been disposed of by the Court.

## ORDER XVI.

The following shall be inserted as rule 1 A to order 16 :—

I A. (1) The Court may, on the application of any party for a summons for the attendance of any person, permit that service of such summons shall be effected by such party.

(2) When the Court has directed service of the summons by the party applying for the same and such service is not effected, the Court may, if it is satisfied that reasonable diligence has been used by such party to effect such service, permit service, to be effected by an officer of the Court.

The following shall be inserted as proviso to sub-rule (1) of rule 2 of Order 16 :—

Provided that where Government or a public officer being a party to a suit or proceeding as such public officer supported by Government in the litigation applies for a summons to any public officer to whom the Civil Service Regulations apply to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal, as a public officer, or to produce any document from public records, the Government or the aforesaid officer shall not be required to pay any sum of money on account of the travelling and other expenses of such witness.

The following shall be inserted as proviso to rule 3 of order 16 :—

Provided that where the witness is a public officer to whom the Civil Service Regulations apply and is summoned to give evidence of facts which have come to his notice or of facts with which he has had to deal in his official capacity, or to produce a document from public records, the sum payable by the party obtaining the summons on account of his travelling and other expenses shall not be tendered to him.

## ORDER XXI.

Rule 22—In rule 22 of Order 21 the words “two years” shall be substituted for the words “one year” whenever they occur.

The following proviso shall be added to sub-rule (2) of Rule 24 :—

\*Provided that a First Class Subordinate Judge may in his special jurisdiction send a process to another Subordinate Court in the same District for execution by the proper officer in that Court.”

After rule 44 of Order 21, the following shall be inserted, namely :—

44 A. When the property to be attached is agricultural produce, a copy of the warrant or order of attachment shall be sent by post to the office of the Collector of the District in which the land is situate.

The following words shall be added to sub-rule (1) of rule 45 of Order 21, after substituting a semi-colon for the full stop :—

“and the applicant shall deposit in Court at the time of the application such sum as the Court shall deem sufficient to defray the cost of watching and tending the crop till such time.”

The following shall be added to sub-rule (1) of rule 54 of Order 21 :—

Such order shall take effect, where there is no consideration for such transfer or charge, from the date of such order, and where there is consideration for such transfer or charge, from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged.

In sub-rule (2) of rule 69 of Order 21, “thirty days” shall be substituted for “seven days.”

\*After rule 72 of Order 21, the following shall be inserted, namely :—

72 A. If leave to bid is granted to the mortgagee of immovable property, a reserve price as regards him shall be fixed [unless the Court shall otherwise think fit] at a sum not less than the amount then due for principal, interest and costs in case the property is sold in one lot, and not less in respect of each lot (in case

the property is sold in lots, than such sum as shall appear to be properly attributable to it in relation to the amount aforesaid.

The following rule shall be inserted as rule 91 A in Order XXI of the Code of Civil Procedure :—

91 A. Where the execution of a decree has been transferred to the Collector and the sale has been conducted by the Collector or by an officer subordinate to the Collector, an application under rules 89, 90 or 91, and in the case of an application under rule 89, the deposit required by that rule if made to the Collector or the officer to whom the decree is referred for execution in accordance with any rule framed by the Local Government under section 70 of the Code, shall be deemed to have been made to or in the Court within the meaning of rules 89, 90 and 91.

#### ORDER XXV.

Rule 2—The following shall be added as sub-rule (4), namely :—

(4) The provisions of section 5 of the Indian Limitation Act 1908, shall apply to applications under this rule.

#### ORDER XXXII.

Rule 3 (4) :—

The words "to the minor and" in line 2 of sub-rule (4) rule 3 of Order 32 shall be deleted.

#### ORDER XXXIII.

The following sentence shall be added to the Explanation to rule 1 of Order XXXIII, Civil Procedure Code, namely :—

In determining whether he is possessed of sufficient means the subject-matter of the suit shall be excluded.

#### ORDER XXXIV.

Rule 2—The following shall be substituted for clause (d) of rule 2 of Order 34 :—

(d) that, if such payment is not made on or before the day to be fixed by the Court the plaintiff shall be entitled to apply for a final decree for foreclosure under rule 3.

Rule 4—In sub-rule (1) of rule 4 of Order 34, after the words "as therein mentioned" substitute "the plaintiff shall be entitled to apply for a final decree for sale under rule 5."

In sub-rule (2) of rule 5 of Order 34, after the words "proceeds of the sale," substitute "(after defraying the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid together with subsequent interest at such rate as the Court deems reasonable and subsequent costs, and that the balance (if any) be paid to the defendants or other persons entitled to the same :

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for such payment."

For clause (d) of rule 7 of Order 34, substitute "(d) that, if such payment is not made on or before the day to be fixed by the Court the defendant shall be entitled to apply for a final decree for sale or foreclosure under rule 8."

#### ORDER XXXVII.

Rule 2—In sub-rule (1) of rule 2 of Order 37, after the words "promissory notes" the following words shall be inserted, namely :—

and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising on a contract express or implied, or an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or on a guarantee where the claim against the principal is in respect of a debt or a liquidated demand only.

Rule 3—In rule 3 of Order 37, the following sub-rule shall be inserted :—

(3) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1).

#### ORDER XLI.

After rule 3 of Order 41, the following rule shall be inserted, namely :—

3A. Where an appellant applies for delay to be excused, notice to show cause shall at once be issued to the respondent and the matter shall be finally decided before notice is issued to the Court from whose decree the appeal is preferred under rule 13.

## ORDER XLI.

The following shall be added as rule 38 :—

"38 (1) An address for service filed under Order VII, rule 19 or Order VIII, rule 11, subsequently altered under Order VII, rule 24, or Order VIII, rule 12, shall hold good during all appellate proceedings arising out of the original suit or petition, subject to any alteration under sub-rule (3).

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rule 22, 23 and 24 of Order VII shall apply, so far as may be, to appellate proceedings."

## ORDER XLIII.

Rule 1—Clause (w) shall be deleted.

In sub-rule (2) or rule 3 of Order 45, after the words "to show cause why the said certificate should not be granted" the following words shall be inserted, namely :—  
"unless it thinks fit to refuse the certificate."

## ORDER XLV.

ORDER 7—After rule 7 of Order 45, the following rule shall be inserted, namely :—

7A. No such security as is mentioned in rule 7(1), clause (a), shall be required from the Secretary of State for India in Council or, where the Local Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity.

## ORDER XLVI.

The following shall be added as rule 8 :—

"8. Rule 38 of Order XLI shall apply so far as may be, to proceedings under this Order."

## ORDER XLVII.

Rule 5—In rule 5, for the word "six" the word "two" shall be substituted.

Rule 10—The following shall be added as rule 10 :—

"10. Rule 38 of Order XLI shall apply so far as may be, to proceedings under this order."

## ORDER XLIX.

Rule 3—In rule 3 the word "and" immediately preceding paragraph (6) shall be omitted and the following paragraph shall be inserted between paragraphs (5) and (6) namely :—

"(5a) Rule 72 A of Order XXI and"

For the word and figures "rule 35" occurring below item 6 of rule 3, the words and figures "rules 31 and 35" shall be substituted.

The following clause shall be inserted as clause (1), namely :—

"(1) rule 21 A of Order V ;"

For the existing clause (1) the following shall be substituted, namely :—

(1a) rule 10, rule 11, clause (b) and (c) and rules 19 to 26 of Order VII,"

Below clause (6) the following shall be inserted, namely :—

"(1b) rule 11 and 12 of Order VII".

Below clause (6) the following shall be inserted, namely :—

"(7) rule 38 of Order XLI".

Rule 4—The following be added as rule 4 in Order 49 :—

Under s. 128 para 2, cl. (1) of the C. P. Code of 1908, the following power is delegated to the Registrar of the High Court, Appellate side, Bombay.

Where on a memorandum of appeal presented within the time prescribed for the same, the whole or any part of the fee prescribed by the law for the time being in force relating to Court-fees has not been paid, the Registrar may in his discretion allow the appellant to pay the whole or part as the case may be of such 'Court-fees and may admit the appeal to the Registrar even though the subsequent payment of Court-fee may have been made after time prescribed for presentation of the appeal.

## ORDER LII.

The following shall be added as order LII :—

"1. Rule 38 of Order XVI shall apply so far as may be to proceedings under s. 115 of the Code."

## SCHEDULE I.

**Appendix B.**—Forms Nos. 1, 2, 3, 4, 5 and 6.

The following notes shall be inserted in red ink in forms 1, 2, 3, 5 and 6 :—

"Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out.

Form No. 10 in Appendix B, Schedule I.....be amended to read as follows :—

"To accompany returns of summons of another Court (Order V, r. 23).

Title,

Read proceeding from the \_\_\_\_\_ forwarding \_\_\_\_\_  
for service on \_\_\_\_\_ in Suit No. \_\_\_\_\_ of 19 \_\_\_\_  
of that Court.

Read Serving Officer's Indorsement stating that the  
and proof of the above have been duly taken by me on the oath of  
and \_\_\_\_\_ it is ordered that the

be returned to the \_\_\_\_\_ with this proceeding.

I hereby declare that the said summons on \_\_\_\_\_ has been duly served  
Judge

NOTE.—This form will be applicable to process other than summons the service  
of which may have to be effected in the same manner."

**Appendix B**—Form No. 4. In line 4 of Form No. 4 in Appendix D, for  
"realization" substitute "the day hereinafter referred to."

For clause (2) of the said form substitute "(2) that if such payment is not made  
on or before the said day of \_\_\_\_\_ 19 \_\_, the plaintiff shall  
be entitled to apply to the Court for a final decree for sale."

Delete clause (3) of the said form.

**Appendix C.**—Form No. 5. For clause (2) of Form No. 5 in Appendix D,  
substitute "(2) That if such payment is not made on or before the said day of  
19 \_\_, the defendant shall be entitled to apply for a final decree for fore-  
closure or sale."

**Appendix D.**—Form No. 10A.—Add the following form as Form No. 10A :—

"No. 10. A.

Final decree for sale."

(Title).

Upon reading the decree passed in the above suit on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_,  
and the application of the plaintiff, dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_,  
, and after hearing \_\_\_\_\_ pleader for the plaintiff and  
pleader for the defendant, and it appearing that the payment directed by the said  
decree has not been made.

It is hereby decreed as follows :—

(1) That the mortgaged property or a sufficient part thereof be sold and that the  
proceeds of the sale (after defraying thereout the expenses of the sale) be paid into  
Court and applied in payment of what is declared due to the plaintiff as aforesaid  
together with subsequent interest at \_\_\_\_\_ per cent. per annum as subsequent costs  
and that the balance, if any, be paid to the defendant.

(2) That if the net proceeds of the sale are insufficient to pay such amount and  
such subsequent interest and costs in full, the plaintiff shall be at liberty to apply  
for a personal decree for the amount of the balance.

## APPENDIX III.

*Rules framed by the High Court of Calcutta.*

### ORDER V.

Rule 5—Insert the words "for the ascertainment whether the suit will be con-  
tested" after the words "issues only".

Rules 15 and 17—Substitute the following rules 15 and 17 for the original :—

"15. Where in any suit the defendant is absent from his residence at the time  
when service is sought to be effected on him thereat and there is no likelihood of  
his being found thereat within a reasonable time, then unless he has an agent  
empowered to accept service of the summons on his behalf, service may be made  
on any adult male member of the family of the defendant who is residing with him :

Provided that there such adult male member has an interest in the suit and such interest is adverse to that of the defendant, a summons so served shall be deemed for the purposes of the third column of Art. 164 of Schedule I of the Limitation Act, 1908, not to have been duly served.

Explanation—A servant is not a member of the family within the meaning of this rule.

"17. Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the defendant is absent from his residence at the time when service is sought to be effected on him, thereat and there is no likelihood of his being found thereat within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person upon whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed."

Rule 19—Substitute the following for rule 19 :—

"19. Where a summons is returned under Rule 17, the Court shall, if the return under that rule has not been verified by the declaration of the serving officer, and may, if it has been so verified, examine the serving officer on oath or cause him to be so examined by another Court, touching his proceedings and may make such further inquiry in the matter as it thinks fit ; and shall either declare that the summons has been duly served or order such service as it thinks fit."

Rule 19 A—Insert the following rule after rule 19 :—

"19A. A declaration made, and subscribed by a serving officer shall be received as evidence of the facts as to the service or attempted service of the summons."

#### ORDER VI.

Rule 14 A—Insert the following after rule 14 :—

"14A. Every pleading when filed shall be accompanied by a statement in prescribed form, signed as provided in the rule 14 of this order, of the party's address for service. Such address may from time to time be changed by lodging in Court a form duly filled up and stating the new address of the party and accompanied by verified petition. The address so given shall be called the registered address of the party and shall, until duly changed as aforesaid, be deemed to be the address of the party for the purpose of service of all processes in the suit or in any appeal from any decree or order therein made and for the purposes of execution, and shall hold good subject as aforesaid for a period of two years, after the final determination of the cause or matter. Service of any process may be effected upon a party at his registered address in like manner in all respects as though such party resided thereat."

#### ORDER VII.

Rule 3—After rule 3, add the words :—

"and where there is mentioned, such description shall further state the area according to the notation used in the record of settlement or survey, with or without at the option of the party, the same area in terms of the local measures."

Rule 9—Substitute the following for rule 9 (1) :—

"9 (1). The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it.

(1 A). The plaintiff shall present with the plaint :—

(i) as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason permits him to present a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit in which case he shall present such statements ;

(ii) draft forms of summons and fees for the service thereof."

Rule 11.—Add the following as clause (e).

"(e) Where any of the provisions of Rule 9 (1 A) is not complied with and the plaintiff on being required by the Court to comply therewith within a time to be fixed by the Court, fails to do so."

## ORDER IX.

Rule 9—Re-number sub-rule (2) as sub-rule (3) and insert therein after the words "notice of the application" the words "with a copy thereof (or concise statement as the case may be)".

(b) Insert the following as sub-rule (2) :—

(2) The plaintiff shall, for service on the opposite parties, present along with his application under this rule either—

(i) As many copies thereof on plain papers as there are opposite parties, or,

(ii) if the Court by reason of the length of the application or the number of opposite parties, or for any other sufficient reason grant permission in this behalf, a like number of concise statements. (3-2-1933).

Rule 13—Re-number rule 13 as rule 13 (1) and add the following as rule 13 (2) :—

"(2) The defendant shall, for service on the opposite party present along with his application under this rule either—

(i) as many copies thereof on plain paper as there are opposite parties, or

(ii) if the Court by reason of the length of application or the number of opposite parties or for any sufficient reason grants permission in this behalf, a like number of concise statements (3-2-1933).

Rule 14—Cancel the word "thereof" in rule 14 and substitute therefor the following words :—

"together with a copy thereof (or concise statement as the case may be)".

## ORDER XVI.

Rule 2—Cancel clauses (1) and (2) and substitute therefor the following :—

"(1) The Court shall fix in respect of such summons such a sum of money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

(2) In fixing such an amount the Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case."

Rule 3—Cancel rule 3 and substitute the following :—

"3. The sum so fixed shall be tendered to the person summoned, at the time of serving the summons, if it can be served personally."

Rule 4—Cancel clause (1) and substitute therefor the following :—

"Where it appears to the Court or to such officer as it appoints in this behalf that the sum so fixed is not sufficient to cover such expenses or reasonable remuneration, the Court may direct such further sum to be paid to the person summoned as appears to be necessary on that account, and in case of default in payment, may order such sum to be levied by attachment and sale of the movable property of the party obtaining the summons ; or the Court may discharge the persons summoned without requiring him to give evidence ; or may both order such levy and discharge such person as aforesaid."

Rule 7A.—Insert the following after rule 7 :—

"7A. (i) Except where it appears to the Court that a summons under this order should be served by the Court in the same manner as a summons to a defendant, the Court shall make over for service all summonses under this order to the party applying therefor. The service shall be effected by or on behalf of such party by delivering or tendering to the witness in person a copy thereof signed by the Judge or such officer as he appoints in this behalf and sealed with the seal of the Court.

(ii) Rules 16 and 18 of Order V shall apply to summonses personally served under this rule, as though the person effecting service were a serving officer.

(iii) If such summons, when tendered, is refused or if the person served refuses to sign an acknowledgment of service or if for any reason such summons cannot be served personally, the Court shall, on the application of the party, re-issue such summons to be served by the Court in like manner as a summons to a defendant."

Rule 8.—Cancel rule 8 and substitute therefor the following :—

"8. (1) Every summons under this order not being a summons made over to a party for service under rule 7A (1) of this order, shall be served as nearly as may be in the same manner as a summons to a defendant, and the rules in Order V as to proof of service shall apply thereto.



(2) The party applying for a summons to be served under this rule shall before the summons is granted and within a period to be fixed, pay into Court the sum fixed by the Court under rule 2 of this order."

Rule 21.—Cancel rule 21 and substitute therefor the following :—

"21 (1) When any party to a suit is required by any other party thereto to give evidence, or to produce a document, the provisions as to witnesses shall apply to him so far as applicable.

"(2) When a party to a suit gives evidence on his own behalf, the Court may, in its discretion, permit him to include as costs in the suit a sum of money equal to the amount payable for travelling and other expenses to other witnesses in the case of similar standing."

#### ORDER XVIII.

Rule 2 A—After rule 2, insert the following as rule 2 A :—

"2 A. Notwithstanding anything contained in clauses (1) and (2) of Rule 2, the Court may for sufficient reason go on with the hearing, although the evidence of the party having the right to begin had not been concluded, and may also allow either party to produce any witness at any stage of the suit."

#### ORDER XXI.

Rule 16—In the first proviso cancel the words "and the decree shall not be executed until the Court has heard their objections (if any) to its execution" and substitute therefor the following words :—

"and until the Court has heard their objections (if any) the decree shall not be executed provided that if, with the application for execution, an affidavit by the transferee admitting the transfer or an instrument of transfer duly registered be filed, the Court may proceed with the execution of the decree pending the hearing of such objections."

Rule 17.—In sub-rule (1) cancel the words "the Court may reject the application ; or may allow the defect to be remedied then and there or within a time to be fixed by it" and substitute therefor the following words :—

"the Court shall allow the defect to be remedied then and there or within a time to be fixed by it. If the defect is not remedied within the time fixed the Court rejects the application."

Rule 22.—Add the following as sub-rule (3) :—

(3) Omissions issue a notice in a case where notice is required under sub-rule (1), or to record reasons in a case where notice is dispensed with under sub-rule (2), shall not affect the jurisdiction of the Court in executing the decree."

Rule 24.—Add the following to sub-rule (3) :—

"and a day shall be specified on or before which it shall be returned to the Court.

Rule 26.—In sub-rule (3) cancel the words "the Court may require such security from or impose such conditions upon, the judgment-debtor as it thinks fit," and substitute therefor the following words :—

"the Court shall require security from the judgment-debtor unless sufficient case is shown to the contrary."

Rule 31.—Substitute the words "three months" for the words "six months" in sub-rules (2) and (3).

Rule 32.—Substitute the words "three months" for the words "one year" in sub-rule (3).

Rule 39.—Omit the words "in the civil prison" in sub-rule (5).

Rule 43. shall read as follows :—

Where the property to be attached is movable property, other than agricultural produce, in the possession of judgment-debtor, the attachment shall be made by actual seizure, and, save as otherwise prescribed, the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates and shall be responsible for the due custody thereof :—

Provided that when the property seized does not, in the opinion of the attaching officer, exceed twenty rupees in value or is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

Rule 45.—Add the following to sub-rule (1) :—

"and the applicant shall deposit in Court such sum as the Court shall require in order to defray the cost of watching or tending the crop till such time."

Add the following after Rule 46, Order XXI :—

46 A.—The Court may in case of a debt, other than a debt, secured by a mortgage or a charge or by a negotiable instrument, which has been attached under rule 46 or 51 of this order, upon the application of the attaching creditor, issue notice to the garnishee liable to pay such debt calling upon him either to pay into Court the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree and costs of execution, or to appear and show cause why he should not do so :

Provided that if the debt in respect of which the application aforesaid is made is in respect of a sum of money beyond the pecuniary jurisdiction of the Court, the Court shall send the execution case to the Court of the District Judge or any other competent Court to which it may be transferred by the District Judge will deal it in the same manner as if the case has been originally instituted in that Court.

Such application shall be made on affidavit verifying the facts alleged and stating that in the belief of the deponent the garnishee is indebted to the judgment debtor.

46 B.—Where the garnishee does not forthwith pay into the Court the amount due from him to the judgment-debtor or so much thereof as is sufficient to satisfy the decree and the costs of execution or does not appear and show cause in answer to the notice, the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree against him.

46 C.—Where the garnishee disputes liability, the Court may order that any issue or question necessary for the determination of liability shall be tried as if it were an issue in a suit, and upon the determination of such issue shall make such order or orders upon the parties as may seem just.

46 D. Where it is suggested or appears to be probable that the debt belongs to some third person, or that any third person has a lien or charge on, or other interest in such debt, the Court may order such third person to appear and state the nature and particulars of his claim (if any) to such debt and prove the same.

46 E. After hearing such third person and any other person or persons who may subsequently be ordered to appear or where such third or other person or persons do not appear when so ordered, the Court may make such order as is hereinbefore provided or such other order or orders upon such terms, if any, with respect to the lien, charge or interest, if any, of such third person or other person as may seem fit and proper.

46 F. Payment made by the garnishee or a notice under rule 46 A or under any such order as aforesaid shall be valid discharge to him as against the judgment debtor and any other person ordered to appear as aforesaid for the amount paid or levied although such judgment may be set aside or reversed.

46 G. The costs of any application made under Rule 46A and of any proceedings arising therefrom or incidental thereto, shall be in the discretion of the Court.

46H. An order made under Rule 46B, 46C or 46E, shall be appealable as a decree.

II. Add the following as Rule 63A, Order 21 :—

When an attachment of movable property ceases the Court may order the restoration of the attached property to the person in whose possession it was before the attachment.

Rule 53.—(a) In sub-rule (1) (b) insert after the words "then by the issue to such other Court" the words "and to any Court to which it has been transferred for execution" and also insert therein the words "or Courts" after the words "requesting such other Court" (b). In sub-rule (1) (b) (ii) cancel the words "to execute its own decree" and substitute therefor the words "to execute the attached decree with the consent of the said decree-holder expressed in writing or the permission of the attaching Court."

(c) In sub-rule (4), insert after the words "by sending to such other Court" the words "and to any Court to which it has been transferred for execution." (d) In sub-rule (b) substitute the words "in contravention of the said order with knowledge thereof" for the words "in contravention of such order after receipt of notice thereof."

Rule 54.—Add the following as sub-rule (3) :—

"Such order shall take effect, where there is no consideration for such transfer or charge, from the date of the order, and where there is consideration for such transfer

or charge from the date when such order came to the knowledge of the person to whom or in whose favour the property was transferred or charged or from the date when the order was proclaimed under sub-rule (2) whichever is earlier."

Rule 57.—Add the following words at the end of rule 57 :—  
"Unless the Court shall make an order to the contrary."

Rule 58.—Add the following words at the end of the sub-rule (2) :—

"Upon such terms as the security, or otherwise as to the Court shall seem fit."

Rule 69.—Substitute the words "one Calender month" for the words "seven days" in sub-rule (2).

Rule 75.—(a) Insert the following words in sub-rule (2) after the words "where the crop from its nature does not admit of being stored" :—

"or can be sold to greater advantage in an unripe state (*e.g.*, as green wheat),

(b) Cancel the word "and" between the words 'tending' and "cutting" in sub-rule (2) and substitute therefor the word 'or'.

Rule 89.—In sub-rule (1), cancel the words "either owning such property or holding to interest therein by virtue of a title acquired before such sale" and substitute the words 'whose interest is affected by such sale (provided that such interest has not been voluntarily acquired by him after such sale).

Rule 90.—Add the following words to Rule 90 (1) :—

"Or on the ground of failure to issue notice to him as required by rule 22 of this order."

(b) Cancel the proviso to rule 90 (1), and substitute therefor the following :—

"Provided (i) that no sale shall be set aside on the ground of such irregularity fraud or failure unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity, fraud or failure.

(ii) that no sale be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person to whose presence the proclamation was drawn up, unless objection was made by him at the time in respect of the defect relied on.

Rule 98.—Insert the words "or on his behalf" after the words "at his instigation" occurring twice.

Rule 99.—Insert the words "to have a right" after the words 'in good faith.'

Insert the following as Order XXIA.

1. Every person applying to a Civil Court to attach movable property shall, in addition to the process-fee ( deposit such reasonable sum as the Court may direct, if it think necessary) for the cost of its removal to the Court-house (for its custody, and if such property is live-stock) for its maintenance according to the rates prescribed in Rule 2 of this Order. If the deposit, when ordered be not made, the attachment shall not issue. The Court may from time to time, order the deposit of such further fees as may be necessary. In default of due payment the property shall be released from attachment.

2. The following daily rates shall be chargeable for custody and maintenance of live-stock under attachment :

Goat and pig—Annas 2 to annas 4.

Sheep—Annas 2 to annas 3.

Cow and bullock—Annas 6 to annas 10.

Calf—Annas 3 to annas 6.

Buffalo—Annas 8 to annas 12.

Horse—Annas 8 to annas 12.

Ass—Annas 3 to annas 5.

Poultry—Annas 2 to annas 3 pies 6.

**Explanation** :—Although the rates indicated above are regarded as reasonable the Courts should consider individual circumstances and the local conditions and permit deposit at reduced rates where the actual expenses are likely to fall short of the minima or maxima. If any specimen of special value in any of the above classes is seized a special rate may be fixed by the Court. If any animal not specified is attached, the Court may fix the cost as a special case.

3. When the property attached consists of agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not

act under the proviso to Rule 43, Order 21, he may, unless the Court has otherwise directed, leave it in the village or place where it has been attached :—

(a) in the charge of the judgment-debtor or decree-holder or of some other person, provided that the judgment-debtor, decree-holder or other person enters into a bond in Form No. 15 A of the Appendix E to this Schedule with one or more sureties for the production of the property when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of fifteen days paid in advance.

4. If attached property (other than livestock) is not sold under the proviso to Rule 43, Order 21, or retained in the village or place where it is attached, it shall be brought to the Court-house at the decreeholder's expense and delivered to the proper officer of the Court. In the event of the decree-holder failing to make his own arrangement for the removal of the property with safety, or paying the cost thereof in advance to the attaching officer, then, unless such payment has previously been made into Court, the attachment shall at once be deemed to be withdrawn and the property shall be made over to the person in whose possession it was before attachment.

5. When livestock is attached it shall not, without the special order of the Court be brought to the Court or its compound or vicinity, but shall be left at the village or place where it was attached in the manner and on the conditions set forth in Rule 3 of this Order :

Provided that livestock shall not be left in the charge of any person under Clause (a) of the said rule unless he enters into a bond for the proper care and maintenance thereof as well as for its production when called for, and that it shall not be left in charge of an officer of the Court under Clause (b) of the said rule unless in addition to the requirements of the said clause provision be made for its care and maintenance.

6. When for any reason the attaching officer shall find it impossible to obtain compliance with the requirements of the preceding rule so as to entitle him to leave the attached livestock in the village or place where it was attached and no order has been made by the Court for its removal to the Court, the attaching officer shall not proceed with the attachment and no attachment shall be deemed to have been effected.

7. Whenever it shall appear to the Court that livestock under attachment are not being properly tended or maintained, the Court shall make such orders as are necessary for their care and maintenance and may if necessary direct the attachment to cease and the livestock to be returned to the person in whose possession they were when attached. The Court may order the decree-holder to pay any expenses so incurred in providing for the care and maintenance of the livestock, and may direct that any sum so paid shall be refunded to the decreeholder by any other party to the proceedings.

8. If under a special order of the Court livestock is to be conveyed to the Court, the decreeholder shall make his own arrangement for such removal, and if he fails to do so the attachment shall be withdrawn and the property made over to the person in whose possession it was before attachment.

9. Nothing in these rules shall prevent the judgment-debtor or any person claiming to be interested in attached livestock from making such arrangements for feeding, watering and tending the same as may not be inconsistent with its safe custody, or contrary to any order of the Court.

10. The Court may direct that any sums which have been legitimately expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the sale-proceeds of the attached property, if sold or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceeding.

11. In the event of the custodian of attached property failing, after due notice, to produce such property at the place named to the officer deputed for the purpose or to restore it to its owner if so ordered or failing in the case of livestock to maintain and take proper care thereof, he shall be liable to be proceeded against for the enforcement of his bond in the execution proceedings.

12. When property other than livestock is brought to the Court, it shall immediately be made over to the Nazir, who shall keep it on his sole responsibility in such place as may be approved by the Court. If the property cannot from its nature or bulk be conveniently stored, or kept on the Court premises or in the personal custody of the Nazir, he may, subject to the approval of the Court, make such arrangement for its safe custody under his own supervision as may be most convenient and economical. If any premises are to be hired and persons are to be engaged for watching the property the Court shall fix the charges for the premises and the remuneration to be allowed to the persons (not being officers of the Court) in whose custody the property is kept. All such costs shall be paid into Court by decree-holder in advance for such period as the Court may from time to time direct.

13. When attached livestock is brought to Court under special order as aforesaid it shall be immediately made over to the Nazir, who shall be responsible for its due preservation and safe custody until he delivers it up under the orders of the Court.

14. If there be a pound maintained by Government or local authority in or near the place where the Court is held, the Nazir shall, subject to the approval of the Court, be at liberty to place in it such livestock as can be properly kept there, in which case the pound-keeper will be responsible for the property to the Nazir and shall receive from the Nazir the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

15. If there no pound available or if in the opinion of the Court, it be inconvenient to lodge the attached livestock in the pound, the Nazir may keep them in his own premises, or he may entrust them to any person selected by himself and approved by the Court.

16. All costs for the keeping and maintenance of the livestock shall be paid into the Court by the decreeholder in advance for not less than fifteen days at a time as often as the Court may from time to time direct. In the event of failure to pay the costs within the time fixed by the Court, the attachment shall be withdrawn and the livestock shall be at the disposal of the person in whose possession it was at the time of attachment.

17. So much of any sum deposited or paid into Court under these rules as may not be expended shall be refunded to the depositor.

#### ORDER XXII.

Rule 11.—Add the following proviso to rule 11 :—

(Provided always that where an Appellate Court has made an order dispensing with service of notice of appeal upon legal representatives of any person deceased under Order XXI, Rule 14 (3), the appeal shall not be deemed to abate as against such party and the decree made on appeal shall be binding on the estate or the interest of such party."

#### ORDER XXVI.

Rule 9.—Omit the proviso to Rule 9, Order XXVI, First Schedule to the Code of Civil Procedure.

#### ORDER XXXII.

Rule 4.—Substitute the words (Except as otherwise provided in this order" for the words( where there is no other person fit and willing to act as guardian for the suit".

#### ORDER XXXIV.

Rule 4.—Re-number sub-rules (3) and (4) as sub-rules (4) and (5) respectively and insert the following as sub-rule (3) :—

[(3). The Court may in its discretion direct in the decree for sale that if the proceeds of the sale are not sufficient to pay the mortgage debt the mortgagor shall pay the balance personally "

#### ORDER XXXVII.

In clause (c) of rule 1 of Order XXXVII the word "and" shall be omitted.

After clause (c) the following clause shall be inserted, namely :—

[(cc) all Civil Courts (except Courts of Small Causes) in the District of Chittagong, Dacca, Pabna and 24 Parganas : and."

#### ORDER XXXIX.

Rule 1.—Renumber Rule 1 as Rule 1 (1) and add the following as sub-rules (2) and (3) :—

[(2) In case of disobedience, or of breach of the terms of such temporary injunction or order, the Court granting the injunction or making such order may order

the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding six months, unless in the meantime the Court directs his release.

"(3) The property attached under sub-rule (2) may, when the Court considers it fit so to direct, be sold and, out of the proceeds, the Court may award such compensation to the injured party as it finds proper and shall pay the balance, if any, to the party entitled thereto."

Order XLI.

Rule 14—Insert the following as clause (3) :—

"(3) It shall be in the discretion of the Appellate Court to make an order, at any stage of the appeal whether on its own motion, or *ex parte*, dispensing with service of such notice on any respondent who did not appear, either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of that Court or on the legal representatives of any such respondent :—

Provided that :

(a) The Court may require notice of the appeal to be published in any newspaper or newspapers as it may direct.

(b) No such Order shall preclude any such respondent or legal representative from appearing to contest the appeal.

XLVIII.

Rule 1—Cancel clause (2), Rule 1, Order XLVIII and substitute therefor the following :—

"(2) The Court-fee chargeable for such service shall be paid when the process is applied for, or within such time, if any, as the Court may, when ordering its issue, fix for the purpose." 17. 1. 1934.

ORDER XLIII.

"Rule 1—Insert the following after clause (1) Rule 1.

(ii) an order under rule 57 of Order XXI, directing that an attachment shall cease or directing or omitting to direct that an attachment shall continue".

ORDER XLVIII.

Insert the following words after the word "appendices" in Rule 3 of Order XLVIII.

"or such other forms as may be prescribed by the High Court of Judicature at Fort William in Bengal".

**Appendix A.**

FORM No. 13

In the form of "Breach of agreement to purchase land" cancel the word "bighas" acres  
and substitute therefor the words—

bighas

**Appendix B.**

FORM No. 1 A.

Insert the following form after form 1 and number it as 1 A.

"No 1 A.

SUMMONS to defendant for ascertainment whether the suit will be contested (Order V, rules 1 and 5).

Title.

To

(Name, description and place of residence).

WHEREAS has instituted a suit against you for you  
are hereby summoned to, to appear in this Court in person or by a  
pleader, duly instructed, and able to answer all material questions relating to  
the suit on the day of 19 , at

O'clock in the noon in order that on that day you may inform the Court whether  
you will or will not contest the claim either in whole or in part and in order that  
in the event of your deciding to contest the claim either in whole or in part directions  
may be given you as to the date upon which your written statement is to be filed  
and the witness or witnesses upon whose evidence you intend to rely in support of  
your defence are to be produced and also the document or documents upon which  
you intend to rely.

Take notice that, in default of your appearance on the day before-mentioned, the  
suit will be heard and determined in your absence and take further notice that in the

event of your admitting the claim either in whole or in part the Court will forthwith pass judgment in accordance with such admissions.

Given under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_.

*Seal* \_\_\_\_\_ *Judge* \_\_\_\_\_

**Notice.**—If you admit the claim either in whole or in part you should come prepared to pay into Court the money due by virtue of such admission together with the costs of the suit, to avoid execution of any decree which may be passed against your person or property, or both."

Form No. 10.

Insert the words "or proof of the above having been duly made by the declaration of \_\_\_\_\_" after the words "proof of the above having been duly taken by me on the oath of \_\_\_\_\_"

Form No. 11.

**Substitute the following for the existing Form No. 11.**

"No. 11.

**Declaration**—OF PROCESS-SERVER TO ACCOMPANY RETURN OF A SUMMONS OR  
NOTICE (Order V, rule 18).

**Title.**

I a process-server of this Court declare :—

(1) On the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, I received a summons issued by the Court of \_\_\_\_\_ in Suit No. \_\_\_\_\_ of 19\_\_\_\_, in the said Court, dated \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, for service on \_\_\_\_\_, (2) The said \_\_\_\_\_ was at the time personally known to me and I served the said summons on him/her \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, at about \_\_\_\_\_ o'clock \_\_\_\_\_ in the \_\_\_\_\_ noon at by tendering a copy thereof to \_\_\_\_\_ and requiring his/her signature to the original summons notice.

(a)

(b)

**Or**

(2) The said \_\_\_\_\_ not being personally known to me \_\_\_\_\_ pointed out to me a person whom he stated to be the said \_\_\_\_\_ and I served the said summons on him on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_\_, at about \_\_\_\_\_ o'clock in the \_\_\_\_\_ notice her \_\_\_\_\_ noon at by tendering a copy there of to him and requiring his signature to the her original service. \_\_\_\_\_ notice.

(a)

(b)

**Or**

(2) The said \_\_\_\_\_ and the house in which he ordinarily resides being personally known to me, I went to the said house, in \_\_\_\_\_ and thereon the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, at about \_\_\_\_\_ o'clock in \_\_\_\_\_ the \_\_\_\_\_ noon, I did not find the said \_\_\_\_\_.

(x)

(v)

**Or**

(2) One                      pointed out to me which he said was the house in which ordinarily resides. I did not find the said                      there.

 $(x)$ 

(g)

(a) Here state whether the process served, signed or refused to sign the process and in whose presence.

(b) Signature of proces-server.

(x) Enter fully and exactly the manner in which the process was served, with special reference to Order 5, rule 15 and 17.

(y) Signature of the process-server.

Or

(3) If substituted service has been ordered state fully and exactly the manner in which summons was served with special reference to the terms of the order for substituted service.

## APPENDIX D.

## Form No. 1.

Cancel the table under the head 'Cost of Suit' in Form No. 1 and substitute there- for the following :-

Plaintiff.	Defendant.
Rs. A.	Rs. A.
1. Stamp for plaint.	1. Stamp for power.
2. Stamp for power.	2. Stamp for petitions and affidavits.
3. Stamp for petitions and affidavits.	3. Costs of exhibits including copies made under the Bankers' Books Evidence Act, 1891.
4. Cost of exhibits including copies made under the Bankers' Books Evidence Act, 1891.	4. Pleadings' fee.
5. Pleadings' fee on Rs.	5. Subsistence and travelling allowances of witnesses (including those of party, if allowed by Judge).
6. Subsistence and travelling allowances of witnesses (including those of party if allowed by Judge.)	6. Process-fees.
7. Process-fees.	7. Commissioners' fees.
8. Commissioners' fees.	8. Demi paper
9. Demi paper.	9. Costs of transmission of records.
10. Costs of transmission of records.	10. Other costs allowed under the Code and General Rules and Orders.
11. Other costs allowed under the Code and General Rules and Orders.	11. Adjournment costs not paid in cash (to be deducted or added as the case may be).
12. Adjournment costs not paid in cash (to be added or deducted as the case may be).	

## Form No. 2.

Cancel the table under the head "costs of suit" in Form No. 2 and substitute therefor the following :-

Plaintiff.	Defendant.
Rs. A. P.	Rs. A. P.
1. Stamp for plaint.	1. Stamp for power.
2. Stamp for power.	2. Stamp for petitions and affidavits.
3. Stamp for petitions and affidavits.	3. Costs of exhibits including copies, made under the Banker's Books Evidence Act, 1891.
4. Cost of exhibits including copies made under the Banker's Books Evidence Act, 1891.	4. Pleadings' fee.
5. Pleadings' fee on Rs.	5. Subsistence and travelling allowance of witnesses (including those of party, if allowed by Judge).
6. Subsistence and travelling allowance of witnesses (including those of party, if allowed by Judge.)	6. Process-fees.
7. Process fees.	7. Commissioners' fee.
8. Commissioners' fee.	8. Demi paper.
9. Demi paper.	9. Costs of transmission of records.
10. Cost of transmission of records.	10. Other costs allowed under the Code and General Rules and Orders.
11. Other costs allowed under the Code and General Rules and Orders.	11. Adjournment costs not paid in cash (to be deducted or added as the case may be).
12. Adjournment costs paid in cash (to be added or deducted as the case may be).	

2. This rule will come into force from 1st January, 1928.





**APPENDIX H.****Form No. 14.**

Cancel columns 20 to 27 of Form No. 14—and substitute therefor the following columns.

	20 No. of Execution application as per execution application register and the date of application.	EXECUTION.
	21. Relief sought, if money, amount claimed.	
	22. Order and date thereof. If portion of relief not granted what portion.	
	23 Against whom order made.	
	24. For what amount to be stated.	
	25. Amount of cost.	RETURN OF EXECUTION.
	26. Adjustment and satisfaction reported, if any.	
	27. Amount paid into Court.	
	28. Persons arrested.	
	29 Whether judgment-debtor committed to jail, if not why not? If committed to jail the period of stay in it.	
	30. Minute of other return, other than arrest and payment.	
	31. Amount or relief still due and why execution petition is closed.	
	32. If petition is infructuous why and to what extent.	
	33. Appeal, if any, against order in execution and if so, the result.	

## APPENDIX IV.

## Rules made by the Chief Court of the Punjab and the High Court of Lahore.

## ORDER II.

Rule 8.—After rule 7 of order II, insert :—

"8. (1) Where an objection, duly taken has been allowed by the Court, the plaintiff shall be permitted to select the cause of action with which he will proceed, and shall, within a time to be fixed by the Court, amend the plaint by striking out the remaining causes of action.

(2) When the plaintiff has selected the cause of action with which he will proceed the Court shall pass an order giving him time within which to submit amended plaints for the remaining causes of action and for making up the Court-fees that may be necessary. Should the plaintiff not comply with the Court's order, the Court shall proceed as provided in rule 18 of Order VI and as required by the provisions of the Court-fees Act."

## ORDER V.

Rule 10.—To rule 10 the following proviso was added :—

"Provided that in any case if the plaintiff so wishes the Court may serve the summons in the first instance by registered post (acknowledgment due) instead of in the mode of service laid down in this rule." 24. 11. 1927.

Rule 15.—In rule 15 after the words "where in any suit the defendant can not be found" the following words were inserted :—

"or is absent from his residence."

## ORDER VII.

Rule 2.—In the second paragraph of rule 2 of Order VII after the words "and the defendant" insert "or for movables in the possession of the defendant, or for debts of which the value he cannot, after the exercise of reasonable diligence, estimate," and after the words "the amount" insert "or value".

Rules 19 to 25.—Add the following after rule 18.

19. Every plaint or original plaint shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiff or petitioner subsequently added shall, immediately on being so added, file a proceeding of this nature.

20. An address for service filed under the proceeding rule shall be within the local limits of the District Court within which the suit or petition is filed or of the District Court within which the party ordinarily resides, if within the limits of the territorial jurisdiction of the High Court of Judicature at Lahore.

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice, summons or other process can be served is present, a copy of the notice, summons or other process shall be fixed to the outer door of the house. If on the date fixed such party is not present, another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post, and such service shall be deemed to be as effectual as if the notice, summons or other process had been personally served.

23. Where a party engages a pleader, notices, summons or other processes for service on him shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at the address for service given by the party.

24. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

25. Nothing in these rules shall prevent the Court from directing the service of a notice, summons or other process in any other manner, if, for any reasons, it thinks fit to do so.

#### Order VIII.

Rule 1.—In Rule 1, the following was added :—

“and with such written statement shall produce in Court all documents in his possession or power on which he bases his defence or any claim for set-off.”

(2). Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his defence or claim for set-off he shall enter such documents in a list to be added or annexed to the written statement.”

Rules 11 and 12—Add the following rules :—

“11. Every party, whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons, notice or other process served on him as the date of hearing, file in Court a proceeding stating his address for service, and, if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make such order as it thinks just.

12. Rules 20, 22, 23, 24 and 25 of Order VII shall apply, so far as may be, to addresses for service filed under the preceding rule.”

#### ORDER IX.

Rule 9 (1)—To rule 9 (1) the following proviso shall be added :—

“Provided that the plaintiff shall not be precluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default.”

Rule 13—To sub-rule (1) the following further proviso shall be added :—

Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced :

Provided also that no *ex parte* decree shall be set aside under this rule on the ground that the summons was not duly served if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim.

*Explanation* :—Where a summons has been served under Order 5, rule 15 on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of the rule.

#### ORDER XIII.

Rule 9—To sub-rule (1) the following further proviso was added :—

“Provided further that the cost of such certified copy shall be recoverable as a fine from the party at whose instance the original document has been produced.”

#### ORDER XVI.

Rule 1.—To rule (1) the following proviso has been added :—

“Provided that no party who has begun to call his witness shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to produce any witness not named in a list, which must be filed in Court on before the date on which the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence without an order of the Court made in writing and stating the reasons therefor.”

15. 10. 32.

Rule 2. (1) Add the following as an Exception to rule 2 (1) :—

Exception—when applying for a summons for any of its own officers, Government will be exempt from the operation of clause (1).

Rule 3. For rule 3, substitute :—

“3 (1) The sum so paid into a Court shall except in the case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

(2) When the person summoned is a Government servant, the sum so paid into Court shall be credited to Government.

*Exception* (1)—In cases in which the Government servants have to give evidence at a Court situate not more than five miles from their head quarters,

actual travelling expenses incurred by them may when the Court considers it necessary, be paid to them.

*Exception (2)*—A Government servant, whose salary does not exceed Rs. 10 per mensem, may receive his expenses from the Court.

Rule 4. After the word 'summoned,' where it first occurs in rule 4 (1), insert :—  
"or when such person is a Government servant, to be paid into Court."

#### ORDER XVII.

Rule 1 (3) To rule, add the following as sub-rule (3) :—

"(3) Where sufficient cause is not shown for the grant of an adjournment under sub-rule (1) the Court shall proceed with the suit forthwith."

#### ORDER XXI.

Rule 1.—In rule (1) the following explanation was added :—

Explanation.—The judgment-debtor may, if he so desires, pay the decretal amount, or any part thereof, into the Court under clause (a) by postal money order on a form specially approved by the High Court for the purpose.

(2) Where any payment is made under clause (a) of sub-rule (1), notice of such payments shall be given to the decree-holder.

Rule 10.—Add as para second the following proviso :—

"Provided that if the judgment-debtor has left the jurisdiction of the Court which passed the decree, or of the Court to which the decree has been sent the holder of the decree may apply to the Court within whose jurisdiction the judgment-debtor is or to the officer appointed in this behalf, to order immediate execution on the production of the decree and of an affidavit of non-satisfaction by the holder of the decree pending the receipt of an order of transfer under section 39."

Rule 16.—Omit the words "and the judgment-debtor" after the word "transferor" in the first proviso.

Rule 17.—In sub-clause (1) omit the words after the words "if they have not been complied with" and substitute in its place the following :—

"The Court shall fix a time within which the defect shall be remedied, and if it is not remedied within such time, may reject the application."

Rule 22.—In sub-clause (1) (a) and in the proviso, substitute "two years" for "one year" wherever they occur.

In sub-clause (2) add at the end the following words :—

"Failure to record such reason shall be considered an irregularity not amounting to a defect in jurisdiction."

Rule 26.—In sub-rule (3) omit the word "may" after the word "Court" and insert the following words :—

"Shall, unless sufficient cause is shown to the contrary".

Rule 29 A.—Added by notification No. 2212 G. dated 12. 5. 1909 omitted by notification No. 563 G. dated 24. 11. 1927.

Rule 31.—In sub-rule (2) substitute the words "three months" for the words "six months" and add as second para to it the following :—"Provided that the Court may in any special case, according to the special circumstances thereof, extend the period beyond three months ; but it shall in no case exceed six months in all."

In sub-rule (3) omit the words "six months" and substitute in their place the following :—

"three months or such other period as may have been prescribed by the Court".

Rule 32.—In sub-rule (3) substitute the words "three months" for the words "one year" and add the following proviso :—

"Provided that the Court may for sufficient reason, on the application of the judgment-debtor, extend the period beyond 3 months ; but it shall in no case exceed one year in all."

In sub-rule (4) omit the words "one year" and substitute in its place the following :—  
"three months or such other period as may be prescribed by the Court".

•Rule 39.—In sub-rule (5) omit the words "in the civil prison."

Rule 43.—This rule was numbered as sub-rule (1) and the following further proviso and sub-rules (2) and (3) were added :—

"and provided also that, when the property attached consists of livestock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the ins-

tance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) In the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15A of Appendix E to this Schedule with one or more sufficient sureties for its production when called for, or

(b) In the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance, or

(c) In the charge of a village lambardar such other respectable person as will undertake to keep such property, subject to the orders of the Court, if such person enters into a bond in Form No. 15 B of Appendix E with one or more sureties for its production.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in rules 55, 57 or 60 of this order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

(3) When property is made over to a custodian under sub-clause (a) or (c) of clause (1), the schedule of property annexed to the Bond shall be drawn up by the attaching officer in triplicate and dated and signed by :

- (a) The custodian and his sureties.
- (b) The officer of the Court who made the attachment.
- (c) The person whose property is attached and made over.
- (d) Two respectable witnesses.

One copy will be transmitted to the Court by the attaching officer and placed on the record of the proceedings under which the attachment has been ordered, one copy will be made over to the person whose property is attached and one copy will be made over to the custodian.

The following rules were added :—

“43A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso to rule 43 or retained in the village or place where it is attached under the second proviso to that rule it shall be brought to the Court-house and delivered to the proper officer of the Court.

(3) A custodian appointed under the second proviso to rule 43 may at any time terminate his responsibilities by giving notice to the Court of his desire to be relieved of his trust and delivering to the proper officer of the Court the property made over to him.

(4) When any property is taken back from a custodian he shall be granted a receipt for the same.

43B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is retained shall provide for its maintenance and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house. Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of the property, if sold or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

43C. When an application is made for the attachment of live-stock or other movable property, the decree-holder shall pay into Court in cash such sum as will cover the cost of the maintenance and custody of the property for 15 days. If within three clear days, before the expiry of any such period of 15 days, the amount of such

costs for such further period as the Court may direct be not paid into Court, the Court on receiving a report thereof from the proper officer, may issue an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid.

43D. Any person who has undertaken to keep attached property under rule 43 (1) (c) shall be liable to be proceeded against as a surety under section 145 of the Code and shall be liable to pay in execution proceeding the value of any such property wilfully lost by him."

Rule 45.—Added the following to sub-rule (1) :—

And with every such application such charges as may be necessary for the custody of the crop up to the time at which it is likely to be fit to be cut or gathered shall be paid to the Court."

Rule 53.—In sub-rule (1) (b) insert after the words "then by the issue to such other Court," the words "and to the Court to which it has been transferred for execution."

In sub-rule (1) (b) (ii) cancel the words "to execute its own decree" and substitute therefor the words "to execute the attached decree with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court."

In sub-rule (b) substitute the words "with the knowledge" for the words "after receipt of notice."

Rule 54.—Add the following as sub-rule (3) :—

"(3) The order shall take effect, as against persons claiming under a gratuitous transfer from the judgment-debtor, from the date of the order of attachment, and as against others from the time they had knowledge of the passing of the order of attachment or from the date of the proclamation, whichever is earlier."

Rule 58.—Add at the end of the proviso to sub-rule (1) :—

"and that if an objection is not made within a reasonable time of the first attachment the objector shall have no further right to object to the attachment and sale of the same property in execution of the same decree, unless he can prove a title acquired subsequent to the date of the first attachment."

Rule 63A.—After rule 63, insert the following new rule :—

63A. (1) When the property attached is a debt the Court executing the decree shall investigate the claims of the judgment-debtor against the garnishee in respect thereto and may order the garnishee to pay the amount of the debt to the Court.

(2) The garnishee shall be deemed to be a party to the suit in which the decree was passed within the meaning of s. 47, and subject to the provisions of that section the order passed by the Court as a result of such investigation shall be conclusive between the judgment-debtor and the garnishee and no separate suit relating thereto shall lie."

Rule 66.—Add to sub-rule (2) clause (c) after the word "property" the following proviso : "Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property ; but the proclamation shall include the estimate, if any, given by either or both of the parties."

Rule 68.—Substitute the words "fifteen days" for "thirty days" and "one week" for "fifteen days" in this rule.

Rule 69.—In sub-rule (2) substitute the words "thirty days" for the words "seven days".

Rule 75.—In sub-rule (2) after the word "stored" the following words shall be inserted :—"or can be sold to great advantage in an unripe state, such as green wheat or grain".

Rule 89.—In sub-rule (1) cancel the words "either owing such property or holding an interest therein by virtue of a title acquired before such sale" and substitute the words "claiming any interest in the property sold at the time of the sale or at the time of making the application under this rule or acting for or in the interest of such a person."

Rule 90.—Add the following proviso as the third para :—

• "Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted."

Rule 98.—Insert the words "or on his behalf" after the words "some other person at his instigation" and add the following words at the end :—

"Such detention shall be at the public expense and the person at whose instance the detention is ordered shall not be required to pay subsistence allowance."

Rule 104.—For the purpose of all proceedings under this order service on any party shall be deemed to be sufficient if effected at the address for service referred to in Order VIII, rule 11, subject to the provisions of Order VII, rule 24, provided that this rule shall not apply to the notice prescribed by rule 22 of this order.

#### ORDER XXX.

1. To rule 1 of Order XXX the following explanation shall be added :—

*Explanation.*—"This rule applies to a joint Hindu family trading partnership".

#### ORDER XXXII.

1. Rule To rule 1 the following paragraph shall be added :—

Such person may be ordered to pay any costs in the suit as if he were the plaintiff.

Rule 3—The following sub-rules were substituted for sub-rules (3) and (4) :—

"(3) The plaintiff shall file with his plaint a list of relatives of the minor and other persons, with their addresses, who *prima facie* are most likely to be capable of acting as guardian for the suit for a minor defendant. The list shall constitute an application by the plaintiff under sub-rule (2) above.

(4) The Court may, at any time after institution of the suit, call upon the plaintiff to furnish such a list, and, in default of compliance may reject the plaint.

(5) Any application for the appointment of a guardian for the suit and any list furnished under this rule shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that each person proposed is a fit person to be so appointed.

(6) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or where there is no such guardian, upon notice to the father or natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under the sub-rule :

Provided that the Court may, if it sees fit, issue notice to the minor also."

Rule 4—New sub-rule (2A) was inserted after sub-rule (2) :—

(2 A) Where a minor defendant has no guardian appointed or declared by competent authority, the Court may, subject to the proviso to sub-rule (1) appoint as his guardian for the suit a relative of the minor.

If no proper person be available who is a relative of the minor, the Court shall appoint one of the other defendants, if any, and failing such other defendant shall ordinarily proceed under sub-rule (4) of this rule to appoint one of its officers, and the following words were added to sub-rule (3) :—

"but the Court may presume such consent to have been given, unless it is expressly refused."

#### ORDER XXXVII.

Rule 1—The word "and" and new clause (e) were added :—

"and

(e) the Court of the District Judge and Subordinate Judges of the First class of the Delhi Province and the Courts of the District Judges and Subordinate Judges of the First Class in the Civil Districts of Lahore and Amritsar in the Province of the Punjab."

Rule 3—To rule 3 the following sub-rule was added :—

"(3) The provision of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

#### ORDER XLI.

Rule 1—The following proviso has been added to sub-rule (1) :—

"Provided that when two or more cases are tried together and decided by the same judgment, and two or more appeals are filed against the decrees, whether by the same or different appellants, the officer appointed in this behalf may, if satisfied that the questions for decision are analogous in each appeal, dispense with the production of more than one copy of the judgment."

Rule 35—The following further proviso was added :—

"Provided also in the case of the High Court, that in the absence of a Judge who passed a decree, or one or more Judges who passed a decree, either the Registrar or the Deputy Registrar of the Court shall sign the decree on behalf of such absent



Judge or Judges ; but that neither the Registrar nor the Deputy Registrar shall sign such decree on behalf of a Judge who dissented from the judgment of the Court."

Rule 38—After rule 37 new rule 38 shall be added :—

"38, (1) An address for service filed under Order VII, rule 19, or Order VIII, rule 11, or subsequently altered under Order VII, rule 24, or order VIII, rule 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rules 21, 22, 23, 24 and 25 of Order VII shall apply, so far as may be, to appellate proceedings."

#### ORDER XLII.

Rule 2—Add the following rule as rule 2 :—

"2. In addition to the copies specified in Order XLI, rule 1, the memorandum of appeal shall be accompanied by a copy of the judgment of the Court of first instance, unless the Appellate Court dispenses therewith."

#### APPENDIX B.

##### Form No. 11.

AFFIDAVIT OF PROCESS-SERVERS TO ACCOMPANY RETURN OF A SUMMONS OR NOTICE (O. 5, r. 18.)

##### *Title.*

The affidavit of \_\_\_\_\_ son of \_\_\_\_\_ make oath and says as follows :—  
affirm

(1) I am a process-server of this Court.

(2) On the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, I received a summons issued by the Court of \_\_\_\_\_ in Suit No. \_\_\_\_\_ of 19\_\_\_\_, in the notice said Court, dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, for service on. \_\_\_\_\_.

(3) The said \_\_\_\_\_ was at the time personally known to me and I served the said summons on him on the \_\_\_\_\_ day of \_\_\_\_\_ at about \_\_\_\_\_ O' clock on the \_\_\_\_\_ noon notice her at \_\_\_\_\_ by tendering a copy thereof to him and requiring his signature to the her original summons notice.

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process, and in whose presence.

(b) Signature of process-server.

(3) The said \_\_\_\_\_ or, not being personally known to me \_\_\_\_\_ accompanied to \_\_\_\_\_ and pointed out to me a person whom he stated to be the said \_\_\_\_\_ and I have served the summons on him on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, at \_\_\_\_\_ about \_\_\_\_\_ O'clock in the \_\_\_\_\_ noon at \_\_\_\_\_ by tendering a copy thereof to him and requiring his signature to the original summons notice her.

(a)

(b)

(a) Here state whether the person served signed or refused to sign the process, and in whose presence.

(b) Signature of process-server.

(3) The said \_\_\_\_\_ or, \_\_\_\_\_ and his house in which he ordinarily resides being personally known to me pointed out to me by \_\_\_\_\_

I went to the said house in \_\_\_\_\_ and there on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_\_,  
at \_\_\_\_\_ O'clock in the <sup>fore</sup>afternoon I did not find the said.

I enquired {<sup>a</sup><sub>b</sub> } neighbours.

I was told that \_\_\_\_\_ had gone to \_\_\_\_\_ and would not be back till \_\_\_\_\_  
Signature of process-server

or,

(3) If substituted service has been ordered, state fully and exactly the manner in which the summons was served with special reference to the terms of the order for substituted service.

Sworn by the said before me this day of 19 .  
Affirmed

Empowered under section 139 of the Code of Civil Procedure to administer the oath to defendants.

## APPENDIX E.

Form No. 15A.

**BOND FOR SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND LEFT  
IN CHARGE OF PERSON INTERESTED AND SURETIES.**

(O. XXII, r. 43).

In the Court of \_\_\_\_\_ at \_\_\_\_\_  
Civil Suit No. \_\_\_\_\_ of \_\_\_\_\_

**A. B. of**

**against**

C. D. of

Know all men by these presents that we I. J. of etc., and K. L. of etc., M. N. of etc., are jointly and severally bound to the Judge of the Court of in Rupees to be paid to the said Judge, for which payment to be made we bind ourselves and each of us, in the whole, our and each of our heirs, executors and administrators, jointly, and severally by these presents.

Dated this                      day of                      19                      .

And whereas the movable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court, dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, in execution of a decree in favour of \_\_\_\_\_ in Suit No. \_\_\_\_\_ of \_\_\_\_\_ 19\_\_\_\_ on the file of \_\_\_\_\_ and the said property has been left in the charge of the said I. J.

Now the condition of this obligation is that, if the above bounden, I. J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void ; otherwise it shall remain in full force.

I. J.  
K. L.  
M. N.

**Signed and delivered by the above bounden in the presence of**

Form No. 15B.

**BOND FOR THE SAFE CUSTODY OF MOVABLE PROPERTY ATTACHED AND  
LEFT IN CHARGE OF ANY PERSON AND SURETIES.**

[O. XXXI, r. 43 (I) (c)]

In the Court of \_\_\_\_\_ at \_\_\_\_\_  
Civil suit No. \_\_\_\_\_ of \_\_\_\_\_

**A. B. of**

**against**

**C. D. of**

Know all men by these presents that we I. J. of etc., and K. L. of etc.  
and M. N. of etc. are jointly and severally bound to the  
Judge of the Court in rupees. to be paid to the said Judge

for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this                      day of                      19                      .

And whereas the movable property specified in the Schedule hereunto annexed has been attached under a warrant from the said Court, dated the                      19                      , in execution of a decree in favour of                      in Suit No.                      of 19                      , on the file of                      and the said property has been left in the charge of the said I. J.

Now the condition of his obligation is that, if the above bounden I. J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void : otherwise it shall remain in full force and be enforceable against the above bounden I. J. in accordance with the procedure laid down in section 145, Civil Procedure Code, as if the aforesaid I. J. were a surety for the restoration of property taken in execution of a decree.

I. J.

K. L.

M. N.

Signed and delivered by the above bounden                      in the presence of,

## APPENDIX V.

### Rules made by the High Court of Judicature at Madras.

#### ORDER III.

Rule 4—In sub-rule (1) the words "subscribed with his signature in his own hand" have been substituted for the words "in writing signed" and in sub-rule (2) the words "a document subscribed with his signature in his own hand" have been substituted for the words "a writing signed."

The following has been added as sub-rule (6) :—

"(6) No Government or other pleader appearing on behalf of the Secretary of State for India in Council, or on behalf of any public servant sued in his official capacity, shall be required to present any document empowering him to act."

Rule 5—At the end of the rule insert the following :—

"Explanation—Service on a pleader who does not act for his client shall not raise the presumption under this rule."

#### ORDER V.

Rule 5—Delete the first paragraph and substitute the following in lieu thereof :—

"5. The Court shall determine at the time of issuing the summons, whether it shall be—

(1) for the settlement of issues only, or (2) for the defendant to appear and

Summons to be either (1) to settle issue, or (2) to ascertain whether the suit is contested or not or (3) for final disposal. state whether he contests or does not contest the claim and directing him if he contest to receive directions as to the date on which he has to file his written, statement the date of trial and other matters and if he does not contest for final disposal of the suit at once ; or (3) for the final disposal of the suit ; and the summons shall contain a direction accordingly.

Rule 15—Delete the words "the defendant cannot be found" and in lieu thereof insert the words "the defendant is absent."

Rule 18 A.—Insert the following rule 18 A after rule 18 :—

"A District Judge, within the meaning of the Madras Civil Courts Act, 1873, may delegate to the Chief Ministerial officer of the District Court the power to order the issue of fresh summons

Chief ministerial officer, district Courts, may be empowered to order issue of fresh summons.

to a defendant when the return on the previous summons is to the effect that the defendant was not served and the plaintiff does not object to the issue of fresh summons within seven days after the return has been notified on notice board."

Substitute the following for rr. 25 and 26 in O. 5 —

25. Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons may be addressed to the defendant at the place where he is residing and sent to him by post, if there is postal communication between such place and the place where the Court is situate : Provided that, if, by any arrangement between the Local Government of the Province in which the Court is situate and the Government of the foreign territory in which the defendant resides, the summons can be served by an officer of the Government of such territory, the summons may be sent to such officer in such manner as by the said arrangement may have been agreed upon.

26. Where—

(a) In the exercise of any foreign jurisdiction vested in His Majesty or in the Governor-General in Council, a Political Agent has been appointed, or a Court has been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) The Governor-General in Council has, by notification in the *Gazette of India* declared, in respect of any Court situate in any such territory and not established or continued in the exercise of any such jurisdiction as aforesaid, that service by such Court of any summons issued by a Court under this Code shall be deemed to be valid service, or

(c) by any arrangement between the Local Government of the Province in which the Court issuing the summons is situated and the Government of the foreign territory in which the defendant resides the summons can be served by an officer of the Government of such territory. The summons may be sent to such Political Agent or Court, or in such manner as may have been agreed upon to the proper officer of the Government of the foreign territory by post or otherwise, for the purpose of being served upon the defendant ; and, if the summons is returned with an endorsement signed by such Political Agent or by the Judge or other officer of the Court or by the officer of the Government of the foreign territory that the summons has been served on the defendant in manner hereinbefore directed such endorsement shall be deemed to be evidence of service.

Make the following amendments and additions to Order 5 :—

27. In rule 27 after the words "send it" insert the words "by registered post prepaid for acknowledgment."

28. In rule 28 after the words "shall send" insert the words "by registered post prepaid for acknowledgment."

29A. Insert as rule 29A.—

Notwithstanding anything contained in the foregoing rules, where the defendant is a public officer (not belonging to His Majesty's Military or Naval forces or His Majesty's Indian Marine Service, sued in his official capacity service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons, which the defendant shall sign and return to the Court which issued the summons.

#### ORDER VII.

Rule 9—In rule 9 after the word "and", occurring in the third line delete the comma and the five following *vis.*, "if the plaint is admitted" and insert the expression "along with the plaint" after the words "shall present"

#### ORDER IX.

Rule 13—Make the following amendment to Order 9, rule 13 :—

(1) Renumber rule 13 as rule 13 (1). (2) Insert the following proviso to sub-rule (1) :—

"Provided further that no Court shall set aside a decree passed *ex-parte* merely on the ground that there has been an irregularity in the service of summons, if it be satisfied that the defendant had notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim.

(3) Add the following as sub-rule (2) to rule 13 :—

"(2) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)".

Rule 15—Add the following as rule 15 of Order IX :—

"15. (1) Rules 6, 13 and 14 shall apply *mutatis mutandis* to those proceedings in execution falling within section 47 of the Code in which notice to the opposite party is required under the provisions of the Code.

Setting aside *ex parte* orders in execution.

(2) Subject to the provisions of sub-rule (2) of rule 13 an application under this rule shall be made within thirty days of the date of the order or where the notice was not duly served, of the date when the applicant has knowledge of the order."

#### ORDER XII.

Rule 6—Re-number the existing rule 6 as sub-rule (1) and insert the following as sub-rule (2) and (3) :—

"(2) The Court may also of its own motion make such order to give such judgment as it may consider just, having due regard to the admissions made by the parties.

(3) Whenever an order or judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such order or judgment and bearing the same date as the day on which the order or judgment was pronounced."

#### ORDER XIII.

Rule 7. Add the following proviso to rule 7 (2) :—

"Provided that no document shall be returned which by force of the decree has become wholly void or useless."

Rule 9. Add the following as sub-rule (3) :—

"(3) Every application under the first proviso to sub-rule (1) above shall be made by a verified petition setting forth facts justifying the immediate return of the original and the Court may make such order as it thinks fit for costs of any or all the parties to the application, including any costs "incidental to the preparation of the certified copy to be substituted for the original" and may further direct that any party against whom any order for costs is made shall have such costs, if paid, "included as costs in the cause."

Add the following as sub-rule 4.

"(4) Subject to the provision of rule 8 above, where a document is produced by a person who is not a party to the suit and such person applies for the return of the document as hereinbefore provided and undertakes to produce it whenever required to do so, the Court shall, except for reasons to be recorded by it in writing require the party on whose behalf the document was produced to substitute with the least possible delay a certified copy for the original, and shall thereupon cause all the original documents to be returned to the applicant and may further make such orders as to costs and charges in this behalf as it thinks fit. If the copy is not so provided within the time fixed by the Court the original document shall be returned to the applicant without further delay.

#### ORDER XV.

Rule 2—Re-number rule 2 as sub-rule 2 (1) and insert the following as sub-rule (2) :—

"(2) Whenever, a judgment is pronounced under the provisions of this rule a decree may be drawn up in accordance with such judgment bearing the same date as the day on which the judgment was pronounced."

#### ORDER XVI.

Rule 4A. Insert the following as rule 4 A after rule 4 :—

"4 A. (1) Notwithstanding anything contained in the foregoing rules, in any suit by or against the Secretary of State for India in Council no payment in accordance with rule 2 or rule 4 shall be required when an application on behalf of Government is made for summons to a Government servant whose salary exceeds Rs. 10 per mensem and whose attendance is required in a Court situate more than five miles

Special provision for public servants summoned as witnesses in suits to which the Government is a party.

from his headquarter ; and the expenses incurred by Government in respect of the attendance of the witness shall not be taken into consideration in determining costs incidental to the suit.

(2) When any other party to such a suit applies for a summons to such an officer, he shall deposit in Court along with his application a sum of money for the travelling and other expenses of the officer according to the scale prescribed by the Government under whom the officer is serving and shall also pay any further sum that may be required under rule 4 according to the same scale ; and the money so deposited or paid shall be credited to Government.

(3) In all cases where a Government servant appears in accordance with this rule the Court shall grant him a certificate of attendance."

#### ORDER XVIII.

Rule 2.—At the end of the rule 2 insert the following Explanation :—

"Explanation.—Nothing in this rule shall affect the jurisdiction of the Court for reasons to be recorded in writing, to direct any party to examine any witness at any stage."

#### ORDER XX.

Rule 1.—The existing rule 1 is re-numbered as sub rule 1 (1) and the following is added as sub-rule (2) :—

"(2) The judgment may be pronounced by dictation to a shorthand-writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court.

Rule 3. For Order 20, rule 3, substitute the following rule :—

"(3) The judgment shall bear the date on which it is pronounced and shall be signed by the Judge and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review, provided also that where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court the transcript of the judgment so pronounced shall, after such revision as may be deemed necessary, be signed by the Judge."

Rule 6. For rule 6 (1) substitute the following :—

"(1) The decree shall agree with the judgment. It shall contain the number of the suit, the names and descriptions of the party, their addresses for service and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit."

In rule 6, after sub-rule (2) the following shall be added :—

"(2A) In all cases in which an element of champerty or maintenance is proved, the Court may provide in the final decree for costs on a special scale approximating to the actual expenses reasonably incurred by the defendant."

Rule 11.—Substitute the following for rule 11 :—

"11 (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalment, with or without interest, notwithstanding anything contained in the contract under which the money is payable.

2 After the passing of any such decree the Court may, on the application of the judgment-debtor and after notice to the decree-holder order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor 'or the taking of security from him, or otherwise, as it thinks fit.' "

Rule 12.—Add the following to rule 12 :—

"(3) Where an Appellate Court directs such an enquiry, it may direct the Court of First Instance to make the inquiry ; and in every case the Court of First Instance shall, on the application of the decree-holder, inquire and pass the final decree."

#### ORDER XXI.

Rule 2 (2)—Substitute the following for the existing Rule 2 (2) :—

"Any party to the suit, or his legal representatives or any person who has become surety for the decree-debt also may inform the Court of such payment or adjustment

and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified, and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly."

Rule 11—In sub-rule (2) of rule 11 between clauses (f) and (g) insert the following new clause :—

"(f) whether the original decree-holder has transferred any part of his interest in the decree and, if so, the date of the transfer and the name and address of the parties to the transferee".

Rule 17—In Order XXI, rule 17, add as rule 17(5).

(5) Registers in accordance with Forms Nos. 19, 20 and 21 in Appendix H are prescribed for use in all Civil Courts having jurisdiction over the classes of cases specified therein.

Rule 22—In rule 22 between sub-rules (1) and (2) insert the following :—

"(1A) Where from the particulars mentioned in the application in compliance with rule 11 (2) (ff) *supra* or otherwise the Court has information that the original decree-holder has transferred any part of his interest in the decree, the Court shall issue notice of the application to all parties to such transfer, other than the petitioner, where he is a party to the transfer."

In sub-rule (1) of rule 22, after clause (b) insert the following :—

"Or (c) where the party to the decree has been declared insolvent, against the Assignee or Receiver in insolvency."

(1) Amend Order 21, rule 25 (2) as follows :—

Insert the words "or cause him to be examined by any other Court" after the words "examine him."

(2) Add the following proviso to r. 25 (2) :—

Provided that an examination of the officer entrusted with the execution of a process by the Nazir or the Deputy Nazir under the general or special orders of the Court shall be deemed to be sufficient compliance with the requirements of this clause.

Rule 30. Delete the present sub-rules 4 and 5 of rule 30 of Order 21 and substitute the following :—

(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for his journey from the Court-house to the civil prison and from the civil prison on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer-in-charge of the civil prison.

(5) Sums disbursed under this rule by the decree-holder for the subsistence and cost of conveyance (if any) of the judgment-debtor shall be deemed to be costs in the suit.

Rule 40—Substitute the following for rule 40 :—

"40 (1) When a judgment-debtor appears before the Court in obedience to a notice issued under rule 37, or is brought before the Court after being arrested in execution of a decree for the payment of money and it appears to the Court that an insolvency petition has been presented by or against the judgment-debtor or that the judgment-debtor is unable from poverty or other sufficient cause to pay the amount of the decree or, if that amount is payable by instalments, the amount of any instalment thereof, the burden of proving the inability to pay being on the judgment-debtor, the Court may upon such terms (if any) as it thinks fit, make an order disallowing the application for his arrest and detention, or directing his release, as the case may be.

(2) Before making an order under sub-rule (1), the Court shall take into consideration any allegation of the decree-holder touching any of the following matters, namely :—

(a) the decree being for a sum for which the judgment-debtor was bound in any fiduciary capacity to account ;

(b) the transfer, concealment or removable by the judgment-debtor of any part of his property after the date of the institution of the suit in which the decree was

passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree :

(c) any undue preference given by the judgment-debtor to any of his other creditors ;

(d) refusal or neglect on the part of judgment-debtor to pay the amount of the decree or some part thereof when he has, or since the date of the decree has had, the means of paying it ;

(e) the likelihood of the judgment-debtor absconding or leaving the jurisdiction of the Court with the object or effect of obstructing or delaying the decree-holder in the execution of this decree.

(3) While any of the matters mentioned in sub-rule (2) are being considered, the Court may, in its discretion, order the judgment-debtor to be detained in the civil prison, or leave him in the custody of an officer of the Court, or release him on his furnishing security, to the satisfaction of the Court for his appearance when required by the Court.

(4) A judgment-debtor released under this rule may be re-arrested.

(5) Where the Court does not make an order under sub-rule (1) it shall cause the judgment-debtor to be arrested if he has not already been arrested and, subject to the other provision of his Code, commit him to the civil prison :

Provided that, in order to give the judgment-debtor an opportunity of satisfying the decree, the Court before making the order of committal may leave the judgment-debtor in the custody of an officer of the Court for a specified period not exceeding ten days or, release him on his furnishing security to the satisfaction of the Court for his appearance at the expiration of the specified period if the decree be not sooner satisfied.

When the Court sees fit to leave a judgment debtor in the custody of an officer of the Court and the judgment debtor does not pay the costs incidental to such intermediate custody, it shall be competent for the Court to require the decree-holder, on pain of his application for arrest being disallowed to pay into Court such sum as the Judge deems sufficient to cover such costs including *batta* for process-server subsistence of the judgment-debtor and cost of conveyance, if any : and sums disbursed by the decree holder under this proviso shall be deemed to be costs in this suit.

(5A). During the temporary absence of the Judge who issued the warrant under rule 37 or 38 the warrant of committal may be signed by any other Judge of the same Court or by any judicial officer superior in rank who has jurisdiction over the same locality, or where the arrest is made on a warrant issued by the District Judge, the warrant of committal may be signed by any Subordinate Judge or District Munsif, empowered in writing by the District Judge in this behalf.

(6) No judgment-debtor shall be committed to the civil prison or brought before the Court from the prison to which he has been committed pending the consideration of any of the matters mentioned in sub-rule (2) unless and until the decree-holder pays into Court such sum as the Judge may think sufficient to meet the travelling and subsistence expenses of the judgment-debtor and the escort for the journey to and from the prison. Sub-rule (5) of rule 39 shall apply to such payments.

For Order 22, r. 43, substitute the following rules, *viz* :—

43 (1). Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor, the attachment shall be made by actual seizure, and the attaching officer shall keep the property in his own custody or in the custody of one of his subordinates, and shall be responsible for the due custody thereof :

Provided that, when the property seized is subject to speedy and natural decay or when the expense of keeping it in custody likely to exceed its value, the attaching officer may sell it at once, and provided also that, when the property attached consists of live-stock, agricultural implements or other articles which cannot conveniently be removed and the attaching officer does not act under the first proviso to this rule, he may at the instance of the judgment-debtor or of the decree-holder or of any person claiming to be interested in such property leave it in the village or place where it has been attached—

(a) in the charge of the person at whose instance the property is retained in such village or place, if such person enters into a bond in the Form No. 15A



of Appendix E to this schedule with one or more sufficient sureties for its production when called for, or

(b) in the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.

(2) Whenever an attachment made under the provisions of this rule ceases for any of the reasons specified in rule 55 or rule 57 or rule 60 of this order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.

Insert the following rules :—

43A. (1) Whenever attached property is kept in the village or place where it is attached, the attaching officer shall forthwith report the fact to the Court and shall with his report forward a list of the property seized.

(2) If attached property is not sold under the first proviso, to rule 43 or retained in the village or place where it is attached under the second proviso to that rule, it shall be brought to the Court-house and delivered to the proper officer of the Court.

43B. (1) Whenever attached property kept in the village or place where it is attached is live-stock, the person at whose instance it is so retained shall provide for its maintenance, and, if he fails to do so and if it is in charge of an officer of the Court, it shall be removed to the Court-house.

Nothing in this rule shall prevent the judgment-debtor, or any person claiming to be interested in such stock from making such arrangements for feeding the same as may not be inconsistent with its safe custody.

(2) The Court may direct that any sums which have been expended by the attaching officer or are payable to him, if not duly deposited or paid, be recovered from the proceeds of property, if sold, or be paid by the person declared entitled to delivery before he receives the same. The Court may also order that any sums deposited or paid under these rules be recovered as costs of the attachment from any party to the proceedings.

Rule 48.—Substitute a comma for the period at the end of sub-rule (1) of rule 48 and add the following words at the end of the sub-rule :—

"Such amount or instalment being calculated to the nearest anna by fractions of anna, of six pies and over being considered as one anna and omitting amounts less than six pies."

Rule 52.—In Order XXI, rule 52, add the following as proviso (ii) and renumber the existing proviso as (i) :—

(ii) Provided further that, where the Court whose attachment is determined to be prior receives or realises such property, the receipt of realisation shall be deemed to be on behalf of all the Courts in which there have attachments of such property in execution of money decrees prior to the receipt of such assets.

Explanation :—Priority of attachment in the case of attachment of property in the custody of the Court shall be determined on the same principles as in the case of attachment of property not in the custody of the Court.

Rule 53. Add the following as sub-rule, 1 (c) to Order 21, rule 53 :—

"(c) If the decree sought to be attached has been sent for execution to another Court, the Court which passed the decree shall send a copy of the said notice to the former Court, and thereupon the provisions of clause (b) shall apply in the same manner as if the former Court had passed the decree and the said notice had been sent to it by the Court which issued it.

Rule 89.—At the end of sub-rule (1) insert the following proviso ;—

"Provided that where the immovable property sold is liable to discharge only a portion of the decree debt, the payment under clause (b) of this sub-rule need not exceed such amount as under the decree the owner of the property sold is liable to pay."

Rule 92.—In sub-rule (2) after the words "within thirty days from the date of sale" insert the following words :—

"and in case where the amount deposited has been diminished owing to any cause not within the control of the depositor such deficiency has been made good within such time as may be fixed by the Court."

## ORDER XXII.

Rule 4.—At the end of sub-rule (3) add the following words :—"except as herein after provided." Insert the following as new sub-rule (4) :—

"(4) The Court, whenever it sees fit, may exempt the plaintiff from the necessity to substitute the legal representative of any such defendant who has been declared *ex parte* or who has failed to file his written statement or who having filed it, has failed to appear and contest at the hearing ; and the judgment may in such case be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

## ORDER XXXIV.

Rule 5—Substitute the following for rule 5 (3) :—

"Where a payment in accordance with sub-rule (1) has not been made the Court shall on application made by the plaintiff in this behalf and after notice to all the parties pass a final decree directing that the mortgaged properties are sufficient part thereof be sold and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4."

5. Add the following as a proviso to Order 22, r. 5 :—

Provided that an Appellate Court before determining it may direct any lower Court to take evidence thereon and to return the evidence so taken together with its finding and reasons and may take such finding and reasons into consideration in determining the question.

11A.—In Order 22, after r. 11, add the following as 11A :—

11A. The entry on the record of the name of the representative of a deceased appellant or respondent in a matter pending before the High Court in its appellate jurisdiction, except in cases under appeal to the King in Council, shall be deemed to a *quasi-judicial* act within the meaning of section 123 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a Judge for disposal.

## ORDER XXV.

Rule 1.—The following shall be inserted as sub-rule (4) :—

"(4) In all cases in which an element of champerty or maintenance is proved, the Court may on the application of the defendant demand security for the estimated amount of the defendant's costs, or such proportion thereof as from time to time during the progress of the suit the Court may think just."

15.—Re-number the existing r. 15 in Or. XXVI as r. 15 (1) and insert the following as sub-rule (2) :—

(2) Before executing and returning any commission issued by foreign Courts under the provisions of s. 78 the Court or the Commissioner required to execute the commission may levy such fee as the High Court may from time to time prescribe in this behalf in addition to the fees prescribed for the issue of summons to witnesses and for expenses of such witnesses under r. 2 of Or. XVI.

## ORDER XXVI A.

1. The Court may in any suit issue a commission to such persons as it thinks fit to translate accounts and other documents which are not in the language of the Court.

2. The report of the Commissioner shall be evidence in the suit and shall form part of the record.

3. Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expense of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the Commission is issued.

## ORDER XXVII.

5.—For Order 27, r. 5, substitute the following rule :—

The Court in fixing the day for the Secretary of State for India in Council to answer the plaint shall allow not less than three months' time from the date of summons for the necessary communication with the Government through the proper channel and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Secretary of State for India in Council or the Government and may extend the time at its discretion.

## ORDER XXIX.

Rule 1A.—Insert as Rule 1A of Order 29 :—

1A. In suits against a Local Authority the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance.

## ORDER XXXII.

Rules 3 and 4.—Substitute rules 3 and 4 by new rule 3 :—

Qualifications to be a next friend or guardian. "3. (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

Provided that the interest of that person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than the guardian shall act as the next friend of the minor or to be appointed his guardian for the suit unless the Court considers for reasons to be recorded, that it is for the minors' welfare that another person be permitted to act or be appointed as the case may be.

(3) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the minor.

(4) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. The application, where it is by the plaintiff, shall set forth, in the order of their suitability a list of persons (with their full addresses for service or notice in Form No. 11A set forth in Appendix H hereto) who are competent and qualified to act as guardian for the suit for the minor defendant. The Court may, for reasons to be recorded, in any particular case, exempt the applicant from furnishing the list referred to above.

(5) The application referred to in the above sub-rule whether made by the plaintiff or on behalf of the minor defendant shall be supported by an affidavit verifying the fact that the proposed guardian has not or that one of the proposed guardians has, any interest in the matters in controversy, in the suit and adverse to that of the minor and that the proposed guardian or guardians are fit persons to be so appointed. The affidavit shall further state according to the circumstances of each case (a) particulars of any existing guardian appointed or declared by competent authority, (b) the name and address of the person, if any, who is the *de facto* guardian of the minor, (c) the names and addresses of persons, if any, who in the event of either the natural or the *de facto* guardian or the guardian appointed or declared by competent authority, not being permitted to act, are by reason of relationship or interest or otherwise, suitable persons to act as guardian for the minor for the suit.

Application for appointment of guardian to be separate from application for bringing on record the legal representatives, of a deceased party. (6) An application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representatives of a deceased plaintiff or defendant. The applications shall be by separate petitions.

(7) No order shall be made on any application under sub-rule (4) above except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or where there is no guardian, upon notice to the father or other natural guardian of the minor or where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may

be urged on behalf of any person served with notice under this sub-rule. The notice required by this sub-rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in Form No. 11 set forth in Appendix H hereto.

(8) Where the application is by the plaintiff, he shall, along with his application and affidavit referred to in sub-rule (4) and (5) above, produce the necessary forms in duplicate, filled in to the extent that is possible at that stage for the issue simultaneously of notices to two at least of the proposed guardians for the suit to be selected by the Court from the list referred to in sub-rule (4) above, together with a duly stamped voucher indicating that the fees prescribed for service have been paid.

If one or more of the proposed guardians signify his or their consent to act, the Court shall appoint one of them and intimate the fact of such appointment to the person appointed by registered post. If no one of the persons served signifies his consent to act, the Court shall proceed to serve simultaneously another selected two, if so many there be, of the persons named in the list referred to in sub-rule (4) above, but no fresh application under sub-rule (4) shall be deemed necessary. The applicant shall, within three days of intimation of unwillingness by the first set of proposed guardians, pay the prescribed fee for service and produce the necessary forms duly filled in.

(9) No person shall, without his consent, be appointed guardian for the suit. Whenever an application is made proposing the name of a person as guardian for the suit, a notice in Form No. 11A set forth in Appendix H hereto shall be served on the proposed guardian unless the applicant himself be the proposed guardian or the proposed guardian consents.

(10) Where the Court finds no person fit and willing to act as guardian, for the suit, the Court may appoint any of its officers or a pleader of the Court to be the guardian and may direct that the costs to be incurred by that officer in the performance of his duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of the costs as justice and the circumstances of the case may require.

(11) When a guardian for the suit of a minor defendant is appointed and it is made to appear to the Court that the guardian is not in possession of any or sufficient funds for the conduct of the suit on behalf of the defendant and that the defendant will be prejudiced in his defence thereby, the Court may, from time to time, order the plaintiff to advance monies to the guardian for purpose of his defence and all monies so advanced shall form part of the costs of the plaintiff in the suit. The order shall direct that the guardian, as and when directed, shall file in Court an account of the monies so received by him.

Rule 6.—Add the following proviso to sub-rule (2) :—

Provided that the Court may in its discretion dispense with such security in cases where the next friend or guardian for the suit is the manager of a joint Hindu family or the Karnavan of a Malabar Tarward and the decree is passed in favour of the joint family or the tarward.

Rule 7.—Add the following in Order 32 rule 7 :—

Rule 7 (A).—Where an application is made to the Court for leave to enter into an agreement or compromise or for withdrawal of a pursuance of a compromise or for taking any other action on behalf of a minor or other person under disability and such minor or other person under disability is represented by counsel or pleader, the counsel or pleader shall file in Court with the application a certificate to the effect that the agreement or compromise or action proposed is in his opinion for the benefit of the minor or other person under disability. A decree or order

for the compromise of a suit, appeal or matter, to which a minor or other person under disability is a party shall recite the sanction of the Court thereto and shall set out the terms of the compromise as in Form No. 24 in Appendix D to this Schedule.

Rule 14A.—In Order 32 after r. 14, add the following as rule 14A :—

14A. The appointment or discharge of a next friend or guardian for the suit of a minor in a matter pending before the High Court in its appellate jurisdiction except in cases under appeal to the King in Council, shall be deemed to be a *quasi-judicial* act within the meaning of section 128 (2) (i) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications represented out of time shall be posted before a Judge for disposal.

Rule 17.—Add as rule 17 of order 32 :—

17. In suits relating to the person or property of a minor or other person under the superintendence of the Court of Wards the Court in fixing the day for the defendant to appear and answer shall allow not less than two months' time between the date of summons and the date for appearance.

#### ORDER XL.

Rule 4.—Substitute the following for rule 4 of Order XL of the Code of Civil Procedure :—

"(1) If a receiver fails to submit his accounts and in such periods and in such form as the Court directs, the Court may order his property to be attached until he duly submits his accounts in the form ordered.

(2) The Court may, at the instance of any party to any suit or proceeding in which a receiver has been appointed or of its own motion, at any time make an enquiry as to what amount, if any, is due from the receiver as shown by his accounts or otherwise, or whether any loss to the property has been occasioned by his wilful default or gross negligence, and may order the amount found due or the amount of the loss so occasioned to be paid by the receiver into Court or otherwise within a period to be fixed by the Court. All parties to the suit or proceeding and the receiver shall be made parties to any such enquiry. Notice of the enquiry shall be given by registered post to the surety, if any, for the receiver ; but the cost of his appearance shall be borne by the surety himself unless the Court otherwise directs : Provided that the Court may, where the account is disputed by the parties and is of a complicated nature or where it is alleged that loss has been occasioned to the property or by the wilful default or gross negligence of the receiver, refer the parties to a suit. In all such cases the Court shall state in writing its reasons for the reference.

(3) If the receiver fails to pay any amount which he has been ordered to pay under sub-rule (2) of this rule, within the period fixed in the order, the Court may direct such amount to be recovered either from the security (if any) furnished by him under rule 3 or attachment and sale of his property, or, if his property has been attached under sub-rule (1) of this rule, by sale of the property so attached, and may apply the proceeds of the sale to make good any amount found due from him or any loss occasioned by him and shall pay the balance (if any) of the sale proceeds to the receiver.

#### ORDER XLI.

Rule 1 (1). Add the following sentence to sub. r. 1 of r. 1 of :—

The copy of the judgment shall be a printed copy in every case in which the High Court has prescribed that the judgment shall be printed when a copy is applied for the purpose of appeal.

Add the following as a proviso to O. 41, r. 1 (1) :—

Provided that, in appeals from decrees or orders under any special or Local Act to which the provisions of Parts II and III of the Limitation Act, IX of 1908, do not apply and in which certified copies of such decrees or orders have not been granted within the time prescribed for preferring an appeal, the Appellate Court may admit the memorandum of appeal subject to the production of the copy of the decree or order appealed from within such time as may be fixed by the Court.

Add the following sentence to sub-rule (2) of r. 1 :—

The memorandum shall also contain a statement of the valuation of the appeal for the purposes of the Court-fees Act.

Add the following as a new sub-rule (3) to Or. XLI, r. 1.

(3) When an appeal is presented after the period of limitation prescribed therefor it shall be accompanied by a petition supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period, and the Court shall not proceed to deal with the appeal in any way (otherwise than by dismissing it either under rule 11 of this Order or on the ground that it is not satisfied as to the sufficiency of the reasons for extending the period of limitation) until notice has been given to the respondent and his objections, if any, to the Court acting under the provisions of section 5 of Act 1908 have been heard.

Rule 5.—Substitute the following for the existing sub-rule (1) to rule 5 of Order XLI :—

"5 (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree ; but the Appellate Court may, for sufficient cause stay of execution of such decree and may, when the appeal is against a preliminary decree, stay the final decree in pursuance of the preliminary decree or the execution of any such making of a final decree if already made.

Rule 9.—In rule 9, delete sub-rule (2) and substitute the following in its place :—  
"Such book shall be called the Register of Appeals."

Rule 14.—Insert the following as a proviso to sub-rule (1) :—

"Provided that the appellate Court may dispense with service of notice on respondents against whom the suit has proceeded *ex parte* in the Court from whose decree the appeal is preferred."

Rule 18. In Order 41 rule 18, after the words "cost of serving the notice" insert the words "or if the notice is returned, unserved, to deposit within any subsequent period fixed the sum required to defray the cost of any further attempt to serve the notice.

Re-number rule 19 as rule 19 (1) and insert the following as sub rule (2) :—

"(2) The provisions of section 5 of the Indian Limitation Act, 1908, shall apply to applications under sub-rule (1)."

Rule 23.—Substitute the following for the present Rule 23 :—

Where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the decree is reversed in appeal, or where the Appellate Court in reversing or setting aside the decree under appeal considers it necessary in the interest of justice to remand the case the Appellate Court may by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded and shall send a copy of the judgment and order to the Court from whose decree the appeal is preferred with directions to readmit the suit under its original number in the register of civil suits, and proceed to determine the suit ; and the evidence if any recorded during the original trial shall subject to all just exceptions, be evidence during the trial after remand.

Rule 31.—Substitute the following for r. 31 :—

31. The judgment of the Appellate Court shall be in writing and shall state :—

- (a) the points for determination ;
- (b) the decision thereon ;
- (c) the reason for the decision ; and
- (d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled ;

and shall bear the date on which it is pronounced and shall be signed by the Judge or the Judges concurring therein : provided that, where the presiding Judge is specially empowered by the High Court to pronounce his judgment by dictation to a shorthand writer in open Court, the transcript of the judgment so pronounced shall after such revision as may be deemed necessary be signed by the Judge.

Rule 35 (2)—Substitute the following :—

"(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, their addresses for service and a clear specification of the relief granted or other adjudication made." \*

#### ORDER XLI A (NEW).

Appeals to the High Court from the Original decrees of subordinate Courts.

1. The rules contained in Order XLI shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order.

2 (1) The memorandum of appeal shall be accompanied by the prescribed fees for service of notice of appeal and the receipt of the accountant of the Court for the sum prescribed by the rules of Court.

(2) Notwithstanding anything contained in rule 22 of Order XLI, the period prescribed for entry of appearance by the respondent and filing by him of memorandum of cross-objections, if any, shall, unless otherwise ordered, be thirty days from the service of notice upon him.

3 (1) If the respondent intends to appear and defend the appeal he shall within the period specified in the notice of appeal enter an appearance by filing in Court a memorandum of appearance.

(2) If a respondent fails to enter an appearance within the time and in the manner provided by the sub-rule above, he shall not be allowed to translate or print any part of the record :

Provided that a respondent may apply by petition for further time, and the Court may thereupon make such order as it thinks fit. The application shall be supported by evidence to be given on affidavit as to the reason for the applicant's default, and notice thereof shall be given to the appellant and all parties who have entered an appearance. Unless otherwise ordered the applicant shall pay the costs of all parties appearing upon the application.

4 (1) The memorandum of appeal and the memorandum of appearance shall state an address for service within the city of Madras at which service of any notice, order or process may be made on the party filing such memorandum.

(2) If a party appears in person, the address for service may be within the local limits of the jurisdiction of the Court from whose decree the appeal is preferred :

Provided that if such party subsequently appears by a pleader he shall state in the vakalat an address for service within the city of Madras, and shall give notice thereof to each party who has appeared.

(3) If a party appears by a pleader, his address for service shall be that of his pleader and all notices to the party shall be served on his pleader at that address.

5. The Court may direct that service of a notice of appeal or other notice or process shall be made by sending the same in a registered cover prepaid for acknowledgment and addressed to the address for service of the party to be served which has been filed by him in the lower Court : Provided that, after a party has given notice of an address for service in accordance with Rule 4, service of any notice or process shall be made at such address.

6. All notices and processes, other than a notice of appeal, shall be sufficiently served if left by a party or his pleader, or by a person employed by the pleader, or by an officer of the Court, between the hours of 11 a. m. and 5 p. m. at the address for service of the party to be served.

7. Notices which may be served by a party or his pleader under Rule 6, or which are sent from the office of the Registrar, may, unless the Court otherwise directs, be sent by registered post, and the time at which the notice so posted would be delivered in the ordinary course of post shall be considered at the time of service thereof and the posting thereof shall be a sufficient service.

8. If there are several respondents, and all do not appear by the same pleader, they shall give notice of appearance to such of the other respondents as appear separately.

9. A list of all cases in which notice is to be issued to the respondent shall be affixed to the Court notice board after the case has been registered.

10 (1) If upon a case being called on for hearing by the Court, it appears that the record has not been translated and printed in accordance with the rules of Court, the Court may hear the appeal or dismiss it, or may adjourn the hearing and direct the party in default to pay costs, or may make such order as it thinks fit.

(2) If the Court proceeds to hear the appeal, it may refuse to read or refer to any part of the record which is not included in the printed papers.

11. When costs are awarded, unless the Court otherwise orders, the costs of a party appearing upon any application before the Registrar or the Court, shall be Rs. 15, and the costs of appearing when the appeal is in the daily cause list for final hearing and is adjourned shall be Rs. 30. At the request of any party the Registrar shall cause the order to be drawn up and the said costs to be inserted therein.

## MEMORANDUM OF OBJECTIONS.

12. (1) If the acknowledgment mentioned in Rule 22 (3) of Order XLI is not filed, the respondent shall, together with the memorandum of objections file so many copies thereof as there are parties affected thereby.

(2) The prescribed fees for service shall be presented together with the memorandum to the Registrar.

13. If any party or the pleader of any party to whom a memorandum of objections has been tendered has refused or neglected for three days from the date of tender to give the acknowledgment mentioned in Rule 22(3) of Order XLI, the respondent may file an affidavit stating the facts and the Registrar may dispense with the service of the copies mentioned in Rule 12(1).

14. Rule 31 of Order XLI shall not apply, to the High Court. If the judgment is given orally a short-handnote thereof shall be taken by an officer of the Court and a transcript made by him shall be signed or initialled by the Judge or by the Judges concurring therein after making such corrections as may be considered necessary.

## ORDER XLI—B (New).

1. The rules of Order XLIA shall apply, so far as may be, to appeals to the High Court of Madras under clause 15 of the Letters Patent of the said Court :

Provided that it shall not be necessary to file copies of the judgment and decree appealed from.

2. Notice of the appeal shall be given in manner prescribed by Order XLIA Rule 6, or if the party to be served has appeared in person, in manner prescribed by Rule 5 of the said Order.

## ORDER XLII (New).

APPEALS FROM APPELLATE DECREE<sup>s</sup>.

1. The rules of Order XLI and Order XLI A shall apply, so far as may be, to appeals to the High Court of Judicature at Madras from appellate decrees with the modifications contained in this Order :

Provided that in appeals from appellate decrees the memorandum of appeal shall be accompanied by a copy of the decree appealed from and four printed copies of the judgment on which it is founded, one of them being a certified copy ; and also four printed copies of the judgment of the Court of first instance, one of them being a certified copy.

2 (1) The memorandum of appeal shall be printed or typewritten and shall be accompanied by the following paper :—

One certified copy of the decrees of Court of first instance and of the Appellate Court ; and four printed copies of each of the judgments of the said Courts one copy of each judgment being a certified copy.

(2) If any ground of appeal is based upon the construction of a document, a printed or typewritten copy of such document, shall be presented with the memorandum of appeal :

Provided that if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader to be a correct translation shall be presented.

(3) If the appellant fails to comply with this rule, the appeal may be dismissed.

## ORDER XLIII.

Rule 1.—Substitute the following for 1 (d) of Order XLIII of the Code of Civil Procedure :

(d) and order under rule 13 or rule 15 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree or order passed *ex-parte*.

Substitute the following for sub-rule (s) of rule 1 of Order XLIII of the Code of Civil Procedure :

(s) An order under rule 1 or 4 of Order XLI except an order under the proviso to sub-rule (2) of rule 4.

Rule 2.—Substitute the following for r. 2 :—

2. The rules of Order XLI and of Order XLI A shall apply, so far as may be, to appeals from the orders specified in Rule 1 and other orders of any Civil Court from which an appeal to the High Court is allowed under any provision of law :



Provided that in the case of appeals against interlocutory orders made prior to decree, the Court which passed the order appealed from shall not send the records of the case unless an order has been made for stay of further proceedings in that Court.

Rule 3.—Substitute the following for rule 3 of Order XLIII of the Code of Civil Procedure :—

3. (1) The provisions of Order XLII shall apply so far as may be, to appeals from Appellate Orders.

(2) A memorandum of appeal from an appellate order shall be accompanied by a certified copy of the judgment and of the order of the Court of first instance and by a certified copy of the judgment and of the order in the appellate Court.

3 If any ground of appeal is based upon the construction of a document, a printed or typewritten copy of such document shall be presented with memorandum of appeal:—

Provided that, if such document is not in the English language and the appellant appears by a pleader, an English translation of the document certified by the pleader to be a correct translation shall be presented.

#### ORDER XLVII.

Rule 7.—In sub-rule (1) substitute the word “order” for the word “application” occurring after the words on the ground that the” .

### Appendix B.

#### FORM NO.1.

Insert the following “Note” in Form No. 1, namely :—

Note.—Also take notice that in default of your filing an address for service before the day before-mentioned you are liable to have your defence struck out.”

After Form No. 1, insert the following as Form No. 1 A :—

“No 1 A.

SUMMONS FOR ASCERTAINING WHETHER A SUIT IS CONTESTED OR NOT, AND IF NOT CONTESTED FOR ITS IMMEDIATE DISPOSAL.

(O. V. rr. 1, 5.)

(Title).

To

(Name, description and place of residence)

WHEREAS has instituted a suit against you for you are hereby summoned to appear in this Court in person or by a pleader duly instructed, and liable to answer all material questions relating to the suit or who shall be accompanied by some person able to answer all such questions on the day of 19 , at o'clock in the noon and to state whether you contest or do not contest the claim and if you contest to receive directions of Court as to the date on which you have to file the written statement, the date of trial and other matters.

Take notice that in the event of the claim not being contested the suit shall be decided at once.

Take further notice that in default of your appearance on the day and hour before mentioned, the suit will be heard and determined in your absence.

GIVEN under my hand and the seal of the Court this day of 19 .  
Judge.

Notice.—If you admit the claim you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person and property or both.”

After Form No. 12, insert the following as Form No. 12 A.

“No. 12 A.

NOTICE TO THE PROPOSED GUARDIAN OF A MINOR DEFENDANT  
RESPONDENT

(ORDER XXXII, rr. 3 and 4.)

(Title).

To

(Name, description and place of residence of proposed guardian).

Take notice that X plaintiff  
appellant in has presented a petition to the Court praying that you be appointed guardian *ad litem* to the minor defendant (s)  
respondent (s) and that the same will be heard on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_.

2. The affidavit of X has been filed in support of this application.

3. If you are willing to act as guardian for the said defendant (s)  
respondent (s) you are required to sign (or affix your mark to) the declaration on the back of this notice.

4. In the event of your failure to signify your express consent in manner indicated above, take further notice that the Court may proceed under Order XXXII, r. 4, Code of Civil Procedure, to appoint some other suitable person or one of its officers as guardian *ad litem* of the minor defendant (s)  
respondent (s) aforesaid.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_

(Signed) \_\_\_\_\_

(To be printed on the reverse).

I hereby acknowledge receipt of a duplicate of this notice and consent to act as guardian of the minor defendant (s)  
respondents (s) therein mentioned.

(Signed) Y. Z.

Witnesses.

1.

2".

Form No. 13 A.—Insert the following as Form No. 13 A after Form No. 13 in Appendix B of schedule I :—

No. 13 A.

Certificate of attendance to an officer of Government summoned as a witness in a suit to which the Government is a party.

(ORDER XVI, r. 4 A).

CAUSE TITLE.

This is to certify that (name) (designation) being a Government servant from the province of (name) was summoned to give evidence in his official capacity on behalf of the plaintiff  
defendant in the above suit  
matter and was in attendance in

this Court from the \_\_\_\_\_ day of \_\_\_\_\_ to the \_\_\_\_\_ day of 193\_\_\_\_, (inclusive) and that a sum of Rupees \_\_\_\_\_ has been paid into Court by the plaintiff  
defendant towards his travelling and subsistence allowance for \_\_\_\_\_ days

according to the scale prescribed by the Government of Province of (name) and that the said amount has been will be remitted to the Government treasury at \_\_\_\_\_ to be credited to Government under the head "XVIA—Miscellaneous Fees and Fines."

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_

*Presiding Judge or Chief Ministerial Officer.*

APPENDIX D TO SCHEDULE I.

Form No. 10A—Insert in Appendix D the following as Form No. 10 A :—

FORM No. 10 A.

Final decree for sale [Order 34, Rule 5 (2), or Order 34, Rule 8 (4) ]

TITLE.

Upon reading the preliminary decree passed in the above suit and the application of the plaintiff  
defendant dated \_\_\_\_\_ and upon hearing

Mr. \_\_\_\_\_ for plaintiff and Mr. \_\_\_\_\_ for defendant and it appearing that the payment directed by the said decree has not been made.

It is hereby decreed as follows :—

(1) That the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after) defraying thereout the expenses of the sale, be applied in payment of what is declared due to  $\frac{\text{plaintiff}}{\text{defendant}}$  in the aforesaid preliminary decree together with subsequent interest and subsequent costs and that the balance, if any, be paid to the  $\frac{\text{defendant}}{\text{plaintiff}}$  or other person entitled to receive it ; (2) that if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full the  $\frac{\text{plaintiff}}{\text{defendant}}$  be at liberty to apply for a personal decree for the amount of the balance ; and (3) that the  $\frac{\text{defendant}}{\text{plaintiff}}$  do also pay  $\frac{\text{plaintiff}}{\text{defendant}}$  Rs. for the cost of this application.

(Here enter description of mortgaged property in English or in the language of the Court)

**Note.**—(1) In the case of a decree under Order 34, rule 5 (2), score out the words plaintiff and defendant below the lines and in the case of a decree under Order 34, rule 8 (4), score out the same words occurring above the lines.

(2) Direction No. (2) should be struck out if the personal liability has not been adjudicated in the suit or has been declared not to exist.

Form No. 10 B—insert in Appendix D the following as Form No. 10 B :—

FORM NO. 10 B.

Final decree for redemption [(Order 34, Rule 3 (1), Order 34, Rule 5 (1) and Order 34, Rule 8 (1).]

#### TITLE.

Upon reading the preliminary decree in the above suit on \_\_\_\_\_ and the application of the  $\frac{\text{defendant}}{\text{plaintiff}}$  I. A. No. \_\_\_\_\_, dated and after hearing Mr. \_\_\_\_\_ pleader for the \_\_\_\_\_ and Mr. \_\_\_\_\_ pleader for the \_\_\_\_\_ and it appearing that the payment directed by the aforesaid decree has been made :—

It is hereby decreed as follows :—

That the  $\frac{\text{plaintiff}}{\text{defendant}}$  do deliver up to the  $\frac{\text{defendant}}{\text{plaintiff}}$  or to such person as he appoints all documents in his possession or power relating to the mortgaged property and do also retransfer the property to the  $\frac{\text{defendant}}{\text{plaintiff}}$  free from the mortgage and from all incumbrances created by the  $\frac{\text{plaintiff}}{\text{defendant}}$  or any person claiming under him (or by those under whom he claims) and do also put the  $\frac{\text{defendant}}{\text{plaintiff}}$  in possession of the property.

#### SCHEDULE.

Description of the mortgaged property.

The costs of the  $\frac{\text{defendant}}{\text{plaintiff}}$  in this proceeding :—

Particulars.

Amount.

**Note.**—(1) In the case of a decree under Order 34, rule 8 (1), score out the words plaintiff and defendant above the lines ; in the case of decree under Order 34, rule 3 (1) and rule 5 (1), score out the words plaintiff and defendant below the lines.

(2) The words "or by those, under whom he claims" will be inserted only if the mortgagee derives title from an original mortgagee.

Form No. 24.—Add the following as Form No. 24 in Appendix D :—

FORM NO. 24.

[Decree sanctioning a compromise of a suit on behalf of a minor or lunatic.]

#### TITLE.

• This suit coming on this day for final disposal in the presence of etc., and C. D. the defendant, a minor by E. F., his guardian *ad litem*, applying that this suit may be compromised in the terms of an agreement in writing, dated the \_\_\_\_\_ day of \_\_\_\_\_ and made between A. B., the plaintiff of the one part, and the said C. D. by the said guardian *ad litem* of the other part,

(or, on the terms hereafter set forth) and it appearing to this Court that the said compromise is fit and proper and for the benefit of the said minor, this Court doth sanction the said compromise on behalf of the said minor, and with the consent of all parties hereto ; it is ordered as follows :—

*(Set out the terms of the compromise.)*

#### APPENDIX E TO SCHEDULE I.

Form No. 15—For the word “Dated” substitute the words “Given under my hand and the seal of the Court, this                      day of                      .”

Form No. 15 A—Add the following as Form No. 15A in the Appendix E :—

##### FORM NO. 15A.

Bond for safe custody of movable property attached and left in charge of person interested and sureties.

#### ORDER XXI, RULE 43.

In the Court of  
of

at

Civil Suit No.

A. B. of \_\_\_\_\_  
against.

C. D. of \_\_\_\_\_

Know all men by these presents that we, I. J. of \_\_\_\_\_, etc., and K. L. of \_\_\_\_\_ etc., and M. N. of \_\_\_\_\_ etc., are jointly and severally bound to the Judge of the Court of \_\_\_\_\_ in Rupees \_\_\_\_\_ to be paid to the said Judge, for which payment to be made we bind ourselves, and each of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, by these presents.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_.

And whereas the movable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court dated the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_, in execution of a decree in favour of \_\_\_\_\_ in suit No. \_\_\_\_\_ of \_\_\_\_\_ 19 \_\_\_\_\_, on the file of \_\_\_\_\_ and the said property has been left in the charge of said I. J.

Now the condition of this obligation is that, if the above bounden I. J. shall duly account for and produce when required before the said Court all and every the property aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void : otherwise it shall remain in full force.

I. J.  
K. L.  
M. N.

Signed and delivered by the above bounden \_\_\_\_\_ in the presence of \_\_\_\_\_.

Form No. 29.—Add the following as a “Note” to Form No. 29.

(Proclamation of Sale)—of Appendix E to Schedule I of the Code of Civil Procedure, 1908 :—

“Note.—The title-deeds relating to the property have not been filed in Court, and the purchaser will take the property subject to the risk of there being mortgages by deposit of title-deeds, or mortgages not disclosed in the encumbrance certificate.”

##### Form No. 39.

Substitute the following for the old one :—

Order for delivery to certified purchaser of land at a sale in execution (O. 21, r.95).  
(Title.)

To

The bailiff of the Court.

WHEREAS \_\_\_\_\_ has become the certified purchaser of \_\_\_\_\_ at a sale in execution of decree in suit No. \_\_\_\_\_ of \_\_\_\_\_ 19 \_\_\_\_\_ ; you are hereby ordered to put the said \_\_\_\_\_, the certified purchaser, as aforesaid, in possession of the same ; and you are hereby further required to state in your return whether there are crops on the land and whether you have delivered them to the certified purchaser.

GIVEN under my hand and the seal of the Court, this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_.  
Judge.

APPENDIX F TO SCHEDULE I.

Form No. 9.—For Form No. 9 of Appendix F, substitute—  
Form No. 9.

Appointment of a Receiver.  
(Order XL, r. 1.)

TITLE.

WHEREAS it appears to the Court that in the above suit it is just and convenient to appoint a receiver of the properties specified below (or whereas the properties specified below have been attached in execution of a decree passed in the above suit on the                      day of                      192                      , in favour of                      .)

It is hereby ordered that A. B. be appointed (subject to his giving security to the satisfaction of the Court) the receiver of the said property and of the rents, issues and profits thereof under Order XL of the Code of Civil Procedure, 1908, with all powers under the provisions of that Order, except that he shall not without leave of the Court (1) grant leases for a term exceeding three years or (2) institute suits in any Court (except suits for rent) or (3) institute appeals in any Court (except from a decree in a rent suit) where the value of the appeal is over Rs. 1,000 or (4) expend on the repairs of any property in any period of two years more than half of the net annual rent of the property to be repaired, such rental being calculated at the amount at which the property to be repaired would be let when in a fair state of repair, provided that such amount shall not exceed Rs. 1,000.

And it is further ordered that the parties to the above suit and all persons defendants claiming under them do deliver up quiet possession of the properties, movable and immovable, specified below together with all leases, agreements for leases, kabuleats, account books, papers, memoranda and writings relating thereto to the said receiver. And it is further ordered that the said receiver do take possession of the said property, movable and immovable, and collect the rents, issues and profits of the said immovable property, and that the tenants and occupiers do attorn and pay their rents in arrear and growing rents to the said receiver. And it is further ordered that the said receiver shall have power to bring and defend suits in his own name and shall also have power to use the names of the plaintiffs and defendants where necessary. And it is further ordered that the receipt or receipts of the said receiver shall be a sufficient discharge for all such sum or sums of money or property as shall be paid or delivered to him as such receiver.

And it is further ordered that the said receiver do out of the first monies to be received by him pay the debts due from the said                      and shall be entitled to retain in his hands the sum of Rs.                      for current expenses, but, subject thereto shall pay his net receipts, as soon as the same come to his hands, into Court to the credit of this suit. He shall once in every                      months file his accounts and vouchers in Court, the first account to be filed on the                      day of                      and to be passed on the                      day of                      . He shall be entitled to commission at the rate of Rs.                      per cent. on the net amounts collected by him or to the sum of Rs.                      per month (or as the case may be) as his remuneration (or he shall act without any remuneration).

And it is further ordered (where an additional office establishment is required) that the said receiver shall be allowed to charge to the state in addition to his own office establishment the following further establishment :—

(Here enter specification of property.)

GIVEN under my hand and the seal of the Court, this                      day of                      19                      .

APPENDIX G TO SCHEDULE I.

FORM No. 6.—Insert the following note in red ink in Form No. 6, namely :—

"Also take notice that if an address for service is not filed before the aforesaid date, this appeal is liable to be heard and decided as if you had not made an appearance."

FORM No. 6A.—In Appendix G, insert the following as Form No. 6A :—  
Form No. 6A (Order XLIA, rule 2).

Notice to Respondent.

(CAUSE TITLE.)

Appeal from the                      of the Court of                      dated the                      day of                      19                      .  
To                      Respondents.

Take notice that an appeal from the above decree (order) has been presented by

the above-named appellants and registered in this Court, and that if you intend to defend the same you must enter an appearance in this Court and give notice thereof to the appellant or his pleader within 30 days after service of this notice on you..

If no appearance is entered on your behalf by yourself, your pleader or some one by law authorized to act for you in this appeal, it will be heard and decided in your absence.

The address for service of the appellant is that of his pleader Mr. A. B. (*insert address*) Madras.

(If the appellant appears in person, insert his address for service.)

GIVEN under my hand and the seal of this Court this  
day of 19 .

Registrar.

[Interlocutory application No. of 19 , has been made by appellant, and execution has been stayed (or other order made) by order dated the day of 19 .]

Form No 6B.—In APPENDIX G, insert the following as Form No. 6B :—

Form No. 6B (Order XLI-A, rule 3.)

Memorandum of Appearance.

(CAUSE TITLE.)

Take notice that the respondent intends to appear and defend the above appeal, and that his address for service of all notices and process is (*insert address*).

The said respondent requires a list of the papers, which the appellant proposes to translate and print.

Dated the day of 19 .

(Signed) C. D.

*Vakil for Respondent.*

To the Registrar, High Court of Judicature, Madras.

No. 9.

Omit from Form No. 9 in Appendix G. to the First Schedule to the Code of Civil Procedure the entire portion beginning with the words "Memorandum of Appeal," and ending with the words "the following reasons, namely :—"

No. 12. A.

Certificate of leave to Appeal to His Majesty in Council.

O. XLV, r. 7, C. P. C.

(In cases where the subject-matter of the appeal is of sufficient value and the findings of the Courts are not concurrent)

Read petition presented under O. XLV, r. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the decree of this Court in suit No. of 192 .

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and the other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondents (if he appears) this Court doth certify that the amount of the subject-value

matter of the suit in the Court of first instance is Rs. 10,000 upwards of Rs. 10,000 and the

amount of the subject-matter in dispute on appeal to His Majesty in Council is value

also of the value of Rs. 10,000 upwards of Rs. 10,000 or that the decree appealed from final order

involves directly some claim or question to property of the value of indirectly respecting

Rs. 10,000 and that the decree appealed from does not affirm the upwards of Rs. 10,000 final order decision of the lower Court.

No. 12 B.

Certificate of leave to appeal to His Majesty in Council.

O. XLV, r. 7, C. P. C.

(In cases where the subject-matter is of sufficient value and the findings of the Court concurrent.)

Read petition presented under O. XLV, r. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the  $\frac{\text{decree}}{\text{final order}}$  of this Court in suit No. of 192 .

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he appears) this Court doth certify that the  $\frac{\text{amount}}{\text{value}}$  of the subject-matter of the suit in the Court of first instance is  $\frac{\text{Rs. 10,000}}{\text{upwards of Rs. 10,000}}$  and the  $\frac{\text{amount}}{\text{value}}$  of the subject-matter in dispute on appeal to His Majesty in Council is also of the value of  $\frac{\text{Rs. 10,000}}{\text{upwards of Rs. 10,000}}$  or that the  $\frac{\text{decree}}{\text{final order}}$  appealed against involves directly some claim or question to property of the value of  $\frac{\text{Rs. 10,000}}{\text{indirectly}}$  and that the affirming  $\frac{\text{decree}}{\text{final order}}$  appealed from involves the following substantial question (s) of law, viz :—

- (1)
- (2)

No. 12-c.

Certificate of leave to appeal to His Majesty in Council.

O. XLV, r. 7, C. P. C.

(In cases where the subject-matter in dispute is either not of sufficient value or is incapable of money valuation.)

Read petition presented under O. XLV, r. 3 of the Code of Civil Procedure, praying for the grant of a certificate to enable the petitioner to appeal to His Majesty in Council against the  $\frac{\text{decree}}{\text{final order}}$  of this Court in suit No. of 192 .

The petition coming on for hearing upon perusing the petition and the grounds of appeal to His Majesty in Council and other papers material to the application and upon hearing the arguments of for the petitioner and of for the respondent (if he appears) this Court doth certify that the  $\frac{\text{amount}}{\text{value}}$  of the subject-matter of the suit both in the Court of first instance and in this Court is  $\frac{\text{below Rs. 10,000 in value}}{\text{incapable of money valuation}}$ ; this Court in the exercise of the discretion vested in it is satisfied that the case is a fit one for appeal to His Majesty in Council for the reasons set forth below, viz :—

- (1)
- (2)

APPENDIX H TO SCHEDULE I.

FORM No. 11.—Substitute the following form No. 11 of Appendix H:—

Form No. 11.

Notice to Guardian appointed or declared, or to Father or other Natural Guardian, or to the Person in charge of the Minor.

[ORDER XXXII, RULE 3(5)].

Title.

To

Guardian appointed or declared, or father or other natural guardian, or person in charge of the minor.

WHEREAS an application has been presented on the part of the  
in the above suit for the appointment of a guardian for the suit for  
the said minor, you are hereby required to take notice that, unless within  
days from the service upon you of this notice an application is made to this  
Court for the appointment of you or of some friend of the said minor to act as <sup>his</sup>  
guardian for the purposes of the said suit, the Court will proceed to appoint some <sup>her</sup>  
other person to act as guardian of the said minor for the purposes of the said .....  
GIVEN under my hand and the seal of the Court this ..... day of

191 .

Form No 11A.

Notice to proposed Guardian.

[ORDER XXXII, r. 4 (3).]

*Title.*

To ..... residing at

Take notice that the above-named petitioner has made an application to this  
Court to appoint you guardian for the suit of ..... minor defendant in No. .... of  
19 ....., and that the said application will be heard on the day of ..... next

GIVEN under my hand and the seal of the Court, this ..... day of ..... 19 .....

Forms No 14 to 25—Omitted.

## APPENDIX VI.

### Rules made by the High Court of Patna.

#### ORDER III.

Rule 5A.—“5A. Notwithstanding anything contained in Order III, rule 4 (3) of the First Schedule of the Code of Civil Procedure, 1908, no advocate shall be entitled to make or do any appearance, application or act for any person unless he presents an appointment in writing, duly signed by such person or his recognized agent or by some other agent duly authorized by power of attorney to act in his behalf ; or unless he is instructed by an attorney or pleader duly authorized to act on behalf of such person.”

“Rule 5 B.—Notwithstanding anything contained in Order III, sub-rule (2) and (3) of rule 4 of the First Schedule of the Code of Civil Procedure, 1908, no pleader shall act for any person in the High Court, unless he has appointed for the purpose in the manner prescribed by sub-rule (1) and the appointment has been filed in the High Court.”

#### ORDER V.

Rule 10.—Add the following to rule 10 :—

“Provided that in any case the Court may, of its own motion, or on the application of the plaintiff, send the summons to the defendant by post in addition to the mode of service laid down in this rule. An acknowledgment purporting to be signed by the defendant or an endorsement by postal servant that the defendant refused to take delivery may be deemed by the Court issuing the summons to be *prima facie* proof of service.”

#### ORDER VII.

#### RULES 19 TO 22.

Insert the following rules after rule 18 :—

“19. Every plaint or original petition shall be accompanied by a statement giving an address at which service of notice, summons or other process may be made on the plaintiffs or petitioner and every plaintiff or petitioner subsequently added shall, immediately on being so added, file a similar statement.

20. An address for service filed under the preceding rule shall state the following particulars :—

1. The name of the street and number of the house (if in a town) ;
2. The name of the town or village ;
3. The post office ;
4. The district ;
5. The Munsiffi (if in Bihar and Orissa) or the District Court (if outside Bihar and Orissa).

21. Where a plaintiff or petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.



22. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties or be sent to them by registered post, as the Court thinks fit.

## ORDER VIII.

Rule 6.—To rule 6 (1) the following shall be added :—

“and the provisions of Order VII, rules 14 to 18 shall, *mutatis mutandis* apply to a defendant claiming set off as if he were a plaintiff.”

Rules 11 and 12.—After rule 10 add the following rules :—

“11. Every party, whether original, added or substituted, who appears in any suit or other proceedings shall at the time of entering appearance to the summons, notice or other process served on him, file in Court a statement stating his address for service and if he fails to do so he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect and the Court may make an order as it thinks just.

“12. Rules 20 and 22 of Order VII shall apply, so far as may be, to addresses for service filed under the preceding rule.”

## ORDER XII.

Rule 6.—Substitute the following for rule 6 in Order XII—

6. Where admissions of fact have been made, either on the pleadings or otherwise, the Court may, at any stage of suit, on the application of any party, or of its own motion, without waiting for the determination of any other question between the parties, make such order or give such judgment, as it thinks just.

## ORDER XIII.

Rule 1.—In rule 1, after the words “at the first hearing of the suit” should be added the words :—

“Or, where issues are framed, on the day where issues are framed, or within such further time as the Court may permit.”

Rule 9.—Add the following as sub-rule (A) in rule 9, Order XXII—

9. (1-A.) Where a document is produced by a person who is not a party in the proceeding, the Court may require the party on whose behalf the document is produced, to substitute a certified copy for the original as hereinbefore provided.

## ORDER XVI.

Rule 2—2. (1)—Add the following proviso to O. 16. r. 2. (1) :—

Provided that the Secretary of State shall not be required to pay any expenses into Court under this rule when he is the party applying for the summons, and the persons to be summoned is an officer serving under Government, who is summoned to give evidence of facts which have come to his knowledge, or of matters with which he has had to deal in his public capacity.

(3)—Add the following proviso to rule 3 :—

Provided that when the person summoned is an officer of Government, who has been summoned to give evidence in a case to which Government is a party, of facts, which have come to his knowledge, or of matters with which he has had to deal, in his public capacity, then—

(i) if the officer's salary does not exceed Rs. 10 a month, the Court shall at the time of the service of the summons make payment to him of his expenses as determined by rule 2 and recover the amount from the Treasury :

(ii) if the officer's salary exceeds Rs. 10 a month and the Court is situated not more than 5 miles from his head quarters, the Court may, at its discretion, on his appearance, pay him the actual travelling expenses incurred :

(iii) if the officer's salary exceeds Rs. 10 a month and the Court is situated more than 5 miles from his head quarters no payment shall be made to him by the Court. In such cases any expenses paid into Court under rule 2 shall be credited to Government.

Rule 8—Add the following to rule 8 :—

“Provided that a summons under this order may, by leave of the Court, be served by the party or his agent, applying for the same, by personal service. If such service is not effected and the Court is satisfied that reasonable diligence has

been used by the party or his agent to effect such service then the summons shall be served by the Court in the usual manner.

#### ORDER XXI.

*Rule 43. Substitute the following for rule 43 of Order XXI :—*

43. Where the property to be attached is movable property, other than agricultural produce, in the possession of the judgment-debtor the attachment shall be made by actual seizure and the attaching officer shall be responsible for the due custody thereof :

Provided that when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attaching officer may sell it at once.

43A. Insert the following as rule 43A below rule 43 in Order XXI :—

43A. (1) The attaching officer shall, in suitable cases, keep the attached property in the village or locality either :—

(a) in his own custody in any suitable place provided by the judgment debtor or in his absence by any adult member of his family who is present, on his own premises or elsewhere ;

(b) in the case of livestock, and provided the decree-holder furnishes the necessary funds in the local pound, if a pound has been established in or near the village in which case the pound-keeper will be responsible for the property to the attaching officer, and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon ;

(c) in the custody of a respectable surety, provided the decree-holder furnishes the cost of maintenance and other cost, if any.

(2) If, in the opinion of the attaching officer, the attached property cannot be kept in the village or locality, through lack of a suitable place, or satisfactory surety, or through failure of decree-holder to provide necessary funds, or for any other reasons the attaching officer shall remove the property of the Court at the decree-holder's expense. In the event of the decree-holder failing to provide the necessary funds the attachment shall be withdrawn.

(3) Whenever attached property is kept in the village or locality as aforesaid, the officer shall forthwith report the fact to the Court, and shall with his report forward an accurate list of property seized, such that the Court may thereon at once issue the proclamation of sale prescribed by rule 66.

(4) If the debtor shall give his consent in writing to the sale of the property without awaiting the expiry of the term prescribed in rule 61, the officer shall receive the same and forward it without delay to the Court for its orders.

(5) When property is removed to the Court it shall be kept by the Nazir on his own sole responsibility in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the Court premises, or in the personal custody of the Nazir he may, subject to approval by the Court, make such arrangements for its safe custody under his own supervision as may be most convenient and economical and the Court may fix the remuneration to be allowed to the persons not being officers of the Court in whose custody the property is kept.

(6) When property remains in the village or locality where it is attached and any person other than the judgment-debtor shall claim the same, or any part of it, the attaching officer shall nevertheless unless the decree-holder desires to withdraw the attachment of the property so claimed, maintain the attachment and shall direct the claimant to prefer his claim to the Court.

(7) (a) If the decree-holder shall withdraw an attachment or it shall be withdrawn under sub-rule (2) or sub-rule (9), the attaching officer shall inform the debtor, or in his absence, any adult member of his family, that the property is at his disposal.

(b) In the absence of any person to take charge of it, or in case the officer shall have had notice of claim by a person other than the judgment-debtor, the officer shall if the property has been moved from the premises in which it was seized, replace it where it was found at the time of seizure.

(8) Whenever livestock is kept in the village or locality where it has been attached the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer ; but the latter shall, if required by the decree-holder, and on his paying for the same at the rate to be fixed by the District Judge, and the subject to the orders of the Court

under whose order the attachment is made, engage the services of as many persons as may be necessary, for the safe custody of it.

(9) In the event of the judgment-debtor failing to feed the attached livestock in accordance with sub-rule (8), the officer shall call upon the decree-holder to pay forthwith, for feeding the same, in the event of his failure to do so, the officer shall proceed as provided in sub-rule (2), and shall report the matter to the Court without delay.

(10) When attached livestock is brought to Court, the Nazir shall be responsible for the safe custody and proper feeding of it so long as the attachment continues.

(11) If a pound has been established in or near the place where the Court is held, the Nazir shall be at liberty to place in it such attached livestock as can be properly kept in which case the pound-keeper will be responsible for the property to the Nazir and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description, or such less rate as may be agreed upon.

(12) If there be no pound available, or if in the opinion of the Court it be inconvenient to lodge the attached livestock in the pound, the Nazir may keep it in his own premises, or he may entrust it to any person selected by himself and approved by the Court. The Nazir will in all cases remain responsible for the custody of the property.

(13) Each Court shall from time to time fix the rates to be allowed for the custody and maintenance of the various descriptions of livestock with reference to seasons and local circumstances. The district judge may make any alteration he deems fit in the rates prescribed by Courts subordinate to him. Where there are two or more Courts in the same place, the rates shall be the same for each Court.

Rule 104.—After 103 insert the following rule :—

"104. For the purpose of all proceedings under this order service on any party shall be deemed to be sufficient if effected at the address for service referred to in Order VIII, rule 11, subject to the provisions of Order VII, rule 22, provided that this rule shall not apply to the notice prescribed by rule 22 of this order."

#### ORDER XXVI.

Rule 14.—Substitute the following for sub-rules (2) and (3) of rule 14 :—

(2) The commissioner shall then prepare and sign a report or the commissioners (where the commission was issued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if necessary) by metes and bounds. The commissioner or commissioners shall append to the report, or where there is more than one to each report, a schedule showing the plots and areas allotted to each party and also, unless otherwise directed by the Court, a map showing in different colours the plots or portions of plots allotted to each party. In the event of a plot being subdivided, the area of each sub-plot shall be given in the Schedule, and also measurements showing how the plot is to be divided. Such report or reports with the schedule and the map, if any, shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(3) Where the Court confirms or varies the report or reports it shall pass a decree in accordance with the same as confirmed or varied and, when drawing up final decree shall incorporate in the decree the schedule, and the map, if any, mentioned in sub-rule (2) above, as confirmed or varied by the Court. The whole report or reports of the Commissioner or Commissioners shall not ordinarily be entered in the decree. Where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall think fit.

#### ORDER XXXII.

Rule 4.—In sub-rule (4) for the words "where there is no other person fit and willing to act as guardian for the suit" in the first sentence of the sub-rule substitute the following :—

"Where the person whom the Court, after hearing objections, if any, under sub-rule (4) of rule 3, proposes to appoint as guardian for the suit, fails within the time fixed in a notice to him to express his consent to be so appointed."

## ORDER XLI.

Rule 14.—Add the following as rule 14 (A) in Order XLI :—

"14 (A). The appellate Court may, in its discretion, dispense with the service of notice here-in-before required on a respondent, or on the legal representative of a deceased respondent, in a case where such respondent did not appear, either at any stage of the proceedings in the Court whose decree is appealed from or in any proceedings subsequent to the decree of that Court and no relief is claimed against such opposite party or respondent or his legal representative either in the original case or appeal."

Rule 38.—Add the following rule after rule 37 :—

"38 (1) An address for service filed under Order VII, rule 19, or Order VIII, rule 11, or subsequently altered under Order VII, rule 22, or Order VII, rule 12, shall hold good for all notices of appeals and all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processess shall issue from Appellate Court to such addresses.

(3) Rules 21 and 22 of Order VII shall apply, so far as may be, to appellate proceedings."

## APPENDIX D.

## FORM NO. 1.

Substitute the following for the Schedule of Courts of suits in the form of decree No. 1 :—

Plaintiff.	Amount. Rs. A. P.	Defendant.	Amount. Rs. A. P.
1. Stamp for plaint.		Stamp for power.	
2. Stamp for power.		Stamp for petition or affidavit.	
3. Stamp for petition or affidavit.		Costs for exhibits.	
4. Costs for exhibits.		Pleader's fee.	
5. Pleader's fee on Rs.		Subsistence.	
6. Subsistence.		(a) for defendant or his agent.	
(a) for plaintiff or his agent.		(b) for witnesses.	
(b) for witnesses.		Commissioner's fee.	
7. Commissioners' fee.		Service of process.	
8. Service of process.		Copying or typing charges.	
9. Copying or typing charges.			
TOTAL.	_____	TOTAL.	_____

## APPENDIX E.

## FORM NO. 38.

Substitute the following for FORM NO. 38 :—

No. 38.

Certificate of Sale of Land (Order XXI, Rule 94) District  
In the Court of at

Execution Case No.

of 19 .

decree-holder.

Versus

judgment-debtor.

This is to certify that  
caste by occupation son of by  
District has been declared the purchaser at a sale by  
public auction on the day of 19 , of the property specified  
below in execution of the decree in Suit No. of this Court (1) and that  
the said sale has been duly confirmed by this Court.

GIVEN under my hand and the seal of the Court this  
19 .

day (2) of

*Judge.*

Specification and price of properties (3).

(1) If the decree has been received by transfer from other Court, enter the name  
of that Court.

(2) The date when the sale became absolute.

(3) Particulars sufficient to identify the property including the name of each  
registration sub-district in which any part of the property is situated should be  
fully stated.

#### APPENDIX G.

##### FORM NO. 3.

In the Schedule of costs in the form of decree in Appeal add "copying or typing  
charges" below the item "pleaders' fee on Rs.....in the columns.

For Appellant and respondent, and number the new entry in first column as "5."

#### APPENDIX H.

##### FORM NO. 7.

Add the following "Note" at the foot :—

"Note.—The commissioner has power under chapter X of the Indian Evidence  
Act to control the examination of witnesses."

##### FORM NO. 11.

For Form No. 11 substitute the following forms :—

##### No. 7.

Notice to minor defendant and guardian of application for appointment of the  
guardian to be guardian for the suit (O. 32, r. 3).

*Title.*

To

.....  
.....Minor defendant.  
Guardian (Appointed by authority, or  
natural or the person in whose care  
the minor is, as the case may be).

WHEREAS an application has been presented on the part of the plaintiff in the  
above suit for the appointment of you \* as guardian for the suit to the minor  
defendant, you the said minor and you \* are hereby required to take notice  
that unless within 21 days from the service upon you if this notice you\*  
give your consent to be appointed to act as guardian, the Court will proceed, sub-  
ject to the decision of any objection that may be raised, to appoint an officer of the  
Court to act as guardian to you the minor for the said suit.

GIVEN under my hand and the seal of this Court, this

day of

19 .

*Judge.*

\* Here insert name of guardian.

FORM NO. 11A.

Notice to minor defendant and guardian of application for appointment of another person to be guardian for the suit. (O. 32, r. 3.)

To

Minor defendant.

Guardian (appointed by authority or natural, or the person in whose care the minor is).

WHEREAS an application has been presented on the part of the plaintiff in the above suit for appointment of (\*) as guardian for the suit to the minor defendant, you the said minor and you (†) are hereby required to take notice that unless within 21 days from the service upon you of this notice you (†) make an application for the appointment of yourself or of some friend of you the minor to act as guardian, the Court will proceed, subject to the decision of any objection that may be raised, to appoint (\*) or an officer of the Court to act as guardian to you the minor for the said suit.

GIVEN under my hand and the seal of this Court this day of 19 .  
Judge.

Form No. 11B.

Notice to the proposed guardian for the minor defendant, when the person proposed is not the guardian appointed by authority of the natural guardian or the person in whose care the minor is.

Order XXXII, rule 4.

(Title.)

District

In the Court of  
Suit No.

at  
of 19 .  
Plaintiff  
Versus  
Defendant.

To

Proposed guardian.

WHEREAS an application has been presented by the plaintiff in the above case for the appointment of you† as guardian for the suit to the minor defendant you are hereby required to take notice that unless within.....days from the service upon you of this notice you make an application to the Court intimating your consent to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the said suit.

GIVEN under my hand and the seal of this Court, this day of 19 .  
Judge.

(\*) Here insert name and description of proposed guardian.

(†) Here insert name of guardian upon whom the notice is to be served.

‡ Here insert the name of the proposed guardian.

## SUBSTITUTE THE FOLLOWING FORM FOR FORM NO. 14.

Register of Civil Suits (O. 4, r. 2.)

Court of the \_\_\_\_\_ at \_\_\_\_\_  
 Register of Civil suits in the year 19 \_\_\_\_ .

Date of presentation of plaint.	Serial number of suit.	Serial number of suit dealt with under the S. C. powers.	PLAIN- TIF.		DEFEN- DANT.	CLAIM.		JUDG- MENT.	APPEAL.	ADJUSTMENT OR SATISFACTION OF DECREES OTHERWISE THAN BY EXECUTION.		EXECUTION.				RESULT OF EXECUTION				Orders in appeals, revisions or under section 144 C. P. Code with date and name of Court.	Relief or amount still due.	Remarks.							
			Name.	Description.		Place of residence.	Name.			Description.	Place of residence.	Particulars.	Amount or value.	When the cause of action accrued.	Date.	For whom.	For what amount.	Number and year of appeal.	Order on appeal with date and name of ap- pellate Court.				Particulars.	Date.	Number and date of ap- plication.	Date of final order.	Against whom.	For what amount if money.	Amount of Cost.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30

Note 1.—Where there are numerous plaintiffs or numerous defendants, the name for the first defendant only as the case may be, need be entered in the register. Note 2.—Case remanded by appellate Courts under Order XLI, rule 23, C.P. Code will be re-admitted and entered in the General Register of suits under this original numbers. In each case the letter R will be affixed to the number to be entered in column 2. Note 3.—In column 14 should be indicated whether the decision was *ex-parte*, or compromise or on contest against all or any of the defendants. Note 4.—When the Court of execution is other than the Court which passed the decree, the name of the executing Court should be given in column 20.

## APPENDIX VII.

### Rules made by the High Court of Rangoon.

#### ORDER V.

Rule 15.—For the words “where in any suit the defendant cannot be found” substitute the words “where the defendant is absent.” Omit the word “male” between the word “adult” and the word “member”.

Rule 20A.—After rule 20 add the following as rule 20A, namely :—

“20A (1) Every plaintiff, appellant or applicant on presenting or on entering an appearance to prosecute a plaint, memorandum of appeal, or originating petition or application, shall, at the same time, file in Court a proceeding stating his address for service.

(2) Every defendant or respondent who intends to appear and defend any suit, appeal, or originating petition or application shall, on or before the date fixed for his appearance in the summons or notice served on him, file in Court a proceeding stating his address for service.

(3) Such address for service shall be within the local limits of the jurisdiction of the Court in which the suit, appeal or petition or application is filed, or of the District Court within whose jurisdiction the party ordinarily resides.

(4) Where any party fails to file an address for service, as required by sub-rule (1) or sub-rule (2), he shall, if a plaintiff, appellant or applicant, be liable to have his suit, appeal, petition or application, dismissed for want of prosecution, and, if a defendant or respondent, be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. Any party may apply for such an order against an opposite party, and the Court may, on such application, make such order as it thinks just.

(5) Where a party is not found at the address given by him for service, and no agent or adult member of his family on whom a notice or process can be served is found at the address, a copy of the notice or process shall be affixed on the outer door or some other conspicuous part of the house or place which has been given as the address for service ; and service shall be deemed to be as effectual as if the notice or process had been personally served on the party.

(6) Where a party is represented by an advocate or pleader, notices or processes for service on him shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at the address for service given by such party.

(7) A party who desires to change the address for service given by him under sub-rule (1) or sub-rule (2) shall present a verified petition to that effect, and the Court may direct the amendment of the record accordingly. Notice of every such petition shall be given to all other parties to the proceedings.

(8) Nothing in this rule shall prevent the Court from directing the service of a notice or process in any other manner if it thinks fit to do so.”

Rule 21 A.—1. In Or. V, the following shall be inserted as r. 21 A :—

21 A. When any summons is sent for service by a Court to any Court situated beyond the limits of Burma, it shall, unless it is written in English, be accompanied by a translation in English or in the language of the locality in which it is to be served.

Rule 22.—In rule 22 the following proviso shall be added :—

“Provided that where such summons is to be served within the limits of the town of Rangoon the Court may, in addition to or in substitution of any other mode of service, send the summons by registered post to the defendant at the place within such limits where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service thereof.”

Rule 23 A.—In Or. V, the following shall be inserted as r. 23 A :—

23 A. (1) Before re-transmitting a summons received from another Court for service, the Court shall either take down the deposition of the peon serving, the summons as to the time when, and the manner in which the summons was served ; or cause the peon to make an affidavit before the bailiff, if the bailiff has been empowered to administer oaths ; and shall transmit the same, together with the summons, to the Court whence the summons originally issued. In the case of processes received from other provinces the deposition or affidavit of the peon serving the summons, if not recorded in English shall be translated into English, before the summons is returned to the issuing Court.



(2) In the case of processes received from India, if the person on whom the summons is to be served is not personally known to the process-server an affidavit or deposition by the person, who pointed out to the process-server the said person or his ordinary residence or place of business shall also be attached to the summons.

(3) When a process is forwarded for service by one Court in Burma to another Court in Burma and when the person on whom the process is to be served is not personally known to the process-server the case, in connection with which the process was issued, shall not be heard *ex-parte* without an affidavit or deposition of some person who pointed out to the process-server the person to be served on his ordinary residence.

The onus shall be upon the person at whose instance the summons is issued, either himself or by an agent, to point out to the process-server the person on whom the process is to be served or his ordinary residence or place of business.

(4) When the summons has been returned by the process-server under r. 17, a declaration of due service or of failure to serve shall be recorded in Form, Civil 47 and sent with the summons to the Court by which it was issued.

Rule 25.—In rule 25 the words "may be addressed" shall be substituted for the words "shall be addressed".

25A.—After rule 25, insert the following as 25A, namely :—

"25A.—Where the defendant resides in British India, but outside the limits of the Province of Burma, the Court may, in addition to or in substitution of any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by the defendant, or an endorsement by a postal servant that the defendant refused service, may be deemed by the Court issuing the summons to be *prima facie* proof of service thereof".

#### ORDER VII.

Rule 9.—After the word, "present" in the further line of rule 9 add the following :—  
"On the day on which the plaint is admitted".

#### ORDER IX.

Rule 13.—Add the following as second proviso to rule 13 :—

"Provided also that no decree or order shall be set aside under this rule merely on the ground that there has been an irregularity in the service of the summons, if the Court is satisfied that the defendant was aware of the date of the hearing in sufficient time to enable him to appear and answer the plaintiff's claim. Substitute "decree or order" for "decree" wherever this word occurs in rule 13."

#### ORDER XII.

Rule 6.—For the words "judgment or order" where they first occur substitute "judgment, decree or order." For the last part of the rule substitute the following :—  
"and the Court may, either upon such application or upon its own motion, give such judgment or make such decree or order as the Court may think just."

Add the following as sub-rule (2) :—

"(2) A decree or order passed under this rule may be executed at any time notwithstanding that other questions between the parties still remain to be decided in the case.

#### ORDER XIII.

Rule 1.—To Or. XIII, r. 1, the following shall be added as sub-rule (3) : —

(3) The High Court of Judicature at Rangoon directs that such lists shall be prepared in Form <sup>Judicial</sup> General 23 which will be given free of charge to parties wishing to tender documents in evidence.

Rule 4.—To Or. XIII, r. 4, the following shall be added as sub-rules (3), (4) and (5) :—

(3). The Court shall mark the documents which are admitted on behalf of the plaintiff or plaintiffs with capital letters in the order in which they are admitted, thus A. B. C., etc., and the documents admitted on behalf of the defendant with figures thus 1, 2, 3, etc.

(4) When a number of documents of the same nature are admitted, as for example a series of receipts for rent, the whole series shall bear one number or capital letter, a small number or small letter being added to distinguish each paper of the series.

(5) Every document or admission shall be entered in a list in Form Judicial  
General 25, prepared by the Bench Clerk and signed by the Judge.

Rule 5.—To Or. XIII, r. 5, sub-rule (3), the following shall be added :—

A note of the return should be made in the list in Form Judicial  
General 25.

Rule 7.—To Or. XIII, r. 7, sub-rule (2), the following shall be added :—

"Who shall give a receipt for them in column 6 of the list in Form Judicial  
General 25."

Rule 10.—In Or. XIII, r. 10, sub-r. (3), shall be re-numbered as (5) and the following shall be inserted as sub-rules (3) and (4) :—

(3) If the Court thinks fit to send for the record, it shall do so by sending a formal proceeding to the Court whose record is required. No summons to produce any record shall be issued to any Record Keeper, Chief Clerk or official of any Court.

(4) Whenever a Judge sends for the record of another suit or case, or other official papers, and uses any part of such record or papers as evidence in a trial before him, he shall direct that an authenticated copy of the part so used shall be put up with the trial record, and shall further direct, at the expense of which party such copy shall be made.

In Or. XIII, the following shall be inserted as rr. 10A and 10B :—

10 A. Exhibits with their accompanying lists, shall not be filed with the record until after the termination of the trial.

10 B. If any exhibit included in the index of contents of the trial record is withdrawn after judgment, the fact should be noted in the column of remarks of the index, and it should be stated whether a copy has been substituted or no.

#### ORDER XVI.

Rule 2.—In Or. XVI, add the following to r. 2 (1) :—

Provided that in cases to which Government is a party—

(a) no payment into Court will be required for the travelling and other expenses of a Government servant who may be required to be summoned at the instance of Government to give evidence in his official capacity ;

(b) the amount to be paid into Court for the travelling and other expenses of a Government servant whose salary exceeds Rs. 10 and may be required to be summoned at the instance of a party other than the Government to give evidence in his official capacity in a Court situate at a distance of more than five miles from his head quarters shall be equivalent to the travelling and halting allowances admissible under the Civil Service Regulations.

In Order XVI, r. 2, the following shall be substituted for sub-r. (3) :—

Subject to the provisions of sub r. (2), travelling and other expenses of witnesses, in Courts subordinate to the High Court other than the Court of Small Causes of Rangoon, shall be payable on the following scale :—

*Ordinary Labouring Classes* :—The actual railway or steam-boat fare to and from the Court by the lowest class ; or where the journey could not have been performed by rail or steam-boat, actual travelling expenses up to a limit of Rs. 2, a day by boat and of four annas a mile by road ; and an allowance for each day's absence from home of ten annas to those who are residents of places other than the place where Court is held and of eight annas to those who are residents of the place where the Court is held.

(2) *Petty village officers*.—The same rates as above for railway or steam boat fare or actual travelling expenses by boat or road up to the limit of Rs. 2 a day by boat and of four annas a mile by road ; and an allowance for each day's absence from home of fourteen annas to those who are residents of the places other than the place where the Court is held, and of twelve annas to those who are residents of the place where the Court is held.

(3) *Persons of higher ranks of life such as Clerks, Trades people, Village Head men and Head men of Circles*.—Second class railway or steam-boat fare to and from the Court ; or where the journey could not have been performed by rail or steam-boat, actual travelling expenses up to a limit of Rs. 4, a day by boat and annas six a mile by road ; and an allowance not to exceed except in special cases, Re. 1-8-0 per each day's absence from home.

(4) *Persons of Superior Rank.*—The actual sum spent in travelling to and from the Court with an allowance according to circumstances not to exceed except in special cases Rs. 5 for each day's absence from home.

(5) *Witnesses following any Profession such as Medicine or Law.*—A special allowance according to circumstances.

(6) *Lodging allowance.*—In addition to the above, a lodging allowance not exceeding except in special cases Re. 1/- for persons in class (3) and Rs. 2 for persons in classes (4) and (5) may be allowed for each night necessarily spent away from home if the Court is satisfied that the witness has to pay for his night's lodging. When an amount exceeding this scale is sanctioned as a special case, it shall not exceed the actual amount spent :

Provided that—

(i) A Government servant whose salary exceeds Rs. 10 per mensem giving evidence in his official capacity in a suit to which Government is a party :—

(a) when giving evidence at a place more than five miles from his headquarters, shall not receive anything under these rules, but shall be given a certificate of attendance.

(b) when giving evidence at a place not more than five miles from his headquarters, shall, in cases where the Court considers it necessary, receive under these rules actual travelling expenses, but shall not receive subsistence, special or expert allowances.

(ii) A Government servant whose salary does not exceed Rs. 10 per mensem, giving evidence in his official capacity, shall receive his expenses from the Court.

Rule 3.—To Or. XVI, r. 3, add the following :—

'This rule does not apply, where the person summoned is a Government servant summoned to give evidence in his official capacity in a case to which the Government is a party.'

Rule 8.—To Or. XVI, r. 8, add the following proviso, namely :—

"Provided that, at the request of a party or his pleader, summons for service on a witness or witnesses, whose attendance is required by such party, may be delivered to such party or his pleader for service by a person employed by such party or his pleader, and in the rules in Order V as to service and proof of service shall apply in such case as if the person employed by such party or his pleader to effect service were the officer of the Court whose duty it is to effect service of summons."

Rule 9.—To Or. XVI, r. 9, the following shall be added :—

"Where the persons summoned is a public officer or servant of the Railway Company, sufficient time shall also be allowed in order to give the witness an opportunity of communicating with his departmental superior, so as to arrange for the discharge of his duties during his temporary absence from his post.

#### ORDER XVIII.

Rule 2.—Add the following as a proviso to sub-rule (2) :—

"Provided that the Court may, in its discretion, call upon the other party to proceed under this sub-rule upon the evidence for the party having the right to begin is complete if it considers that the other party will not be prejudiced by so proceeding and that unnecessary inconvenience and delay will thereby be avoided."

The following shall be substituted for r. 5 of Order XVIII :—

'In cases in which an appeal is allowed, the evidence of each witness shall be taken down in writing in the language of the Court or in English by or in the presence and under the direction and supervision of the Judge, not ordinarily in the form of question and answer, but in that of a narrative, and when completed shall be read over or translated to the witness by such person as the Judge may direct, provided that the Judge may, if thinks fit, require the evidence to be read over in his own presence.

Such person shall after reading over the deposition to the witness append a certificate at the foot of the deposition form as follows :—

Read over by me in Burmese or (as the case may be) and acknowledged correct.

Signature

Interpreter or Clerk.

The Judge shall, if necessary, correct the deposition and shall sign it.

In Or. XVIII, the following shall be inserted as rule 6 A :—

"6 A. Where there are no interpreters paid by Government, and it is found necessary to employ an interpreter in a civil case, he shall be paid such fee, ordinarily not exceeding Rs. 2 *per diem*, as the Court may fix. The fee shall be advanced by the party at whose instance the interpreter is required, and shall be treated as costs in the case. All payments of interpreter's fees shall be made through the Court and duly entered in Bailiff's Register II.

Rule 8.—Rule 8 shall be deleted. Rule 14.—In sub-rule (1) for the words "this order" the words and figures and Rules 13 shall be substituted.

#### ORDER XIX.

To Or. XIX the following shall be added as rules 4 to 12 :—

The officer administering the oath to the declarant of an affidavit should first make the declarant take the oath or affirmation. Then he should make the declarant repeat the whole of the statement written in the affidavit, as coming from him. Then the declarant should sign the affidavit, and lastly the officer administering the oath should sign and date it.

5. Every affidavit to be used in a Court of Justice should be entitled. "In the Court of \_\_\_\_\_ at \_\_\_\_\_," naming the Court. If there is a case in Court, the affidavit in support of or in opposition to an application respecting it, must also be entitled "In the case of \_\_\_\_\_."

If there is no case in Court, the affidavit should be entitled : "In the matter of the petition of \_\_\_\_\_."

6. Every affidavit containing any statement of facts shall be divided into paragraphs, and every paragraph shall be numbered consecutively and, as nearly as may be, shall be confined to a distinct portion of the subject.

7. Every person, other than a plaintiff or defendant in a suit in which an application is made, making an affidavit, shall be described in such a manner as will serve to identify him clearly, that is to say, by the statement of his full name, the name of his father, his profession or trade, and the place of his residence.

8. When the declarant in any affidavit speaks to any fact within his own knowledge, he must do so directly and positively, using the words "I affirm" (or "make oath") and say."

9. When the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant must use the expression 'I am informed' (and, if such be the case, should add) ; "and verily believe it to be true" ; or he may state the source from which he received such information. When the statement rests on facts disclosed in documents or copies of documents procured from any Court of Justice or other source, the deponent shall state what is the source from which they were procured and his information or belief as to the truth of the facts disclosed in such documents.

10. Every person making an affidavit, if not personally known to the Commissioner, shall be identified to the Commissioner by some person known to him, and the Commissioner shall specify at the foot of the petition, or of the affidavit (as the case may be) the name and description of him by whom identification is made, as well as the time and place of the identification and of the making of the affidavit.

11. If any person making an affidavit is ignorant of the language in which it is written, or appears to the Commissioner to be illiterate or not fully to understand the contents of the affidavit the Commissioner shall cause the affidavit to be read and explained to him in a language which he understands. If it is necessary to employ an interpreter for this purpose, the interpreter shall be sworn to interpret truly. When an affidavit is read and explained as herein provided, the Commissioner shall certify in writing at the foot of the affidavit that it has been so read and explained, and that the declarant seemed perfectly to understand the same at the time of making the affidavit. When an interpreter is employed the Commissioner shall state in his certificate the name of the interpreter, and the fact that he was sworn to interpret truly.

12. In administering oaths and affirmations to declarants the Commissioner shall be guided by the provisions of the Indian Oaths Act, 1873.

#### ORDER XX.

Rule 11.—The following amendment shall be made to the second sub-section of r. 11 of Or. XX :—

For the words "and with the consent of the decree-holder" substitute the words "and after notice to the decree-holder."

To Or. XX, the following shall be added as rules 21 and 22 :—

21. As soon as the decree of a Court of first instance in a suit relating to land in a district in which there is a Land Records establishment has become final, or if the decree has been appealed against, when the decree in appeal has become final, and the interest of any party to the suit in any land included in the survey has been affected thereby, the Court of the first instance shall certify the nature and extent of such change of interest in each plot of land in suit to the Superintendent of Land Records of the district in which the land is situate. A copy of the certificate in every such case should also be sent to the Sub-Registrar within whose sub-district the land or any part thereof is situate.

22. The certificate shall be in the prescribed form, and shall be signed by the presiding officer of the Court.

#### ORDER XXI.

Rule 5.—To rule 5 add the following proviso :—

“Provided that where the Court to which the decree is sent for execution is presided over by the same Judge as the Court which passed the decree such transfer may be effected by recording a formal order of transfer in the diary of the execution proceedings.”

Rule 6.—To rule 6, the following proviso shall be added, namely :—

“Provided that where a transfer is effected under the proviso to rule 5 it shall not be necessary to send the above documents.”

Rule 10.—To rule 10 the following shall be added :—

“At the time of presenting the application for execution or at the time of admission thereof the holder of a decree may, if he wishes, deposit in Court the fees requisite for all necessary proceedings in the execution.”

In Or. XXI, the following shall be inserted as rule 10 A.

10. A. If no application is made by the decree-holder within six months of the date of the receipt of the papers, the Court shall return them to the Court which passed the decree with a certificate stating the circumstances as prescribed by s. 41.

Rule 13.—For r. 13 of Or. XXI, the following shall be substituted :—

13 (1) When an application is made for execution of a decree relating to immovable property included within Cadastral or Town Survey and the decree does not contain a plan of the property, or for execution of decree by the attachment and sale of such property, the application must be accompanied by a certified extract from the latest *Kwin* or town map, with the boundary of the land in question marked with a distinctive colour. The particulars specified in the annexed instructions, which have been issued regarding the filling up of forms of process concerning immovable property must also be furnished so far as they are not given in the plan. In the case of other movable property a plan is not required, but such of the particulars in the annexed instructions as can be given must be supplied :—

1. If the property to be sold is agricultural land which has been cadastrally surveyed and of which survey map exists, the area, *Kwin* number latest holding number (if different kinds of holding, *e. g.*, rice land and garden holdings are numbered in different series, the kind of holding must be stated), field numbers (if the property does not coincide with one complete holding, year of *Kwin* map from which the holding number is taken, and revenue last assessed upon the land must be given.

2. In the case of other agricultural land the area and village tract within which it falls, distance and direction from nearest town or village and boundaries should be specified.

3. In the case of land in large towns the area, block or quarter name or number, the lot number (if there are separate series of lots, the series should be stated, and where the land forms part only of a lot, particulars regarding that part), the holding number in the latest town survey map, if any, and years of the map, the rent or revenue last assessed on the land, must be given.

4. In the case of buildings situated in the large town when the land on which such buildings stand is not affected, the name or number of the street, or, if the street has neither name or number the quarter or block name or number, the number of the building in the street or if it has no number, the lot number, must be given.

5. In the case of immovable property situated in a small town or village, such of the particulars in paragraphs 3 and 4 above as can be given should be given.

6. The purpose to which land or buildings are put, the material and age of buildings, all incumbrances and municipal taxes should be stated.

7. The judgment-debtor's share or interest in the property should be specified.

(2) The costs of the certified extract should be reckoned in the costs of the application.

Rule 16.—For the first proviso to rule 16, the following shall be substituted, namely :—

“Provided that, where the decree or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferer; and, unless an affidavit by the transferer admitting the transfer is filed with the application, the decree shall not be executed until the Court has heard his objections (if any) to its execution.”

Rule 17.—In sub-rule (1) of rule 17 for the words “the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it” substitute the following “the Court may, reject the application if the defect is not remedied within a time to be fixed by it.”

Rule 22.—In clause (a) of sub-rule (1) of rule 22 for the words “one year” the word “three years” shall be substituted.

Rule 24.—To sub-rule (3) of rule 24, the following shall be added, namely :—

“and a day shall also be specified on or before which it shall be returned to the Court.”

Rule 26.—In sub-rule (3) of rule 26 for the word “may” the words “shall” unless sufficient cause is shown to the contrary shall be substituted.

Rule 31.—In sub-rules (2) and (3) of rule 31 for the words “six months” the words “three months” shall be substituted.

The following shall be added as sub-rule (4) of rule 31 :—

“(4) The Court may, on application, extend the period of three months mentioned in sub-rule (2) and (3) to such period, not exceeding six months in the whole, as it may think fit”.

Rule 32.—In sub-rule (3) of rule 32 for the words “for one year” the words “for three months or for such further period, not exceeding one year in the whole” as may be fixed by the Court on the application of the judgment debtor” shall be substituted.

Rule 38 A.—In Order XXI, the following shall be inserted as rule 38A :—

“38A. The actual cost of conveyance of a civil prisoner shall be borne by the Court ordering his arrest or requiring his attendance at Court, as the case may be, and shall be charged to the judgment-creditor.

Rule 39.—In order XXI, rule 39, the following shall be inserted as sub-rule (2A):—

2A When a civil prisoner is kept in confinement at the instance of more than one decree-holder, he shall only receive the same allowance for his subsistence as if he were detained in confinement upon the application of one decree-holder. each decree-holder shall, however, pay the full allowance for subsistence and when the debtor is released, the balance shall be divided rateably among the decree-holders, and paid to them.

Rule 45.—In order XXI, the following shall be inserted as rules 45A and 45B :—

45A. (1) Before issuing a warrant for the attachment of movable property which it will be necessary to place in charge of one or more peons, permanent or temporary, the Court shall satisfy itself that the attaching decree-holder has produced a receipt in the Form 15A, Appendix E, from the Bailiff that he has paid in cash as process-fees under rule 17 (1) C (ii) of the Process Fees Rules not less than Rs. 10 for each person who the Bailiff considers should be employed.

(2) In sending the warrant for execution to the Bailiff the Court Clerk shall certify at the foot of the warrant that the receipt granted by the Bailiff for the necessary fees has been filed in the record, the Bailiff shall then endorse on the warrant the name of the process-server to whom it is issued for execution. If a temporary peon is employed for the custody of the attached property, the process-server shall state in his report of the attachment the name of the temporary peon employed and the date from which his duties commenced.

(3) At the time of granting the receipt in Form 15A, for payments made by the decree-holder, as required by sub-rule (1), the Bailiff shall state in the lower portion of the form the date on which the fees paid will be exhausted,

warning the decree-holder that the property will not be kept under attachment after that date, unless further fees are paid before that date.

If the further fees required are not paid, the attachment shall cease as soon as the period for which fees have already been paid expires. In such a case the amount paid prior to the cessation of the attachment shall not be allowed to the attaching decree-holder as costs.

(4) The payment of fees under sub-rule (1) shall be made in cash to the Bailiff and the amount shall at once be entered in Bailiff's Register No. II. The Court Clerk shall on receipt of the Bailiff's acknowledgment (Form 15) file it in the record and make an entry to that effect in the diary.

(5) Temporary peons employed for the custody of attached property shall be remunerated at the rate provided for in r. 15 of the rules regarding process serving establishments, provided that the total remuneration disbursed shall in no case exceed the amount of the process fees actually paid under the foregoing sub-rules.

Permanent peons shall be presumed to be remunerated at the same rate as temporary peons but if the services of the former are utilised, the fees paid shall be credited direct into the Treasury to "Process-Servers' Fees—" "XVIA, Law and Justice"—"Courts of Law"—"Court-Fees realised in cash."

(6) The remuneration of temporary peons employed to take charge of attached property shall be paid direct by the Bailiff to them on the order of the Judge.

Before passing such order the Judge must verify the name of the payee from the report of the attachment and must satisfy himself that the amount proposed to be paid does not exceed the amount of the fees deposited with the Bailiff, or, if any payments have already been made in the case of the unexpended balance of such deposits and that all amounts previously drawn have been disbursed to the proper persons.

(7) When the order has been signed by the Judge, the money shall be disbursed by the Bailiff at once to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register II. If, however, the amount has been transferred to Bailiffs Register I the Bailiff shall draw the amount necessary for payment from the Treasury as if it were a re-payment of deposit and shall then disburse the amount due to the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiff's Register I.

(8) When the attachment is brought to a close or has not been effected, if the Judge finds, at the time of calculating the amount paid in and properly chargeable for peons, that the total amount of the fees actually paid under sub-rules 1 and 3 exceeds the total amount that is chargeable for peons including the amount of the last payments, he shall direct that the excess be refunded to the payer.

(9) The Judge shall in all cases in which a refund is to be made, issue to the bailiff an order, a copy of which shall be placed on the record, to make such refund.

If a sufficient portion of the amount paid by the decree-holder to pay such refund is in the hands of the Bailiff that officer shall make the refund in the ordinary way prescribed in his Register II for repayments. If the amount has been credited into the Treasury, he shall prepare a bill for the amount to be refunded in the prescribed treasury form and shall lay it before the Judge for signature with the record of the case in the same way as a bill for the remuneration of temporary peons. Before signing the refund order, the Judge must satisfy himself that the amount is available for refund by examining Bailiff's Register I and the record. The bill when signed by the Judge will be given to the payee, with instructions to present it for payment at the Treasury or Sub-Treasury.

45B. (1) In addition to the fees payable before a warrant issues for the attachment of movable property under r. 45 A, the Bailiff shall require the attaching decree-holder to deposit a sum of money sufficient to cover the costs of attachment other than the pay of peons employed to take charge of it, for such period as the Bailiff may think fit.

*Explanation.*—The costs in question might be for example, (a) rent of building in which to store attached furniture, (b) cost of conveying the attached property from the place of attachment to Court or to a secure place of custody, (c) cost of feeding and tending livestock, (d) cost of proceeding to the place of attachment to sell perishable property.

(2) If the attaching decree-holder fails to comply with the Bailiff's requisition, the warrant shall not be issued.

(3) Sums thus deposited shall be entered in the Bailiff's Registers I and II and re-payments thereof shall be made according to existing orders. A receipt for such sums shall be granted by the Bailiff in form No. 15A, Appendix E.

(4) In the receipt given for the sums deposited, the Bailiff shall, state the period for which such sums will last, and if the attaching decree-holder does not deposit a further sum before the expiry of such period, the attachment shall cease when the sum deposited is exhausted.

(5) The officer actually attaching the property shall unless the Court otherwise directs, give the debtor, or, in his absence, any adult member of his family who may be present, the option of having the attached property kept on his premises or elsewhere, on condition that a suitable place for its safe custody is duly provided. The option so given may be subsequently withdrawn by order of the Court.

Where the attached property consists of cattle these may be employed, so far as is consistent with rule 43, in agricultural operations.

(6) If no such suitable place be provided, or if the Court directs that the property shall be removed, the officer shall remove the property to the Court, unless the property attached is growing crop, when rule 45 applies. Whenever live-stock is placed at the place where it has been attached, the judgment-debtor shall be at liberty to undertake the due feeding and tending of it under the supervision of the attaching officer.

(7) Whenever property is attached, the officer shall forthwith report to the Court and shall with his report forward an accurate list of the property seized.

(8) If the debtor shall give his consent in writing to the sale of property without awaiting the expiry of the term prescribed in r. 68, the officer shall receive the written consent and forward it without delay to the Court for its orders.

(9) When property is removed to the Court it shall be kept by the Bailiff, on his own sole responsibility, in such place as may be approved by the Court. If the property cannot, from its nature or bulk, be conveniently kept on the Court premises, or in the personal custody of the Bailiff, he may, subject to the approval of the Court, make such arrangement for its safe custody under his own supervision as may be most convenient and economical.

(10) If there be a cattle pound maintained by Government or any Local authority in or near the place where the Court is held, the Bailiff shall be at liberty to place in it such attached live-stock as can be properly there kept, in which case the pound-keeper will be responsible for the property to the Bailiff and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impounded cattle of the same description.

(11) Whenever property is attached, and any person other than the judgment-debtor shall claim the same, or any part of it, the officer shall nevertheless, unless the decree-holder desires to withdraw the attachment of the property so claimed, remain in possession and shall direct the claimant to prefer his claim to the Court.

(12) If the decree-holder shall withdraw an attachment or if it shall cease under sub-r. (2) or (4), the Bailiff's officer shall inform the debtor or in his absence, an adult member of his family that the property is at his disposal.

(13) If any portion of the deposit made under sub-r. (1) or (4) remains unexpended it shall be refunded to the decree-holder in the manner prescribed for such refunds in sub-r. (4) of rule 45 A. Any difference between the cost of attachment of movable property (other than the costs referred to in r. 45A) and the sums deposited by the attaching decree-holder shall, unless the difference is due to the fault of the Bailiff, be recovered from the sale proceeds of the attached property, if any, and if there are no sale proceeds, from the attaching decree-holder on the application of the Bailiff. If there is still a deficiency, the amount shall be paid by Government.

Rule 46.—Sub-Rule (3) of rule 46 shall be deleted.

Rule 53.—In clause (b) of sub-rule (1) of rule 53 after the words "to such other Court" occurring in the second and third lines of the clause, the words "and to any Court to which it may have been transferred for execution" shall be added, and for the word "its" occurring in the fifth line, the word "the" shall be substituted.

In sub-clause (ii) of clause (b) of sub-rule (1) of rule 53 for the words "its own" the words "the attached" shall be substituted.

To sub-clause (ii) of clause (b) of sub-rule (1) of rule 53 the following shall be added, namely :—

"With the consent of the said decree-holder expressed in writing or with the permission of the attaching Court".



In sub-rule (6) of rule 53 for the words "after receipt of notice thereof" the word "with the knowledge thereof" shall be substituted.

Rule 54.—To rule 54, the following shall be added as sub-rule (3), namely :—

"(3) The order of attachment shall take effect, as against transferees without consideration from the judgment-debtor from the date of the order of attachment, and as against all other persons from the date on which they respectively had knowledge of the order of attachment, or the date on which the order was duly proclaimed under sub-rule (2) whichever is the earlier."

Rule 57.—In Or. XXI, the following shall be inserted as rule 57 A:—

57A. A judgment-debtor may secure release of his attached property by giving security to the value thereof to the Court.

Rule 63.—Rules 63A to 63 G.—The following rules and heading shall be inserted after rule 63 :—

#### GARNISHEE ORDERS.

63 A. Where a debt has been attached under rule 46, the debtor prohibited under clause (i) of sub-rule (1) of rule 46 (hereinafter called the garnishee) may pay the amount of the debt due from him to the judgment-debtor into Court, and such payment shall discharge him as effectually as payment to the party entitled to receive the same.

63 B. Where a debt has been attached under rule 46, and the garnishee does not pay the amount of the debt into Court in accordance with the foregoing rule, the Court, on the application of the decree-holder, may order a notice to issue calling upon the garnishee to appear before the Court and show cause why he should not pay into Court the debt due from him to the judgment debtor or so much thereof as may be sufficient to satisfy the decree together with the costs of execution. A copy of such notice shall, unless otherwise ordered by the Court, be served on the judgment-debtor.

63 C (1) If the garnishee does not pay into Court the amount of the debt due from him to the judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the costs of execution, and if he does not appear in answer to the notice issued under rule 63 B, or does not dispute his liability to pay such debt to the judgment-debtor, then the Court may order the garnishee to comply with the terms of such notice, and on such order execution may issue against the garnishee as though such order were a decree against him.

(2) If the garnishee appears in answer to the notice issued under rule 63 B and dispute his liability to pay the debt attached, the Court, instead of making an order as aforesaid, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit, and may proceed to determine such issue, and upon the determination of such issue shall pass such order upon the notice as shall be just.

63 D. Whenever in any proceedings under the foregoing rules, it is alleged by the garnishee that the debt attached belongs to some third person, or that any third person has a lien or charge upon or interest in it, the Court may order such third person to appear and state the nature and particulars of his claim, if any, upon such debt and prove the same if necessary.

63E. After hearing such third person and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing as ordered, the Court may pass such order as is provided in the foregoing rules or make such other order as the Court shall think upon terms to all cases with respect to the lien, charge or interest, if any, or such third or other person, as shall seem just and reasonable.

63F. Payment made by or levied by execution upon the garnishee in accordance with any order made under these rules shall be a valid discharge to him as against the judgment-debtor and any other person ordered to appear under these rules, for the amount paid or levied, although such order or the judgment may be set aside or revised.

63G. The costs of any application for the attachment of a debt or under the foregoing rules, and of any proceedings arising from or incidental to such application, shall be in the discretion of the Court. Costs awarded to the decree-holder shall unless otherwise directed, be retained out of the money recovered by him under the garnishee order and in priority to the amount of his decree."

In Or. XXI, the following shall be substituted for rule 65 :—

65 (1). Sales shall be conducted by the Bailiff or Deputy Bailiff, but the duty may be entrusted to a process-server when the property is movable property not exceeding Rs. 50 in value, and when, in the opinion of the Court, for reasons recorded in the diary of the case, the Bailiff or Deputy Bailiff cannot personally conduct the sale.

(2) Subject to the terms of the proviso to r. 43 and of r. 74, some one day in each week shall be set apart and regularly observed for holding sales in execution of decrees ; and some well-known place in the vicinity of the Court-house or the public bazaar shall be selected for the purpose.

(3) Subject as aforesaid, and unless the Court is of opinion that for any special reason a sale on the spot where the property is attached or situated will be more beneficial to the judgment-debtor, all property, whether movable or immovable, attached in execution of the decree shall be sold at the time and place selected.

The day to be set apart and the place selected for holding the sales, and any changes therein, shall be reported for the information of the High Court.

(4) The following scale is laid down as to the amount which may be deducted from the proceeds of the sale of property sold in execution of the decree, as the expenses of sale, and paid to the officer conducting the sale under the orders of the Court as his authorized commission :—

Where the proceeds of sale do not exceeds Rs. 500—5 per cent.

Where they exceed Rs. 500 and do not exceed Rs. 5,000—5 per cent. on the first Rs. 500 and 2 per cent. on the remainder.

Where they exceed Rs. 5,000—at the above rate on the first Rs. 5,000 and 1 per cent. on the remainder.

The calculation of the commission shall be on the whole amount realised in pursuance of one application for execution.

(5) Subject to the provisions of sub-rule (13) of rule 45B, no further sum beyond this authorized commission and the cost of conveyance of property to the place of sale shall be deducted from the sale proceeds.

(6) When a sale of immovable property is set aside under the provisions of rule 92 (2) below no commission shall be paid to the Bailiff for selling the property.

(7) No officer of a Subordinate Court shall receive any larger commission or fee in respect of any sale or property (mortgaged or otherwise) held in execution or pursuance of any decree or order of the Court directing or authorizing such sale than that allowed by sub-rule (4) above.

(8) The gross proceeds of sale shall be entered in Register II and in Bailiff's Register I and shall be paid into the Treasury.

In Order XXI, rule 66, the following shall be added at the end of sub-rule (2) :—

"Provided that no such notice shall be necessary in the case of movable property not exceeding Rs. 250 in value.

Rule 69.—In sub-rule (2) of rule 69 for the words "seven days" the words ' thirty days' shall be substituted.

Rule 72.—In sub-rule (2) of rule 72 for the words "with such permission" the words "the property" shall be substituted. Sub-rules (1) and (3) of rule 72 shall be cancelled, and the figure and brackets "(2)" occurring at the beginning of sub rule (2) shall be deleted.

In Order XXI, the following shall be inserted as rule 81A :—

81A. Whenever guns or other arms in respect of which licenses have to be taken by purchasers under the Indian Arms Act, 1878, are sold by public auction in execution of decrees, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act.

Rule 90.—In Order XXI, for the present proviso to rule 90, the following shall be substituted :

Provided that no application to set aside a sale shall be admitted unless—

(a) it discloses a ground which could not have been put forward by the applicant before the sale was conducted, and,

(b) the applicant deposits with his application the amount mentioned in the sale warrant or an amount equal to the amount realised by the sale, whichever is less ; and in case the application is unsuccessful the costs of the opposite parties shall be a first charge on the amount so deposited.

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

Rule 94.—In Order XXI, the following shall be inserted as rules 94A and 94B :—

"94A. A copy of every sale certificate issued under rule 94 shall be sent forthwith to the Sub-Registrar within whose sub-district the land sold or any part thereof is situate.

94B. If in execution of a decree any interest in land is sold, the names and addresses of the purchaser or purchasers and the interest thereby acquired shall be certified to the Superintendent of Land Records as soon as the sale has been confirmed under rule 92 (1)."

Rule 98.—For rule 98 substitute the following, namely :—

"98. Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession the Court may also, at the instance of the applicant or of its own motion order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison at the cost of Government for a term which may extend to thirty days."

Rule 99.—For the rule 99, the following shall be substituted, namely :—

"99. Where the Court is not so satisfied it shall make an order dismissing the application."

#### ORDER XXIII.

Rule 3.—Add the following proviso to rule 3 of Order XXIII :—

"Provided that before recording and passing a decree in accordance with an agreement, compromise or satisfaction in a suit instituted under the provisions of s. 92, C. P. Code, the Court shall direct notice returnable within a reasonable time to be given to the Government Advocate, Burma, or the officer with whose consent, the suit was instituted, of the agreement, compromise or satisfaction proposed to be recorded. The Government Advocate or such officer as aforesaid may thereupon appear before the Court and be heard in the matter of such agreement, compromise or satisfaction."

#### ORDER XXV.

The following Order XXV shall be substituted for the Order XXV :—

#### "ORDER XXV.

##### *Costs and security for costs in special cases.*

1. (1) Where at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there are more plaintiffs than one) that all the plaintiffs are residing out of British India, and that such plaintiff does not, or that no one of such plaintiff does, possess any sufficient immovable property within British India other than the property in suit, the Court may either of its own motion or on the application of any defendant, order the plaintiff or plaintiffs within a time fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any defendant.

(2) Whoever leaves British India under such circumstances as to affect reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of British India with the meaning of sub-rule (1).

(3) On the application of any defendant in a suit for the payment of money in which the plaintiff is a woman, the Court may at any stage of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immovable property within British India.

2. Where, it is proved to the satisfaction of the Court that the plaintiff is deriving assistance from or is being maintained by a person in consideration of a promise to give to such person a share in the subject-matter or proceeds of the suit, or in consideration of having transferred his interest in the subject-matter of the suit, the Court may, either of its own motion or on the application of any defendant ;

(a) award costs on a special scale to be decided by the Court, and approximating to the actual costs reasonably incurred by the defendant ;

(b) at any stage of the suit, order the plaintiff, within a time fixed by it, to give security for the payment of the estimated amount of such costs or such proportion thereof as the Court may think just.

3(1) In the event of security demanded under rule 1 or rule 2 not being furnished within the time fixed, the Court shall make an order dismissing the suit unless the plaintiff is permitted to withdraw therefrom.

(2) Where a suit is dismissed under this rule, the plaintiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the order of dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(3) The order of dismissal shall not be set aside unless notice of such application has been served on the defendant."

#### ORDER XXVI.

The following shall be substituted for sub-rule (1) of rule 18 of Order XXVI :—

"When a commission is issued under this Order the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders, unless otherwise directed by the Court, within fifteen days."

To Order XXVI, the following shall be added as rules 19 to 26 respectively :—

"Fees to Commissioners for local investigation and Commissioners of partition, or to take accounts or for the examination of witnesses.

19. Civil Courts in issuing commissions will be guided by the provisions of rule 15, and subject to the provisions of rule 23, will exercise their own judgment in fixing a reasonable sum for the expenses of the commission.

20. Under Government of India Resolution in the Home Department (Judicial No. 10—1101, dated the 21st July), 1875, Judicial officers are prohibited from accepting any remuneration for executing commissions issued by Courts of other provinces.

21. It is to be understood that no part of the fee sent for the execution of a commission is to be accepted, either personally or on behalf of Government. The execution of a commission is an official act which judicial officers are bound to perform when called upon and is not work undertaken for a private body.

22. In all cases the unexpended balance, which remains after all charges have been deducted, should be returned to the Court issuing the commission.

23. The following fees are to be allowed to the commissioners of partition or to take accounts, or for the examination of witnesses, namely :—

Commissioners' fees for every effective meeting shall not exceed three gold mohurs for the first two hours and one gold mohur for each succeeding hour.

Fees to commissioners for administering an oath or solemn affirmation to a declarant of an affidavit.

24. When under the orders of a Court in the Town of Rangoon, or of a District Court, an oath on solemn affirmation is administered to a declarant of an affidavit, at his request elsewhere than at the Court, a fee of Rs. 16 shall be paid by the said declarant :

Provided that—

(a) the administration of the oath or of solemn affirmation elsewhere than in Courts shall be authorized by the Court by order in writing ;

(b) if more than one affidavit is taken at the same time and place, the fee shall be Rs. 8 for each affidavit after the first ;

(c) in no case shall the fees for taking any number of affidavits at the same time and place exceed Rs. 80 ;

(d) in pauper suits and appeals, when the affidavit of a pauper is taken, no fee shall be charged.

25. Affidavits taken under rule 24 shall be taken out of Court hours. The fees shall be retained by the commissioner for administering the oath or solemn affirmation.

26. No fee shall be charged for the administration of an oath under the order of any Court other than those specified in rule 24."

Rule 26.—After rule 26 insert the following headings and rules, namely :—  
“Commission issued at the instances of foreign tribunals.

27 (1). If a High Court is satisfied :—

(a) that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it ;

(b) that the proceeding is of a civil nature ; and

(c) that the witness is residing within the limits of the High Court's appellate jurisdiction, it may, subject to the provisions of rule 28 issue a commission for the examination of such witness.

(2) Evidence may be given of the matters specified in clauses (a), (b) and (c) of sub-rule (1)—

(a) by a certificate signed by the Consular officer of the foreign country of the higher rank in India and transmitted to the High Court, through the Governor General in Council ; or

(b) by a letter of request issued by the foreign Court and transmitted to the High Court through the Governor General in Council ;

(c) by a letter of request issued by the foreign Court and produced before the High Court by a party to the proceeding.

28. The High Court may issue a commission under rule 27 :—

(a) upon application by a party to the proceeding before the foreign Court ; or

(b) upon an application by a law officer of the Local Government acting under instruction from the Local Government.

29. A commission under Rule 27 may be issued to any Court within the local limits of whose jurisdiction the witness resides, or where the High Courts established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and the witness resides within the local limits of its ordinary original Civil jurisdiction, to any person whom the Court thinks fit to execute the commission.

30. The provisions of rules 6, 15, 16, 17 and 18 of this order in so far as they are applicable shall apply to the issue, execution and return of such commissions, and where any such commission has been duly executed it shall be returned, together with the evidence taken under it to the High Court, which shall forward it to the Governor General in Council along with the letter of request for transmission to the foreign Court.”

#### ORDER XXXII.

Rule 3.—For rule 3, the following rule shall be substituted :—

“3 (1). Where any of the defendants is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper guardian for the suit for such minor.

(2) For this purpose there be filed by the plaintiff with the plaint a list of all persons whom the plaintiff considers to be capable of acting as a guardian of the minor for the suit. Such list shall be in the form of an application duly verified and requesting that one of such persons may be appointed guardian of the minor for the suit, and shall state for each of such persons whether he is a guardian appointed or declared by competent authority or a natural guardian, or the custodian of the minor, or a stranger, and shall give the address of each of such persons.

(3) An order for the appointment of a guardian for the suit may also be obtained upon application in the name and on behalf of the minor.

(4) An application under sub-rule (2) or sub-rule (3) shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(5) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule”.

Rule 4.—For rule 4, substitute the following :—

“4(1). Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit : provided that the interest of such person is not adverse to that of the minor and that he is not in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor, or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) In the event of there being no such guardian, the natural guardian of the minor, or, if there is no natural guardian, the person in whose care the minor is, should, subject to the proviso to sub-rule (1) ordinarily be appointed his guardian for the suit.

(4) No person shall without his consent be appointed his guardian for the suit.

(5) Where none of the afore-mentioned persons, or of the persons mentioned by the plaintiff in the list filed by him under sub-rule (2) of rule 3, is fit and willing to act as guardian for the suit, and where no application is made on behalf of the minor under sub-rule (3) of rule 3, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officers in the performance of his duties as such guardian shall be borne either by the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for re-payment or allowance of such costs as justice and circumstances of the case may require. An Advocate or Pleader of the Court shall be an officer of the Court for this purpose."

#### ORDER XXXIV.

Rule 2.—The following shall be substituted for r. 2 of Order XXXIV :—

"(2) In a suit for foreclosure if the plaintiff succeeds the Court shall either—

(I) pass a preliminary decree declaring the amount which will be due to the plaintiff on the mortgage for principal and interest (at the mortgage rate) six months from the date of the decree and for his costs of the suit (if any) awarded to him and directing—

(A) that if the defendant within the said period pays into Court the said amount the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required by the defendant, re-transfer to him, free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims and shall also if necessary put the defendant in possession of the property, but

(B) that if such payment is not made within the said period the defendant shall be debarred from all right to redeem the property, or

(II) order that an account be taken of the amount due on the mortgage for principal and interest ; and after the taking of the said account, pass a preliminary decree as above.

Rule 3.—The following shall be substituted for sub-r. (1) of r. 3 of Order XXXIV :—

"(1) Where the defendant pays into Court the amount declared due as aforesaid, within the said period together with such subsequent costs as are mentioned in r. 10, the Court shall pass a decree—

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and if so required—

(b) ordering him to transfer the mortgaged property as directed in the said decree and, also, if necessary,—

(c) ordering him to put the defendant in possession of the property.

Rule 4.—The following shall be substituted for sub-r. (1) of rule 4 :—

(1) In a suit for sale, if the plaintiff succeeds, the Court shall act as prescribed in r. 2, except that instead of the direction contained in cl. b thereof, there shall be the following direction :—

That if such payment is not made within the said period the mortgaged property or a sufficient part thereof be sold and the proceeds of the sale (after defraying there-out the expenses of the sale) be paid into Court and applied in payment of what is due to the plaintiff as aforesaid together with subsequent interest on the said amount at the rate of six per cent. per annum from the last day of the said period up to the actual date of realisation by the plaintiff and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same.

Rule 5.—The following shall be substituted for sub-r. (1) of r. 5 of Order XXXIV :—

"Where the defendant pays into the Court the amount due as aforesaid within the said period together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(a) Ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and, if so required.

(b) Ordering him to re-transfer the mortgaged property as directed in the said decree,

and, also, if necessary,—

(c) Ordering him to put the defendant in possession of the property."

Rule 7.—The following shall be substituted for r. 7 of Order XXXIV :—

"In a suit for redemption, if the plaintiff succeeds, the Court shall either :—

(I) pass a preliminary decree declaring the amount which will be due to the defendant on the mortgage for principal and interest at the mortgage rate six months from the date of the decree and for his costs of the suit (if any) awarded to him and directing—

(A) that if the plaintiff within the said period pays into Court the said amount, the defendant shall deliver up to the plaintiff or to such persons as he appoints all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or where the defendant claims by derived title, by those under whom he claims and shall, if necessary, put the plaintiff in possession of the property, but

(B) that if such payment is not made within the said period the plaintiff shall (unless the mortgage is simple or usufructuary) be debarred from all rights to redeem, or (unless the mortgage is by conditional sale), that the mortgaged property be sold, or

(II) order that an account be taken of the amount due to the defendant on the mortgage for principal and interest and after the taking of the said account, pass a preliminary decree as above.

Rule 8.—The following shall be substituted for sub-r. 1 of r. 8 of Order XXXIV :—

"Where the plaintiff pays into Court the amount due as aforesaid within the said period together with such subsequent costs are mentioned in rule 10, the Court shall pass a decree—

(a) Ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up,

and if so required—

(b) ordering him to re-transfer the mortgaged property as directed in the said decree,

and, also, if necessary :—

(c) ordering him to put the plaintiff in possession of the property."

#### ORDER XXXVII.

Rule 2.—In Or. XXXVII, r. 2, sub-r. (2), the following shall be inserted after the words "pursuance thereof" :—

"Or of his applying for such leave within ten days from the service of the summons on him and on proof that the summons was duly served on him more than ten days before.

#### ORDER XXXIX.

Rule 1.—In clause (a) of rule 1, the words "or wilfully sold in execution of a decree" shall be deleted.

In the last sentence of rule 1 the word "sale" occurring between the words "alienation" and "removal" shall be deleted.

#### ORDER XL.

Rule 2 —For rule 2, the following shall be substituted, namely :—

• "2. The fees to be paid as remuneration for the services of the receiver shall be in accordance with the following scale :—

(a) On rents or outstandings recovered or on the proceeds of the sale of movable or immovable property, unless for special reasons, to be recorded, the Court orders the remuneration to be at some other rate——5 per cent.

(b) For taking charge of money or of movable or immovable property which is not sold, unless for special reasons it is otherwise ordered by Court, on the estimated value——1 per cent.

(c) For any special work not provided for above, such remuneration as the Court on the application of the receiver shall order to be paid."

#### ORDER XLI.

Rule 1.—The following shall be substituted for sub-rule (2) of rule 1 :—

"(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative ; and such grounds shall be numbered consecutively. When Burmese dates are given the corresponding English dates shall be added. The memorandum shall also contain :—

(i) the full names and addresses of all parties ;

(ii) particulars (class, number, year and Court) of the original proceedings ; and

(iii) the value of appeal (a) for Court-fees, and (b) for jurisdiction.

Material corrections or alterations shall be authenticated by the initials of the person signing the memorandum."

To Order XLI, r. 1, the following shall be added as sub-rule (3) :—

"(3) The appellant shall present, along with the petition of appeal, as many copies on plain paper of the grounds of appeal as there are respondents."

Rule 14.—Add the following as sub-rule (3) to rule 14 :—

"(3) Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to an opposite party or respondent who did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court, or to the legal representative of any such opposite party or respondent if deceased."

#### ORDER XLIII.

Rule 1.—To the rule 1, the following shall be added as clause (ii), namely :—

"(ii) A garnishee under rule 63C or rule 63 E, and an order as to costs in garnishee proceedings under rule 63 G of Order XXI."

#### ORDER XLV.

Rule 9A.—Substitute the following for rule 9 A :—

"9A. Nothing in these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to an opposite party or respondent who did not appear either at the hearing in the Court whose decree is complained of or at any proceedings subsequent to the decree of that Court, or on or to the legal representative of any such opposite party or respondent if deceased :

Provided that notices under sub-rule (2) of rule 3 and under rule 8 shall be given by affixing the same in some conspicuous place in the Court-house of the Judge of the district in which the suit was originally brought, and by publication in such newspapers as the Court may direct."

#### ORDER XLVII.

Rule 3.—In rule 3 of Or. XLVIII, the following shall be inserted after the word "appendices" :—

"or such forms as may be prescribed by the High Court of Judicature at Rangoon".

#### ORDER LII.

*The following shall be added as Order LII :—*

#### ORDER LII.

#### *Appellate Side Rules of Procedure.*

The rules contained in the First Schedule to the Code, 1908, shall so far as they are inconsistent with or contrary to the rules herewith published and so far as the practice and procedure of the Appellate Side of the High Court of Judicature at Rangoon only are concerned, be deemed to have been thereby altered or superseded. The Rules relating to appeals from original decrees contained in Order XLI of



Schedule I to the Code of Civil Procedure, so far as they are not inconsistent with or contrary to these rules, shall apply to appeals under clause 13 of the Letters Patent from decrees and orders made by a single Judge of the High Court or by Division Court in the exercise of its Original Civil Jurisdiction.

*Preliminary.*

In the absence of the Deputy Registrar, the Superintendent, Appellate Side, shall exercise all the functions of the Deputy Registrar, under these rules. The term "Deputy Registrar" shall include the Deputy Registrar and the Assistant Registrar, Appellate Side.

2. Except upon close holidays the offices of the Court shall be open to the public on business from 10-30 A. M. until 4-30 P. M. on all week days except Saturdays, and all Saturdays from 10-30 A. M. until 2 P. M.

*Initiation of Proceedings.*

3. Memoranda, applications and affidavits shall be either printed, typewritten or written in a clear and legible hand, in the English language on durable white foolscap paper on one side only of the paper and so as to leave a clear margin one inch and a half wide on the left side.

They shall contain :—

(i) The full names and addresses of all parties.

(ii) Particulars (Number, class, year and Court) of the original proceedings and in the case of second Appeal, of the First Appeal,

(iii) The value of the appeal or application :—

(a) For Court-fees, and

(b) For jurisdiction :

Provided that the Deputy Registrar for cause shown may accept an appeal or application without any of these particulars on an undertaking that such particulars will be supplied as soon as may be.

The matters shall be divided into paragraphs numbered consecutively and each paragraph shall contain as nearly as may be a separate ground of objection or allegation. Dates and figures shall be filled in before presentation. When native dates are given, the corresponding English dates shall always be added.

Material corrections or alterations shall be authenticated by the initials of the persons signing a memorandum, application or affidavit.

4. All memoranda of appeal and applications shall be presented to the Deputy Registrar.

5. Memoranda of appeal and application shall be accompanied by as many copies thereof as there are respondents and by certified copies of the following documents :—

(1) the decree or order against which an appeal or an application is made ;

(2) the judgment on which such decree or order is founded, unless the Court dispenses therewith, and

(3) in appeals and applications from appellate decrees or orders the judgment of the Court of first instance, unless the Court dispenses therewith.

6. Whenever a memorandum of appeal or application is presented to the Deputy Registrar and it is in his opinion insufficiently stamped, or if he considers that the relief claimed is undervalued, he shall fix a time under section 107 (2) or 141 within which such memorandum of appeal or application shall be properly stamped or the valuation amended.

Appeals and applications which are insufficiently stamped must be submitted for orders to the Judges.

(a) if presented on the last day of the period of limitation ; or

(b) if the period of limitation will expire within the time asked for to pay the deficient Court-fees.

7. Where a memorandum of appeal or application is amended the Deputy Registrar shall sign or initial the amendment.

8. The date of hearing an appeal or application for revision shall be fixed by the Deputy Registrar and shall be notified in the manner prescribed by Order XLI, rule 14. He shall also fix the time for filing a memorandum of objection as provided for in rule 26.

9 (1). Process-fees for the issue of notice or notices of the date of hearing to the respondent or respondents shall be deposited within seven days from the date of order directing such notice or notices to issue. In default of payment thereof within the

time allowed the Deputy Registrar shall strike off the appeal or application for non-payment of process-fees, unless, for good cause shown he grants an extension of time. An endorsement over the signature of the Deputy Registrar, to the effect that the appeal or application has been struck off under this rule, shall be made on the memorandum of appeal or application.

(2) On the application of the appellant or applicant and on sufficient grounds being shown to his satisfaction, a Judge may order an appeal or application struck off the file under this rule to be restored to the file, as of the date on which it was originally filed.

(3) When appeal or application is struck off the file under this rule, the appellant or applicant shall be at liberty, subject to the law of limitation, to present a fresh appeal or application in the same matter.

9A. Every application for stay of execution shall have affixed to it on presentation the process-fees necessary for the issue of notices to respondents.

10. When an appeal or application has been admitted and the Records of the Lower Courts have been received the Deputy Registrar shall proceed as provided in the rules for the preparation of Translations and Bench Copies.

11 and 12. (Cancelled).

13. The Deputy Registrar is authorised to take necessary steps to cause the service of fresh notices, if required to dispose of applications for substituted service to grant postponements by consent and dispose of applications for bringing legal representatives of deceased parties on the record and granting postponements, if necessary, for the purpose of service.

14. When a notice is returned unserved or not duly served, and the Deputy Registrar orders the issue of fresh notice and fixes a fresh date, the case should be called out before the Deputy Registrar on the date originally fixed, in case the respondent may put in an appearance, and, if he does, he should be informed of the postponed date and his signature taken.

#### *Process.*

15. Warrants, notices and other processes shall be signed, sealed and issued by the Deputy Registrar provided that every warrant or order committing a person to custody in jail shall be signed by the Judge.

16. Notices and other processes to be served within the local limits of the original jurisdiction of the Court shall be delivered for service to the Bailiff, who shall endorse thereon the date of receipt by him.

17. If the person to be served is personally known to him or to any of his officers who is at the time available, the Bailiff shall cause the process to be served forthwith. If the person to be served is not so known the Bailiff shall forthwith communicate with the party desiring to have the process served or with his advocate appointing a time at which one of his officers will be available and ready to proceed to effect service, and requesting that some one who personally knows the person to be served, may accompany the officer to point him out.

18. The oath of process-servers and identifiers to affidavits in proof of service of process may be administered by the Bailiff. With his return of service of the process, the Bailiff shall submit the affidavits as to service.

19. Notices and other processes to be served in Burma, but beyond the local limits of the original jurisdiction of the Court, or outside of Mandalay Town, shall be sent by post to the Court of widest jurisdiction not being a District Court at the headquarters of the Township in which the person to be served resides. If the notice is to be served out of Burma it shall be sent for service as provided by section 28, Order V, rules 21-23 and 25 to the Court named by the party.

20. Unless otherwise ordered a second or subsequent notice or process shall not be issued until after the one previously issued has been returned.

21. Processes to be served on a party to a case may be served on his advocate, if any, and when so served shall be presumed to be duly communicated and made known to the party for whom such advocate appears. For the purposes of this rule an advocate who has once appeared or entered an appearance on behalf of a party shall be deemed to continue to be his advocate unless and until he withdraws his appearance by a statement to that effect made in and recorded by the Court or unless or until he or such party intimates in writing to the Deputy Registrar that he has ceased to be the advocate for such party.

22. To bring promptly to notice the failure to serve process, every process issued after the first shall have its number, second, third, fourth and so on written clearly on it.

23—32. (Deleted).

*List to be maintained by the Deputy Registrar.*

33. The Deputy Registrar will maintain and keep posted up three lists of pending civil appeals, applications for revision, and miscellaneous applications:

A. List of all incomplete cases.

B. List of cases ripe for hearing that are to be called on a fixed date.

C. List of cases ripe for hearing that await their turn of hearing.

The Chief Clerk shall be responsible that the lists are properly kept from day to day.

34. No case shall be put on the B or the C list until notices on all respondents have been duly served and the necessary Translations and Bench copies have been prepared.

35. The B list shall contain all cases ripe for hearing in which any party is not known to be represented by an advocate.

36. When a case has been placed on the B list and the Deputy Registrar before the date fixed for hearing receives intimation that all parties are represented by advocates the case shall forthwith be transferred to the bottom of the C list.

37. Cases in the B list shall be called on the day fixed for hearing and shall either be for disposal on that or immediately subsequent days of sitting or shall be postponed under the orders of the Court to some subsequent fixed date.

38. When a case has once been transferred to the C list, no further date will be fixed for hearing but it will come up for hearing in its turn, as it stands on that list, unless for special reasons it is otherwise ordered, with notice to the parties or their advocates.

39. When a case on the C list is called for hearing, and hearing is for any reason postponed, the case shall remain in its original place in the C list. It will appear in the daily list of the next Court day appropriate to such case, unless the Judge or Bench, when postponing it directs that it shall not be called again before a specified date.

40. On every Friday the Deputy Registrar shall issue a list of cases which will be on the lists for disposal during the following week. This list will include cases fixed for admission, miscellaneous applications for disposal and B list cases fixed for hearing on a day in such week. On the last Friday in each month the Deputy Registrar shall issue a list of all cases on the B and C lists.

41. A daily list shall also be issued showing the cases for the day taken from the warning list issued on the Friday on the previous week.

42. At the close of the week, unless the Court has otherwise ordered, the remaining cases of the week's list shall be transferred to the top of the list of cases for hearing for the following week.

43. When a case under the Indian Divorce Act, in which a decree for dissolution or nullity of marriage has been passed is submitted for confirmation, a letter shall invariably be addressed to the District Judge who passed the decree, asking him to inform the parties that this Court will take the decree into consideration at the expiry of six months from the date on which it was pronounced with a view to confirming it or passing such order as may seem fit, if either party wishes to make any application relating to the decree he or she must do so within the said period of six months, and that if no such application is made the Court will proceed to pass orders in the absence of the parties.

44. (Omitted),

*The Diary,*

45. The Diary shall be framed so as to show as concisely as possible every stage of and every proceeding taken in the case, and the party or parties present in person or by advocate at every proceeding. Every short proceedings and orders such as proceedings or orders for the adjournment of a case may be written on the diary for the signature of the judge, but when orders not purely formal have to be made, the Bench Clerk should put up a judgment form with the file when submitting it to the judge.

*The Judgment.*

46. Judgments may be written by the Judge himself or be delivered orally. When judgment is given orally a note thereof in writing or in shorthand shall be taken by an officer of the Court, or person authorized by the Judge.

Such note shall be submitted to the Judge for correction and for signature.

Rule 31 of Order XLI shall not apply to the High Court.

*Decrees and formal orders.*

47. Decrees shall be signed by the Deputy Registrar. The advocates, if any, on both sides shall be required to affix their signatures to the decrees before they are signed by the Deputy Registrar. When any advocate has not signed the decree the cause of his failing or refusing to sign shall be certified on the decree.

Care must be taken that each decree is in itself clear and intelligible. It should not be necessary to refer to any other documents to ascertain what it really means and implies.

48. When in interlocutory and miscellaneous proceedings an order is made by the Judge after stating his reason therefor, and in any case in which a party may desire it, a formal order shall be drawn up containing the number of case, the names of the parties, the order or result of the order made, the cost incurred and by what parties and in what proportion the costs are to be paid.

49. Every decree and formal order shall bear the date on which the judgment or order was pronounced by the judge, but the date on which the Judge or the Deputy Registrar has actually signed an order or the Deputy Registrar, a decree shall be noted beneath his signature.

50. When the draft of a decree is ready a notice shall be posted on the Court notice-board that the draft is ready for inspection in the Deputy Registrar's office. If it is not objected to within four days from the date of the notice, a decree in the terms of the draft shall be submitted to the Deputy Registrar for signature.

If the parties do not agree to the form which the decree shall take the case shall be set down upon the daily list on as early a date as may be convenient to speak to the minutes of decree.

51. If a party or an advocate intimates to the Deputy Registrar immediately after an order has been passed by a Judge that he wishes to see the formal order before it is submitted to the Judge for signature, the same procedure as for decrees shall be adopted in respect of the draft formal order.

*General.*

52. In every appeal and petition, if any Burmese name is not spelled in accordance with the Government system of transliteration, the Deputy Registrar shall cause the spelling to be corrected unless the advocate concerned shows any good reason to the contrary.

If the name was incorrectly spelled in the Lower Court it should nevertheless be correctly spelled in the High Court of the name as previously incorrectly spelled being added in brackets, if necessary, to prevent confusion. The same rule shall be applied as far as practicable to names of natives of India. But any person who writes English has the right to spell his own name in any way he likes, and the spelling of his ordinary signature should be adopted in all documents in Court.

53. No correspondence relating to cases before the Court can be attended to by any person having business in the Court or its office shall transact the same in person or by a duly authorized agent or Advocate.

54. The Registrar, Deputy Registrars, Assistant Registrars, the Chief Translator and the Senior Interpreters attached to the High Court for Burmese, Hindusthani, Gujrati, Chinese, Tamil and Telugu, are empowered to administer the oath to deponents of affidavits to be filed in the High Court.

The Senior Interpreters shall exercise the power conferred by this rule only within the precincts of the Court.

55. The Superintendent, Appellate Side, shall certify the copies referred to in Order XLI, rule 37.

*Appeals to the Privy Council.*

56. Applications to the Court for leave to appeal to His Majesty in Council shall be made within 90 days of the decree or order to be appealed from, subject to the provisions of sections 4, 5 and 12 of the Indian Limitation Act, 1908.

57. Petitions for leave to appeal to His Majesty in Council shall be presented to the Deputy Registrar, who, if the petition is in order, will issue notice in the form attached on the respondent to show cause before a Bench consisting of at least two Judges why the certificate prayed for should not be granted.

58. When a certificate is granted, the appellant shall, within the period prescribed by Order XLV, rule 7, give security for the costs of the respondent to the extent of Rs. 4,000 in cases of special magnitude and importance, the Court may require security for a larger sum ; provided that security shall not in any case be required for a sum exceeding Rs. 10,000.

59. Security shall ordinarily be furnished by the deposit of cash or Government securities to the amount required, but subject to the provisions of these rules and of the provisos to sub-rule (1) of rule 7 in Order XLV, it may be furnished in some other form approved by the Court. Cash deposited under this rule shall be paid to the Bailiff of the Court. Government security so deposited shall be made over to the Registrar or the Deputy Registrar.

60. When cash or Government securities are deposited under rule 59, a security bond shall be executed in Form A or Form B attached, as the case may be.

61. If any other form of security is tendered, the appellant shall ordinarily file with the petition for leave to appeal to His Majesty in Council a separate application and if a charge on immovable property is tendered, shall also annex thereto a draft mortgage-bond together with a valuation of the property verified by affidavit. The value of immovable property shall be at least double the amount of the security required ; and in the case of land on which there are buildings which are brought into the valuation of the property, or where a mortgage of building only is tendered, the buildings must be insured. A tender of such security, if made later than the date of filing the petition for leave to appeal, will not be accepted unless the Court is satisfied that the delay in making it was inevitable, and in any case shall not be accepted after the certificate is granted.

62. On tender of security other than cash or Government securities, notice of the tender shall, if possible, be given to the opposite party requiring him to show cause, if he wishes to do so, within the time fixed (see Rule 57 above) for granting the certificate, why the security tendered should not be accepted. No adjournment shall be granted to the opposite party to contest the nature of such security.

63. If the security tendered appears to the Court to be unsatisfactory, the Appellant shall be so informed.

64. In every security bond, the appellant shall bind himself to pay such costs of the opposite party as may be allowed by the Court in the event of the appeal not being prosecuted.

65. Within the period prescribed by Order XLV, rule 7, the appellant shall also deposit with the Bailiff of the Court the sum of Rs. 1,000 or such sum as the Deputy Registrar may determine to defray the expense of printing, translating, transcribing, indexing and transmitting, a copy of the record.

66. Where an appellant, having obtained a certificate for the admission of an appeal fails within the time prescribed to furnish the security or make the deposit required in accordance with Rules 58 and 65, (or apply with due diligence to the Court for an order admitting the appeal), the Court may, on its own motion or on an application on that behalf made by the respondent, cancel the certificate for admission of the appeal, and may give such direction as to the costs of the appeal and the security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires.

67. When the Court admits the appeal, it shall always clearly state in its order who are actual parties at the time of admission.

68. On a certificate being granted to appeal to His Majesty in Council, the Deputy Registrar shall immediately call for the transmission of the record and all material papers. The preparation of the record shall be subject to the supervision of the Court, and the parties may submit any disputed question arising in connection therewith to the decision of the Court, and the Court shall give such directions thereon as the justice of the case may require.

69. The Deputy Registrar shall on payment to him of a fee of Rs. 16, prepare an index of the papers which make up the record. This index shall be prepared within three weeks of the date of receipt of the records or of the date of deposit required by Rule 65, whichever is later. As soon as the index is ready, a notice in form attached shall be issued by the Deputy Registrar requiring the advocates of

both parties to attend his office for the purpose of settling the index within the time specified in the notice. If the Advocates fail to attend or to settle the index within the time aforesaid, the matter shall be reported for the orders of the Court without further delay. Any costs incurred on such account shall be borne in manner as the Court directs.

70. The Registrar or the Deputy Registrar as well as the parties and their legal Agents shall endeavour, to exclude from the record all documents, (more particularly such as are merely formal) that are not relevant to the subject-matter of the appeal, and, generally, to reduce the bulk of the record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents but the documents omitted to be copied or printed shall be enumerated in a manuscript list to be transmitted with the record.

71. If the parties are agreed as to the papers to be omitted, those papers shall not be transcribed. When in the course of the preparation of a record one party objects to the inclusion of the document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists upon its being included, and the Court allows the document to be included, the records, as printed, shall with a view to the subsequent adjustment of the costs of and incidental to such document indicate in the index of papers or otherwise, the fact that and the party by whom, the inclusion of the document was objected to.

72. Where there are two or more appeals arising out of the same matter and the Court is of opinion that it would be for convenience of the Lords of the Judicial Committee and all parties concerned that the appeal should be consolidated, the Court may direct appeals to be consolidated.

73. An appellant who has obtained a certificate for the admission of an appeal may at any time prior to the making of an order admitting the appeal withdraw the appeal on such terms as to costs and otherwise as the Court may direct.

74. An appellant, whose appeal has been admitted shall prosecute his appeal in accordance with the Rules for the time being regulating the general practice and procedure in appeals to His Majesty in Council.

75. Where an appellant, whose appeal has been admitted, desires prior to the despatch of the record to England, to withdraw his appeal, the Court may upon an application in that behalf made by the appellant, grant him a certificate to the effect that the appeal has been withdrawn and appeal shall thereupon be deemed, as from the date of such certificate, to stand dismissed without express order of His Majesty in Council, and costs of the appeal and the security entered into by the appellant shall be dealt with in such manner as the Court thinks fit to direct.

76. Where an appellant whose appeal has been admitted, fails to show due diligence in taking all necessary steps in connection with the preparation of the record, the Court may, either on its motion or on the application of the respondent call upon the appellant to show cause why a certificate should not be issued that the appeal has not been effectually prosecuted by the appellant and if the Court sees fit to issue such a certificate, the appeal shall be deemed as from the date of such certificate to stand dismissed for non-prosecution, without express order of His Majesty in Council, and the costs of the appeal and the security entered into by appellant shall be dealt with in such manner as the Court may think fit to direct.

77. Where at any time between the admission of an appeal and the despatch of the record to England the record becomes defective by reason of the death, or change of status of a party to the appeal, the Court may notwithstanding the admission of the appeal, on an application in that behalf made by any person interested, grant a certificate showing who, in the opinion of the Court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died, or undergone a change of status, and the name of such person shall thereupon be deemed to be so substituted, or entered on the record as aforesaid without express order of His Majesty in Council. If, in the opinion of the Court, there has been undue delay in making this application, the Court may order the appellant or the party interested, to take all necessary steps to perfect the record within such time as the Court may direct, and, if he fails to comply with such order, the Court may call upon him to show cause why a certificate should not be issued that the appeal has not been effectually prosecuted, and if the Court sees fit to issue such a certi-

ificate, the appeal shall be deemed, as from the date of such certificate to stand dismissed for non-prosecution without express order of His Majesty in Council and the costs of the appeal and the security entered into by the appellant shall be dealt with in such manner as the Court may think fit to direct.

78. Where the record subsequently to its despatch to England becomes defective by reason of the death, or change of status of a party to the appeal, the Court may, upon an application in that behalf made by any person interested, cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted, or entered on the record, in place of, or in addition to, the party who has died, or undergone a change of status. If, in the opinion of the Court, there has been undue delay in making this application the Court may order the appellant or the party interested, to take all necessary steps to perfect the record within such time as the Court may direct, and, if he fails to comply with such order, the Court shall report the matter to the Registrar of the Privy Council.

79. The supplementary records dealing with revivor of appeals should be transmitted to England in manuscript and not in print.

*Order of arrangement of the papers prefixed by index.*

80. The Deputy Registrar shall arrange the papers in the transcript in two parts in the order specified below and shall prefix and index to each part. He shall also attach to each part a certified list of all papers omitted from the transcript under Rule 70.

PART I.

*Original Court.*

1. Index to Part I.
2. Diary Sheet of the Original Court.
3. Plaint.
4. Written Statement.
5. Examination of the Court under Order X.
6. Issues Settled.
7. Oral evidence for the party beginning, including evidence given by a witness for such party on commission.
8. Oral evidence for the opposite party or parties, including evidence given by a witness for such party or parties on Commission.
9. The judgment of the Original Court.
10. The decree of the Original Court.

*Appellate Court.*

11. The diary sheet of the Appellate Court.
12. The memorandum of appeal to the Appellate Court.
13. Respondent's memorandum of objections under Order XLI, rule 22.
14. The Judgment of the Appellate Court.
15. The decree of the Appellate Court.
16. The application for a certificate and for leave to appeal to His Majesty in Council.
17. The certificate granted.
18. The Deputy Registrar's certificate that the provisions of Order XLV, rule 7, has been complied with.
19. The Order declaring the appeal admitted.

Appendix 1A.—Interlocutory proceedings and orders in the Original Court and Appellate Court, except such as the parties agree should be excluded, or the Court directs to be excluded.

Appendix 1B.—List of papers excluded.

PART II.

20. Index to Part II.

21. Exhibits.

- *Appendix II.*—List of formal and other documents excluded.

NOTE.

(1) *Index.*—The index to Part I should be in chronological order and should be placed at the beginning of the volume. The index to Part II should follow the order of the exhibit mark, and should be placed immediately after the index to Part I.

**Records.**—Part I should be arranged strictly in chronological order, *i. e.*, in the same order as the index. Part II should be arranged in the most convenient way for the use of the Judicial Committee as the circumstances of the case require. The documents should be printed as far as suitable in chronological order mixing plaintiff's and defendants' documents together when necessary. Each document should show its exhibit mark, and whether it is plaintiff's or defendant's document (unless this is clear from the exhibit mark) and in all cases documents relating to the same matter, such as (a) a series of correspondence, or (b) proceedings in a suit other than the one under appeal, should be kept together. The order in the record of the documents in Part II will probably be different from the order of the index, and the proper page number of each document should be inserted in the printed index.

The parties will be responsible for arranging the record in proper order for the Judicial Committee, and in difficult cases counsel may be asked to settle it.

(3) **Numbering of documents.**—The documents in Part I should be numbered consecutively. The documents in Part II should not be numbered apart from the exhibit mark.

(4) **Heading of documents.**—Each document should have a heading which should consist of the number of exhibit mark, and the description of the document in the index, without the date.

(5) **Marginal note.**—Each document should have a marginal note which should be repeated on each page over which the document extends, *viz* :—

#### PART I.

(a) Where the case has been before more than one Court, the short name of the Court should first appear. Where the case has been before only one Court the name of the Court need not appear.

(b) The marginal note of the document should then appear consisting of the number and the description of the document in the index, with the date, except in the case of oral evidence.

(c) In the case of oral evidence "Plaintiff's evidence" or "Defendant's evidence" should appear beneath the name of the Court and then the marginal note consisting of the number in the index and the witness's name with 'examination', 'cross-examination' or 're-examination' as the case may be.

#### PART II.

The word "Exhibit" should first appear. The marginal note of the exhibit should then appear consisting of the exhibit mark and the description of the document in the index, with the date.

(6) **Omission of formal documents, etc.**—The parties should agree to the omission of formal and irrelevant documents, but the description of the document may appear (both in the index and in the record), if desired with the words "Not printed" against it.

A long series of documents, such as accounts, rent rolls, inventories, etc., should not be printed in full, unless counsel so advise, but the parties should agree to short extracts being printed as specimens.

Every document should be carefully edited for the printer, avoiding the repetition of unnecessary titles and omitting formal portions.

81. The charges for translation and copying shall be regulated by the rules dealing with the matters. It shall not be necessary to translate any papers which have already been translated.

82. All translations whether previously made or made for the purpose of the appeal to His Majesty in Council, shall be authenticated by the person by whom they were made.

83. The notices in India shall be limited, in the absence of any express direction by the Court, to the notice of application for this certificate of admission, notice declaring the appeal admitted and notice of the transmission of the record to England; and in all cases where a party has appeared, service on the advocate shall be deemed to be sufficient notice.

84. When the record is to be printed the style to be adopted shall be as follows :—

(i) The form known as *demi quarto* (*i. e.*, 54 ems in length and 42 in width) shall be followed.



(ii) The size of the paper used shall be such that the sheet when folded and trimmed shall be 11 inches in length and 8½ inches in width.

(iii) The type to be used in the text shall be *Pica* type, but *Longprimer* shall be used in printing accounts, tabular matters and notes.

(iv) The number of lines in each page of *Pica* type shall be 47 or thereabouts and every tenth line shall be numbered in the margin.

85. When the record is printed in India, 100 copies of the transcript shall be struck off. Twenty copies shall be supplied to the party at whose cost the record is printed. Any other party to the suit shall be supplied with copies of the record on payment of the cost price. Copies so supplied shall not be certified. A charge of Re. 1 for every 750 words shall be made for proof reading. Money paid for proof reading shall be credited to Government.

86. When the transcript is ready, if it is to be printed in England, one certified copy shall be transmitted to the Registrar of His Majesty's Privy Council Whitehall at the expense of the appellant, together with an index of all the papers and exhibits in the case. No other certified copies of the record shall be transmitted to the agents in England by or on behalf of the parties to the appeal.

87. When the transcript has been printed in India, and 100 copies struck off under rule 85, 40 copies shall be sent, at the expenses of the appellant, to the Registrar of His Majesty's Privy Council one of which shall be certified to be correct by the Deputy Registrar of the Court by his signing his name on, initialling every eighth page thereof and by affixing the seal of the Court thereto. Where part of the record is printed in India and part is to be printed in England, this rule shall, as far as practicable, apply to such parts as are printed in India and such as are to be printed in England respectively.

88. All costs incurred in British India whether allowed by the Court under rule 64 or otherwise, shall be recoverable, as if they were the amount of a decree for money.

#### Form A. (Rule 60).

*Bond by an Appellant to His Majesty in Council for security for the costs of the Respondent when currency notes are or cash is deposited.*

Know all men by these presents that I                      son of                      native of  
now residing at                      am held and firmly bound to the senior Judge of the High  
Court of Judicature at Rangoon in the sum of Rupees                      to be paid to  
the said senior Judge his successors in office or assigns for which payment well and  
truly to be made I bind myself, my heirs and legal representatives.

In witness whereof I have hereunto set my hand at                      this                      day of                      19                      .

*Signature of Appellant.*

Signed by the said

in the presence of

*Address.  
Occupation.*

Son of  
WHEREAS I the above-bounden                      was  
an appellant                      in Civil                      <sup>1st</sup> Appeal No.                      of 19                      , in the said High Court  
the respondent                      <sup>2nd</sup>  
and whereas the decision of the Court upon the said appeal having been adverse  
to me I presented a petition to the said Court praying for a certificate on which an  
appeal to His Majesty in Council might be admitted: And whereas such certificate  
was granted to me on the                      day of                      19                      . And whereas I was called  
upon to furnish security for the costs which may be incurred by the respondent in  
this Court and before His Majesty's Privy Council upon or in consequence of my  
said appeal to His Majesty to the amount of Rupees                      . And whereas on the  
day of                      19                      I deposited in the said High Court the sum of  
Rs.                      Now the condition of the above written bond is such that if  
the said respondent shall be paid such costs as I or my heirs or legal representa-  
tives shall be ordered to pay to him by the decree or order of His Majesty in Council  
or by order of this Court as costs incurred on or in consequence of my said appeal  
then the above-written bond shall be void and of no effect otherwise the same  
shall remain in full force and virtue. And I hereby agree and declare that the  
said amount deposited by me as aforesaid shall remain under the control of the said  
High Court as and for security for payment by me or my heirs or legal representa-  
tives of such amount or amounts as may be made payable by me or them as costs  
as aforesaid and that upon my failure to pay such amount or amounts the Court

may order that the said amount deposited or so much thereof as may be necessary shall be paid towards the discharge of the amount or amounts which may be payable by me or my heirs or legal representatives as aforesaid : Provided that if no costs shall be ordered to be paid by me, or by my heirs or legal representatives, the amount deposited shall unless otherwise detained be returned to me or them.

## FORM B (Rule 60).

*Bond by an Appellant to His Majesty in Council for security for the costs of the Respondent when Government Promissory Notes are deposited.*

Know all men by these presents that I \_\_\_\_\_ son of native of \_\_\_\_\_ now residing at \_\_\_\_\_ am held and firmly bound to the senior Judge of the High Court of Judicature at Rangoon in the sum of rupees \_\_\_\_\_ to be paid to the said senior Judge his successors in office or assigns for which payment well and truly to be made I bound myself and my heirs and legal representatives.

In witness whereof I have hereunto set my hand at this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_.

Signed by the said \_\_\_\_\_

In the presence of \_\_\_\_\_

*Signature of Appellant.*

*Address  
Occupation.*

Son of \_\_\_\_\_

WHEREAS I the above-bounden \_\_\_\_\_

was \_\_\_\_\_ an appellant \_\_\_\_\_ in Civil \_\_\_\_\_  
the respondent \_\_\_\_\_ 2nd

Appeal No. \_\_\_\_\_ of 19 \_\_\_\_\_, in the said High Court and whereas the decision of the Court upon the said appeal having been adverse to me I presented a petition to the said Court praying for a certificate on which an appeal to His Majesty in Council might be admitted and whereas such certificate was granted to me on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_ and whereas I was called upon to furnish security for the costs which may be incurred by the respondent in this Court and before His Majesty's Privy Council upon or in consequence of my said appeal to His Majesty in Council to the amount of \_\_\_\_\_ Rupees \_\_\_\_\_.

And whereas on the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_, I endorsed and delivered to the Registrar of the said Court the Government Promissory notes particulars of which are set out in the schedule hereunder. Now the condition of the above written bond is such that if the said respondent shall be paid such costs as I or my heirs or legal representative shall be ordered to pay to him by the decree or order of His Majesty in Council or by the order by this Court as costs incurred on or in consequence of my said appeal then the above written bond shall be void and of no effect otherwise the same shall be and remain in full force and virtue.

And I hereby agree and declare that the Government Promissory notes deposited by me as aforesaid or such other Government Promissory notes as may be held in lieu thereof and the interest which may accrue thereon shall remain under the control of the High Court of Judicature at Rangoon as and for security for payment by me, or my heirs or legal representative of such amount and amounts as may be made payable by me or them as costs as aforesaid and that upon my or of their failure to pay such amount or amounts the said Court may order that the same be sold and that the proceeds be applied so far as they may extend towards the discharge of the said amount or amounts : Provided that if the costs shall be ordered to be paid by me, or my heirs or legal representatives to the respondent on my said appeal the said Government Promissory notes or such Government Promissory notes as they may have been replaced by shall unless otherwise detained be returned to me or them.

The Schedule above referred to :—

No. 1	Date. 2	Rate of interest. 3	Amount. 4
		Ra.	Rs.

*Notice to show cause why a certificate of Appeal to His Majesty in Council should not be granted. (Rule 57).*

CODE OF CIVIL PROCEDURE; ORDER XLV, Rule 3 (2). IN  
THE HIGH COURT OF JUDICATURE AT RANGOON.CIVIL MISCELLANEOUS APPLICATION NO. OF 19 .  
Arising out of Civil Appeal NO. of 19 .

Vs.

*Applicant.**Respondent.*

To

Take notice that the applicant above named has through applied to this Court for a certificate that as regards amount or value and nature of the above case fulfills the requirements of section 110 of the Code of Civil Procedure or that it is otherwise a fit one for Appeal to His Majesty in Council.

The day of 19 , is fixed for you to show cause why the Court should not grant the certificate asked for.

GIVEN under my hand and the seal of the Court this day of 19 .  
Process-fee, Rs. realized

Deputy Registrar.

*Notice to Advocates to settle index in paper book of the Privy Council Appeal.*  
(Rule 69)

## IN THE HIGH COURT OF JUDICATURE AT RANGOON.

CIVIL MISCELLANEOUS APPLICATION NO OF 19 .  
Arising out of Civil Appeal No. of 19 .

Vs.

*Appellant to England.**Respondent to England.*

Take notice that (1) an index of all documents included in the transcript record of the above case, and (2) a list of all other papers, etc., not so included have been prepared. You are requested to attend the office of the Deputy Registrar for the purpose of settling the Index within one week from the date hereof.

Deputy Registrar.  
Appellate-side.

The

19

*Notice to Respondent of admission of Appeal to the King in Council*  
[ Code of Civil Procedure, Order XLV, Rule 8. ]

## IN THE HIGH COURT OF JUDICATURE AT RANGOON.

CIVIL MISCELLANEOUS APPLICATION NO. OF 19 .  
Arising out of Civil Appeal No. of 19 .  
Applicant

Vs.

Respondent.

To

WHEREAS the in the above case, has furnished the security and made the deposit required by Order XLV, Rule 7 of the Code of Civil Procedure, 1908.

Take notice that the Appeal of the said Applicant to His Majesty in council has been admitted on the day of 19 .

GIVEN under my hand and the seal of the Court this day of 19 .  
Process-fee Rs.

Rs. realised

Deputy Registrar,

*Notice of the transmission of the Record to England.*

## IN THE HIGH COURT OF JUDICATURE AT RANGOON

Dated Rangoon, the 19 Civil Miscellaneous No. of 19 .  
Arising out of Civil Appeal No. of 19 .  
Applicant

vs.

Respondent.

To

1. Please take notice that the printed Records in the above cause under Appeal to His Majesty in Council will be despatched to the Registrar, Privy Council, by the mail leaving on the 19 .

2. You are requested to send a senior clerk to the Appellate Side to receive 20 printed Records and a copy of payment order for Rs. being unexpended balance to be refunded to you under order dated the 19 .

Deputy Registrar.  
Appellate Side..

### ORDER LIII.

*The following shall be inserted as Order LIII :—*

"Rules for the conduct of suits in the Rangoon Small Cause Court."

### PART I.

#### *Preliminary.*

1. These rules may be called the Rangoon Small Cause Court Rules 1922, and shall form Schedule I to the Rangoon Small Cause Court Act, 1920. They shall come into force simultaneously with the Act and shall apply to all proceedings thereafter to be instituted in the said Court, and as far as may be to all proceedings transferred thereto under proviso (b) of section 2(1).

2. All previous rules so far as they are inconsistent with these rules are hereby superseded and the rules theretofore contained in Schedule I to the Act and in Order LV of the Code are hereby annulled, but not so as to affect anything duly done or suffered thereunder.

3. In these rules unless there be something repugnant in the subject or context ;—

(1) The Act means the Rangoon Small Cause Court Act.

(2) Bailiff means any Bailiff of the Court.

(3) "The Code" means so much of the Code of Civil Procedure 1908 together with the Schedules and Appendices thereto, as is not expressly or impliedly excluded by the Act or these rules.

(4) "Prescribed" means prescribed by these or any duly authorized rules or Orders or by the Code.

(5) "Process" includes a summons to a defendant or to a witness, a notice or any other process (not being a warrant) which has to be served through the Court.

4. The procedure to be followed in the Court shall be that laid down in the Code, subject to the provisions of the Act and of these rules.

5. All plaints, written statements, affidavits, petitions and other proceedings presented to the Court shall be in English and written or typewritten or printed, fairly and legibly, and in the prescribed form : Provided always that in proceedings to which all the parties are Burmans and in which the relief sought does not exceed Rs. 500, all pleadings, petitions and affidavits may be written, typed or printed in Burmese.

6. Written statements, petitions and affidavits, unless filed in Court or before the Registrar, shall be presented to the Chief Clerk or to such other officer as may be appointed in that behalf in like manner as is hereinafter provided for the presentation of plaints.

The Chief Clerk is empowered to administer oaths to the deponents of affidavits to be filed in Court. Copies of pleadings, petition and affidavits must be served on the opposite party not less than 24 hours before the date fixed for hearing.

7. Unless the necessary process fee payable on a plaint or petition are paid within 48 hours from its admission, the suit or petition may be dismissed.

#### *Institution of suits.—The Plaint, its Presentation and Admission.*

8. Every suit shall be instituted by the presentation of a plaint.

9. The subject-matter of the plaint shall be divided into paragraphs numbered consecutively and each paragraph shall contain as nearly as may be a single allegation. Where a Burmese or Indian date is given the corresponding English date shall be added. The names, description and places of residence of the parties must be fully set out in the title or the omission to do so must be satisfactorily explained.

10. A plaint shall be presented to the Chief Clerk of the Court or to such officer as the Chief Judge may from time to time appoint in that behalf. If the plaint be reasonably legible and be properly stamped, signed, and verified and otherwise admissible in accordance with the provisions of the Code and of these rules it shall be received, and a receipt shall be granted to the person presenting it. A diary from the suit shall thereupon be opened by such Chief Clerk or other officer, who shall enter therein the name of the person presenting the plaint, the date of presentation

and the documents (if any) produced or filed with the plaint, together with the plaint shall be filed as many copies thereof as there are defendants to the suit. And the Chief Clerk or such other officer as aforesaid shall thereupon place the plaint with the diary form before the Registrar for his written order for the admission of the plaint and his direction for summons to issue upon payment of the necessary fees.

11. If it appears to the Registrar that the plaint should for any reason be amended or rejected, the matter shall be placed in the daily cause list on a suitable date before the Registrar for admission and the Registrar shall then deal with the matter in question or (if so desired) place the matter for admission before the Judge to whom such case would ordinarily be assigned.

12. If the person desiring to verify a plaint is not a party to the suit he shall obtain leave from the Registrar to verify and his application in that behalf shall be supported by affidavit showing his connection with the case and how the allegations made come within his knowledge or belief.

13. An agent desiring to institute a suit shall, at the time of presenting the plaint, produce his power of attorney for the scrutiny of the Chief Clerk or such other officer as aforesaid who shall examine it and note its production in the diary, and the power of attorney shall be returned with a warning that it must be produced on the day of hearing for inspection.

14. (1) When an original document is produced by the plaintiff under order VII, rule 14, of the Code, the chief clerk shall put thereon his initials and a note of the date of presentation.

(2) If a copy of such document is delivered to be filed with the plaint instead of the original, the chief clerk shall compare the copy with the original and certify as to its correctness by endorsement.

15. When a plaint has been admitted it shall be numbered and registered as a suit only instituted and the chief clerk or other officer as aforesaid shall, upon receipt of the proper fees, issue a summons directed to each defendant.

*Summons—its Service—and the service of process is generally.*

16. The summons to the defendant shall require the defendant or defendants to enter appearance before the Registrar upon a date to be therein mentioned.

17. (1) In all suits for sums not exceeding Rs. 50 the summons shall be for final disposal.

(2) In all suits the value of which exceeds Rs. 1,000 summons shall be for the settlement of issues.

(3) And in all other suits the Registrar shall determine, at the time, of issuing the summons, whether it shall be for the settlement of issues only or for the final disposal of the suit ; and the summons shall contain a direction accordingly.

18. (1) In all suits in which summons is for the settlement of issues the defendant when he enters appearance shall be given an opportunity of filing a written statement in answer to the plaintiff's claim and the suit shall be assigned to a particular Judge for trial and a date fixed for hearing.

(2) In all other suits a verbal defence may be recorded unless for any reason the Court considers a written statement desirable in the circumstances.

19. Ordinarily the interval between the date of issue of a summons and the day fixed for the appearance of the defendant or defendants shall not be less than—

(a) Where all the defendants reside within the local limits of the jurisdiction of the Court :—

(1) in suits the value of which exceeds Rs. 1,000—fourteen days ;

(2) in all other cases—ten days ;

(b) where any one defendant resides in Burma but beyond the local limits of the jurisdiction of the Court—twenty eight days ;

(c) where any one defendant resides elsewhere in India—eight weeks.

(d) where any one defendant resides out of India—three months.

20. Ordinarily a defendant residing within the local limits of the jurisdiction of the Court shall not be deemed to have had sufficient time to appear and answer unless the process were served on him not less than three clear days before the day fixed for appearance.

21. All processes and warrants, except committal and release warrants, shall be signed, sealed and issued by the chief clerk. Committal and release warrants and commissions shall be signed by the Judge who ordered their issue or by the Registrar on his behalf.

22. Processes or warrants for service or execution within the local limits of the jurisdiction of the Court shall be delivered for service or execution to the Bailiff who shall endorse thereon the date of receipt by him. If the person to be served is known to the Bailiff, or to any of his staff, the Bailiff shall cause the process to be served forthwith. If the person to be served is not so known the Bailiff shall require the party applying for the process to provide some person to identify the person to be served and shall fix a time when one of the officers will be ready to proceed to effect service.

23. Processes for service in Burma but beyond the local limits of the jurisdiction of the Court shall unless otherwise directed be sent by post to a Court at the head quarters of a township in which the person to be served resides. If the process is to be served out of Burma it shall be sent for service as required by section 28 and Order V, Rules 21 to 23 and 25 of the Code, to the Court named by the party at whose instance the process is issued.

24. Unless otherwise ordered a second or subsequent process shall not be issued until the previous one has been returned.

25. Proof of service may be made by affidavits. Such affidavits must state fully all particulars which must necessarily be proved before the summons or process can be held to have been duly served. The Bailiff is empowered to administer this oath to the deponents of such affidavits.

26. No summons or other process shall be served or executed on a Sunday, Christmas Day or Good Friday except by the special leave of the Court.

#### *Appearance.*

27. If the defendants or any of them do not appear and the Court is satisfied that they have been duly served with the summons the suit shall be heard *ex parte* as regards such defendants.

28. If the defendants or any of them do appear and wish to defend the suit, the Registrar shall either direct such defendants or defendant to file a written statement before the Judge to whom such case is assigned for trial, allowing such time as may be reasonable for the purpose or direct that the case be placed before such Judge the following Court day for orders.

29. Advocate or pleaders instructed to appear and defend on behalf of any one or more defendants in a suit may enter appearance on his or their behalf at any time before the date for appearance by formal notice in writing addressed to the chief clerk and may at the same time file written statements in answer to the plaintiff's claim and the case will thereupon be placed for orders before the Registrar.

30(1) A minor can only enter appearance by his guardian *ad litem*. And the Court shall upon being satisfied of such incompetence appoint a proper person to be such guardian upon application made to it either in the name or on behalf of such minor or by the plaintiff.

2. (a) If on an application by the plaintiff, and after due notice to the proposed guardian and to the minor, the proposed guardian is not appointed, the Court may appoint one of its officers to act as guardian *ad litem*,

(b) In such case no notice need issue save to the officer concerned, and upon his signifying to the Court his consent to act as a guardian, the order appointing him shall be made, and he shall thereupon endeavour to get into communication with the minor's natural guardian or relatives with a view to ascertaining what defence should be put in in answer to the plaintiff's claim.

(c) The Court may at any time direct the plaintiff or other party having the conduct of the case to pay into Court a sum sufficient to defray such minor's expenses in defending the suit.

(3) The procedure provided for by this rule with regard to minors shall be adopted *mutatis mutandis* with regard to persons of unsound mind.

31. Subject to the control of the High Court, the Chief Judge may from time to time make such arrangement as he thinks fit for the distribution of the business of the Court among the various Judges thereof. And he may whenever it is necessary or expedient withdraw any suit or proceeding from any Judge and transfer it to himself or to any other Judge for disposal.

32. Upon a written statement being filed or a verbal defence recorded the Judge to whom such case is assigned shall fix a date for trial, unless the matter can be disposed of on the pleadings.

*Daily file and Cause Lists.*

33. All pending cases shall be entered in the daily file under the respective dates fixed for hearing.

34. A daily cause list for each Judge and one for the Registrar shall be prepared from the daily file and shall show the matters for disposal in such order as the Chief Judge shall direct.

35. Cases in the daily list shall be called on in turn in the order in which they appear in the list.

36. The daily cause lists, shall be affixed to the Court notice boards daily before the Court opens.

*Documents filed in Court.*

37. The Chief Clerk is authorised to permit party or his pleader to inspect in his presence or in the presence of an officer of the Court any document filed in a suit or proceeding in which he is a party or pleader.

38. Subject to the provisions of Order XIII, Rule 9 of the Code documents filed in Court may be returned after fifteen days from the date of judgment unless the proceedings have in meanwhile been sent for by the High Court.

39. No document not in the English language shall unless the Court otherwise orders) be read or received in evidence without an authorized translation thereof :—

Provided that in cases in which the pleadings may be in the Burmese translation shall not be required of documents written in the Burmese language.

40. The Bench Clerk shall make and sign the endorsement required by order XIII, Rules 4 and 6 of the Code, on documents admitted or rejected.

*Summons to Witnesses.*

41. A party or his pleader may apply for a summons to a witness in any suit or proceeding at any time after the institution and during its pendency. The application shall be presented to the chief clerk. If he thinks that for any reason it should not be granted, he shall take the orders of the Registrar on the point.

42. The party applying shall within twenty four hours from the time when the application is filed, pay to the Bailiff such sum for the travelling and other expenses of the person or persons summoned as the Bailiff may direct according to the following scale :—

	Maximum Minimum.		
	Rs.	R.	A.
Soldiers, mariners, laboures, carriers, domestic servants, sircars, etc.	2	0	4
Tradesmen ... ..	4	1	0
Merchants, managers of banks, zamindars gentlemen of property ...	16	2	0
Auctioneers, brokers professional accountants ...	10	1	0
Professional men ... ..	16	2	0
Editors, engineers and surveyors ... ..	10	2	0
Officers in civil employ drawing not less than Rs. 500,—a month, according to rank ... ..	16	6	0
Military or Naval officer according to rank ... ..	16	6	0
Shroffs, bunnias, school masters, commanders and officers of ships ...	6	2	0
Articled and other clerks ... ..	6	2	0
Police Inspectors, petty officers, military and marine ... ..	4	2	0
Customs-house officers and Engine drivers... ..	4	2	0
Godown Sircars ... ..	2	1	0
Females according to status ... ..	4	0	8

In special cases or in cases not provided for in the scale, the Court shall allow such fees as it thinks fit.

Provided—

*Firstly*,—that in cases to which Government is a party—

(a) no payment into Court will be required for the traveling and other expenses of a Government servant who may be required to be summoned at the instance of Government to give evidence in his official capacity ;

(b) the amount to be paid into Court for the travelling and the other expenses of a Government servant whose salary exceeds Rs 10 and who may be required to be summoned at the instance of a party other than Government to give evidence in his

official capacity in a Court situate at a distance of more than five miles from his headquarters shall be equivalent to the travelling and halting allowances admissible under the Civil Service Regulations.

*Secondly*,—that a Government servant whose salary exceeds Rs 10 per mensem giving evidence in his official capacity in a suit to which Government is a party—

(a) when giving evidence at a place more than five miles from his headquarters shall not receive any thing under these rules, but shall be given a certificate of attendance ;

(b) when giving evidence at a place not more than five miles from his headquarters shall, in cases where the Court considers it necessary, receive under these rules actual travelling expenses, but shall not receive subsistence, special non-expert allowances.

*Thirdly*—That a Government servant whose salary does not exceed Rs. 10 per mensem giving evidence in his official capacity shall receive expenses from the Court.

43. The chief clerk shall issue summons as soon as possible after the Bailiff has endorsed on the application his receipt for the money paid.

44. Fees paid to witnesses otherwise than through the Bailiff shall be certified to the Court before a witness is examined, and if not so certified shall not be allowed in taxation of costs.

45. In cases where the witnesses reside beyond the local limits of the jurisdiction of the Rangoon Small Cause Court, the Bailiff shall remit the expenses of the witnesses by money order to the Court to which the summons is to be sent for service.

46. The Bailiff shall receive all money by other Courts as expenses of witnesses and commissions.

47. On receipt of a summons to a witness issued by another Court, the chief clerk shall send it to the Bailiff who shall note on it whether any and if so, what money has been received as expenses of the witness. If the expenses are sufficient the chief clerk shall then make an order for the issue of the summons.

48. On receiving a commission for the examination of a witness from another Court, the Chief Clerk shall send it to the Bailiff, who shall write on it whether any and, if so what money has been received as expenses of the witness. If sufficient money has been received, the Chief Clerk shall make an order for the issue of the summons to the witness.

49. Any money received as expenses of witness which remains unexpended shall be returned by the Bailiff to the Court of issue, under the orders of the Registrar.

#### *Commissions*

50. The hearing of a suit in which a commission has been issued under Order XXVI of the Code shall be postponed until the return of the commission, unless the Court otherwise directs.

51. An application for commission shall be made promptly after the grounds on which it is asked for are known, and shall be accompanied by an affidavit or affidavits, setting out the facts relied upon as grounds for the issue of the commission, and stating when they first became known to the applicant.

52. In commission for the examination of witnesses which are addressed to the Court and in which the delegation of the commissioner's duties to an advocate or pleader has not been authorized, the Court or the Registrar shall have power to appoint such advocate or pleader or official of the Court as he may determine to execute the commission.

53(1) When an order for the issue of a commission to take evidence on interrogatories has been made, the party obtaining the order shall, within seven days from the date thereof, file his interrogatories, and the documents, if any, to accompany the commission and shall serve a copy of the interrogatories on the other party or his pleader, who shall file his cross-interrogatories, with the documents, if any, to accompanying the same within seven days from such service, and shall serve a copy on the other party or his pleader.

(2) If the commission is for the examination of witnesses *viva voce* the party obtaining the order shall file a list of witnesses, and all necessary papers and documents within seven days from the date of the order.

54. The party obtaining an order for a commission shall pay the necessary costs of and incidental to the same within seven days of the date of the order.



55. On default in the observance of these rules by a party obtaining an order for a commission, the commission shall not issue without leave of the Court, and on default by the opposite party, he shall not be allowed to join in the commission without such leave.

*Judgments, Orders and Decrees.*

56. (1) In all suits of over Rs. 1,000 in value the evidence shall be recorded in manner provided by order XVIII, Rule 5, and the judgments shall contain the particulars required by order XX, Rule 4(2) of the Code.

(2) In all other suits Order XVIII, Rules 5 to 12 shall not apply and judgments shall be in accordance with the provisions of Order XX, Rule 4 (1) of the Code.

57 (1) Except orally delivered judgments taken down in shorthand, judgments and orders shall be pronounced only after they are written. All judgments and orders shall bear the date on which they are delivered.

(2) Decrees shall bear the date of delivery of judgment, and also the date of signature in the hand of a Judge,

(3) If a party or his pleader intimate to the chief clerk immediately after a judgment or order has been passed by a Judge, that he wishes to see the formal decree or order before it is submitted for signature, he may be allowed to do so, and if there is any disagreement as to the form of decree or order, of the taxing or the costs, the case shall be set down on the daily lists, on as early a date as may be convenient, to speak to the minutes of decree.

58. When the Court directs that any decree may be paid by instalments, such instalments shall, in the absence of any direction to the contrary, be paid into Court monthly, and, in default of payment of any one instalment, the whole decree or the balance thereof shall become due.

*Execution Proceedings.*

59. Every application for executing a decree shall be in the prescribed form and shall be presented to the chief clerk, or such other as the Chief Judge may appoint in that behalf, and the application shall, after examination and checked by the Execution clerk be put for orders before the third Judge with a report endorsed thereon as to whether the requirements of the Code and of these rules have been complied with.

60. Applications under section 39 of the Code to send a decree or order for execution to another Court shall be made by verified petition and shall be accompanied by a certified copy of the decree or order.

61. The certified copy, together with the other documents mentioned in Order XXI, Rule 6 of the Code shall be sent by registered post.

62. The process-fees prescribed for the warrant of attachment and for an order of sale shall be annexed to every application for execution by attachment and sale of property.

63. In every application for the attachment of movable property the approximate value of the property sought to be attached shall be stated according to the best of the applicant's belief.

64. In application for execution by attachment of movable property it shall be expressly stated whether the property sought to be attached is in the possession of the judgment-debtor or not, and the place where the property is to be found shall be clearly indicated.

65. A warrant issued under Order XXI, Rule 24, of the Code, shall be returnable within one month from the date thereof :

*Sale of Attached Property.*

66. As soon as possible after an attachment of movable property, the Bailiff shall report to the Court the fact of the attachment and shall furnish a list of the articles attached and their approximate value, and shall note if any of them are not liable to attachment or sale.

• If any of the articles or things fall within the proviso of Order XXI, Rule 43, of the Code, it shall be so stated in the report and list.

67. The report and the list shall be submitted to the Third Judge who shall pass such order for the sale as he may think fit, although the decree-holder may not apply for a sale order. A warrant for sale shall be sent to the Bailiff, who shall forthwith prepare and issue a proclamation.

68. Every proclamation shall be advertised in a local newspaper or advertiser for at least fifteen days (except in the case of property mentioned in the proviso to order XXI, Rule 43, of the Code,) and no proclamation shall issue until the person applying for sale has deposited with the Bailiff an amount sufficient to defray the expense of advertising.

69. Movable property falling within the proviso to order XXI Rule 43, of the Code shall be sold as soon as may be convenient after it has been attached. Other movable property shall be sold on the third Saturday after the day on which the proclamation shall have been affixed on the Court house.

*Security to Court.*

70. When security is required to be given it shall be taken either in cash or in the form of a bond. Such bond shall be with or without sureties as the Judge may direct and shall be in favour of the Bailiff of the Court,

71. When sureties are required and persons resident within the jurisdiction of the Court are tendered, the Bailiff shall report whether the principal and sureties possess within the jurisdiction of the Court property of value equal to the amount of the security required.

72. No sureties shall without the order of the Judge, be accepted unless they make an affidavit or affidavits stating that the property which each of them possesses or that their properties combined, are equal in value to the amount of the security demanded, over and above, any incumbrance to which such properties may be liable, and, over and above, the amount for which they have previously given security in the Court or in any other Court and for which they are at the time liable as securities.

73. On the application of the Bailiff summonses may be issued to persons named by him to appear before him or to produce before him documents of title for the purpose of his enquiry into the value of the property of any person tendered as a surety.

*Bailiff's Commission on sales of Attached Property.*

74. The commission to be drawn by the Bailiff on sales of attached property shall be at the rate of 5 per cent.

The fees paid each month shall be drawn and disbursed to the Bailiff at the end of the month under orders of the Registrar.

*Applications generally.*

75. All applications arising out of a suit shall bear the number of such suit unless they be applications for execution, for attachment, or arrest before judgment, for removal of attachment, for review of judgment, for sanction to prosecute, or miscellaneous applications which necessitate separate judicial proceedings, or in which the petitioner is not a party to the suit.

76. Every application in writing shall be in the form of a petition, signed by the applicant or his recognized agent, or his pleader, and if the Court requires it to be verified shall be verified in the same manner as a plaint.

77. On receiving an application the Court shall (if necessary) direct notice to issue for service on the respondent together with a copy of the application to be supplied by the applicant. The notice shall be served in the same manner as a summons and shall fix date for the hearing of the application.

*Applications to set aside Dismissal orders or ex parte Decrees.*

78. The Court may, at any time after an application to set aside a dismissal order or *ex parte* decree is presented to the Court, put the parties on such terms as to furnishing costs or for security for the amount of the claim and costs by payment into Court or otherwise as it shall think fit.

Part II.

EJECTMENT AND DISTRESSES.

A. *Recovery of possession of immovable property.*

79. An application under Section 17 of the Act shall be in the form of a plaint in which the applicant shall be the plaintiff and the occupant the defendant and the matter shall be treated as a suit. For the purpose of ascertaining the value of the suit the annual rental value of the property in respect of which the claim is made shall be deemed to be the value of such suit, and such annual value shall be stated in the application,

80. When an application has been made under section 17 of the Act, the Court shall by summons call upon the occupant to show cause why he should not be compelled to deliver up the property.

81. The summons shall be served on the occupant in the manner provided by the code for the service of summons on a defendant.

82. If the occupant does not appear at the time appointed and show cause to the contrary, the applicant shall, if the Court is satisfied that he is entitled to apply under section 17 of the Act, be entitled to an order addressed to the Bailiff directing him to give possession of the property to the applicant on such a day as the Court thinks fit to name in such order.

83. Any such order shall justify the Bailiff in entering after the hour of eight in the morning and before the hour of six in the afternoon upon the property named therein, with such assistants as he thinks necessary, and giving possession of such property to the applicant, after removing if necessary anything found therein.

84. When the applicant, at the time of applying for any such order as aforesaid, was entitled to the possession of such property, neither he nor any person acting in his behalf shall be deemed, on account of any error, defect or irregularity in the mode of proceeding to obtain possession thereunder, to be a trespasser; but any person aggrieved may institute a suit for the recovery of compensation for any damage which he has sustained by reason of such error, defect or irregularity. When no such damage is proved, the suit shall be dismissed; and when such damage is proved but the amount of the compensation assessed by the Court does not exceed ten rupees, the Court shall award to the plaintiff no more costs than compensation, unless the Judge who tries the case certifies that in his opinion full costs should be awarded to the plaintiff.

#### *B.—Distress Warrants.*

85. Every application for a distress warrant under section 22 of the Act shall be accompanied by an affidavit in the prescribed form and (so long as the Rangoon Rent Act 1920, remains in force) by a certificate from the controller certifying the standard rent of the premises in respect of which the application is made.

86. The Court may issue a warrant under its seal and returnable within six days, in the prescribed form addressed to the Bailiff.

The Court may, at its discretion, upon personal examination of the person applying for such warrant, decline to issue the same.

87. Every distress shall be made after sunrise, and before sunset, and not at any other time.

88. The Bailiff directed to make the distress may enter any dwelling house, the outer door of which may be open, and may break open the door of any room in such dwelling-house and may force open any stable, out-house or other building for the purpose of seizing property liable to be seized:—

Provided that he shall not enter or break open the door of any room appropriated for residence of women, which by the usage of the country is considered private.

89. In pursuance of the warrant the Bailiff shall seize the movable property found in or upon the house or premises mentioned in the warrant and belonging to the person from whom the rent is claimed (here-in-after called the debtor), or such part thereof as may, in the Bailiff's judgment, be sufficient to cover the amount of the said rent, together with the costs of the said distress.

90. The Bailiff may impound or otherwise secure the property so seized in or on the house or premises chargeable with the rent.

91. On seizing any property under Rule 19 the Bailiff shall make an inventory of such property and shall give notice in writing in the prescribed form to the debtor or to any other person on his behalf in or upon the said house or premises that such property will be sold pursuant to the provisions of the Act. The date on which the sale will be held shall be stated in the notice and shall be not less than seven days after the date of seizure.

The Bailiff shall, as soon as may be, file in the Court copies of the said inventory and notice.

92. The debtor or any other person alleging himself to be the owner of any property seized, or the duly constituted attorney of such debtor or other person, may apply to the Court to discharge or suspend the warrant, or to release a distrained article, and the Court may discharge or suspend such warrant or release such article

accordingly, upon such terms as it thinks just, and may in its discretion give reasonable time to the debtor to pay the rent due from him. Upon any such application, the costs attending it and attending the issue and execution of the warrant shall be in the discretion of the Court, and shall be paid as the Court directs.

93. If any claim is made to, or in respect of any, property seized under these provisions or in respect of the proceeds or value thereof by any person not being the debtor, the Registrar, upon the application of the Bailiff who seized the property may issue a summons calling before the Court the claimant and the person who obtained the warrant.

And thereupon any suit which may have been brought in the High Court in respect of such claim shall be stayed and the High Court, on proof of the issue of such summons and of the distraint, may order the plaintiff to pay the costs of all proceedings in such suit after the issue of such summons.

And the Court shall adjudicate upon such claim and make such order between the parties in respect thereof and of the costs of the proceeding as it thinks fit, and such order shall be enforced as if it were an order made in a suit brought in the Court. The procedure under this rule shall conform, as far as may be, to the procedure in an ordinary suit in the Court.

94. In any case under Rule 92 or 93 the Judge by whom the case is heard may award such compensation by way of damages to the applicant or claimant (as the case may be) as the Judge thinks fit, and may for that purpose make such enquiry as he thinks necessary ;

and the order of the Judges awarding or refusing such compensation shall bar any suit for the recovery of compensation for any damage caused by the distress.

95. In default of any order to the contrary made by the Court or by the High Court the distrained property shall be sold on the day mentioned in the notice prescribed by rule and the Bailiff shall, on realizing the proceeds pay the amount thereof into judicial deposit ; and such amount shall be applied first in payment of the bailiff's commission and the costs of the said distress and then in satisfaction of the debt ; and the surplus, if any, shall be paid to the debtor.

96. No costs of any distress under these provisions shall be taken or demanded except those mentioned in the scale of fees prescribed in Appendix B to this Schedule.

The Chief Judge may apply the sum so obtained as costs towards the payment of the contingent charges and Bailiff's remuneration as appears to the said Judge expedient.

97. The Registrar shall keep a book in which all sums received as costs upon distresses made, and all sums paid as remuneration to the Bailiff, and all contingent charges incurred in respect of such distress, shall be duly entered. He shall also enter in the said book all sums realised by sale of the property distrained and paid over to landlords under these provisions,

98. No distress shall be levied for arrears of rent except under these provisions.

99. The forms prescribed in Appendix B, with such variation as the circumstances may require, shall be used for the purposes therein mentioned.

### PART III.

#### SUMMARY PROCEDURE IN SUIT ON NEGOTIABLE INSTRUMENTS.

100. (1) All suits upon bills of exchange, hundis or promissory notes may, in case the plaintiff desires to proceed hereunder, be instituted by presenting a plaint in the form prescribed with the original bill of exchange, hundi or promissory note annexed together with as many copies thereof as there are defendants to the suit. The summons shall be in Form No. (e) in Appendix C and it shall not be necessary to serve a copy of the plaint on the defendant.

(2) In any case in which the plaint and summons are in such forms, respectively defendant shall not appear or defend the suit unless he obtains leave from the Court as here-in-after provided so to appear and defend and in default of his obtaining such leave or his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summons together with interest at the rate specified (if any) to the date of the decree and such sum for costs as may be prescribed in that behalf unless the plaintiff claims more than such fixed sum, in which case the costs shall be ascertained in the ordinary way, and such decree may be executed forthwith .

Provided always that, unless otherwise ordered by the Court, the summons to the defendant shall have been served upon him :—

(a) If he resides and is served within the local limits of the jurisdiction of the Court, at least five clear days before the returnable date of the summons.

(b) If he resides and is served without such local limits but in Burma, at least ten clear days before the returnable date of the summons.

(c) If he resides and is served elsewhere in India, at least twenty-one clear days before the returnable date of the summons.

101 (1) The Court shall, upon application by the defendant, give leave to appear and to defend the suit upon affidavits, which disclose such facts as would make it incumbent on the holder to prove consideration or such other facts as the Court may deem sufficient to support the application.

The said application and affidavit must be filed in the office of the Registrar and copies thereof must be served on the plaintiff or his pleader not later than three clear days before the day fixed for the defendant's appearance.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing or recording issues or otherwise as the Court thinks fit.

(3) After decree the Court may under special circumstances set aside the decree, and, if necessary, stay or set aside execution, and may leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

102. In any proceeding under this part the Court may order the bill, hundi or note, on which the suit is founded, to be forthwith deposited with an officer of the Court and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

103. The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for non-acceptance or non-payment or otherwise by reason of such dishonour as he has under this part for the recovery of the amount of such bill or note.

104. Save as provided by this part the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.

#### PART IV.

##### *Miscellaneous*

105. All acts which may be done by the Court in regard to the appointment or removal of a guardian *ad litem* under order XXXII, Rules 4 and 11, of the Code or in regard to the substitution or addition of parties to a suit may be done by the Registrar.

106. Any of these rules which require a Judge of the Court to do any act or thing, shall be read as applying equally to a Registrar when exercising any of the powers conferred upon him under section 34 (1) of the Act or by these rules.

The Registrar is authorized to grant certificates under section 28 of the Act to parties in cases which have been disposed of by him.

107. Whenever any judgment debtor, who has been arrested or whose property has been seized in execution of a decree of the Court, or a decree of another Court transferred to it for execution, offers security to the satisfaction of the Court for payment of the amount which he has been ordered to pay and the costs, the Court may order him to be discharged or the properties to be released upon his furnishing such security.

108. Subject to the sanction of the High Court the Court shall frame such forms as it may think necessary for any proceeding before it and may from time to time alter any of such forms.

109. Any such agreement as is contemplated by section 15 of the Act must be filed with the plaint at the time of its presentation, and shall be in the prescribed form, and the matter shall thereupon be placed before the Chief Judge for orders.

110. After the disposal of every suit in which a pauper is concerned the chief clerk shall send to the Collector of Rangoon a memorandum of the court-fees due and payable by the pauper.

111. The following portions of Schedule I of the code shall not extend to the Court, that is to say :—

- (a) So much of the said Schedule as relates to—  
(i) suits excepted from the cognizance of the Court or the execution of decrees in such suit ;  
(ii) the execution of decrees against immovable property or the interest of a partner in partnership property ;  
(b) Order X, Rule 3 (record of examination of parties) ;  
(c) Order XLVII, Rules 6 and 7 ;  
(a) Orders XLIX to LI.

## PART V.

### PROCEEDINGS UNDER OTHER ACTS.

#### *References under the Rangoon Rent Act, 1920.*

112—121. Deleted.

122. Proceedings under section 18 of the Rangoon Rent Act, 1920, shall be commenced by a petition to be presented to the chief clerk, who will put the same up before the Registrar for admission and for directions for notice to issue.

123. Such petition shall be signed by the party aggrieved or by his pleader, shall set out concisely and under distinct heads the ground of objection to the decision of the controller and shall be accompanied by a copy of such decision.

124. Upon the admission of such petition it shall be numbered and registered as a reference under the Rangoon Rent Act, 1920, and notice shall thereupon issue to the opposite party—that is to say, to the landlord or to the tenant of the premises as the case may be.

125. The Registrar shall at the same time inform the controller and call for the proceedings which resulted in the decision complained of and the controller shall forward the same to the Court with all reasonable despatch.

126. Upon due service of the notice on the opposite party the matter shall be placed in the cause list of the Chief Judge for disposal.

127. If the opposite party appears, he shall be given an opportunity of answering the case made in the petition, and the matter shall thereafter be set down for hearing and dealt with in the manner provided by section 23 of the Rangoon Rent Act, 1920.

128. If the opposite party does not appear the Chief Judge shall enquire into the matter and dispose of the same *ex parte*.

129. The judgment of the Chief Judge may confirm, vary or reverse the decision of the controller with such orders as to costs as may be in circumstances be reasonable.

130. A copy of the judgment of the Chief Judge shall be forwarded to the controller for information and record.

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## APPENDIX A.

(PART I RULE 59)

( *Tabular form of Application for Execution* )

IN THE RANGOON SMALL CAUSE COURT

Holder of the Decree in civil

No.

The petition of  
Respectfully Sheweth :—

That your petitioner pray  
to the Particulars given in accordance with Order No. XXI Rule 11 (2), of the Code of Civil Procedure, 1908.

Rangoon,

19 .

Petitioner

1. The number of the Suit.																	
2. The name of the Parties.																	
3. The date of the Decree.																	
4. Whether any appeal has been preferred from Decree.																	
5. Whether any and what adjustment has been made between the parties since the decree.																	
6. Whether any and what previous application has been made for execution of the Decree and with what result.																	
7. The amount of the debt or compensation with the interest, if any, due upon the Decree or relief granted by Decree.	<table border="1"> <tr> <td>Amount decreed</td> <td></td> </tr> <tr> <td>Interest</td> <td></td> </tr> <tr> <td>Costs</td> <td></td> </tr> <tr> <td>Subsequent costs</td> <td></td> </tr> <tr> <td>Costs of the application</td> <td></td> </tr> <tr> <td>Total</td> <td></td> </tr> <tr> <td>Satisfied in part</td> <td></td> </tr> <tr> <td>Total Rs.</td> <td></td> </tr> </table>	Amount decreed		Interest		Costs		Subsequent costs		Costs of the application		Total		Satisfied in part		Total Rs.	
Amount decreed																	
Interest																	
Costs																	
Subsequent costs																	
Costs of the application																	
Total																	
Satisfied in part																	
Total Rs.																	
8. The amount of cost if any, awarded																	
9. The name of person against whom enforcement of decree is sought.																	
10. The mode in which the assistance of the Court is sought whether by the delivery of property specifically decreed, by the arrest and imprisonment of the person named in the application or by the attachment of the property or otherwise.																	

I the petitioner do hereby declare that the contents in columns 1 to 10 of this petition are true to my knowledge and I sign this verification at Rangoon.

Petitioner

Form of Agreement to give jurisdiction to the Court in cases over Rs. 2,000 in value (section 15 and rule 109). We (or the respective advocates or pleaders, as the case may be A. B. of and C. D.

of do hereby agree that the Rangoon Small Cause Court shall have jurisdiction to try this suit brought by A. B.

Against C. D. for under the provisions of section 15 of the Rangoon Small Cause Court Act, 1920.

Witness our hands this day of 19 .

A. B. (or E. F. Advocate for A. B.)

C. D. (or G. H. Advocate for C. D.)

Forms nos. 40 and 46.

Renumber clause 6 and 7 and insert the following as clause 6 :—“6. The persons, who, to the knowledge of the party are interested in the mortgage security or in the right of redemption are as follows, namely :—”

### Appendix B.

#### SCALE OF FEES TO BE LEVIED IN DISTRESS FOR HOUSE RENT.

Sums sued for	Affidavit and Warrants to distrain.	Order to sell	Commission	Total.
1	2	3	4	5
Rs. Rs.	Rs. A.	Rs. A.	Rs. A.	Rs. A.
1 and under 5	0 4	0 8	0 8	1 4
5 and under 10	0 8	0 8	1 0	1 0
10 and under 15	0 8	0 8	1 8	2 8
15 and under 20	0 8	1 0	2 0	3 8
20 and under 25	0 12	1 0	2 8	4 4
25 and under 30	1 0	1 0	3 0	5 0
30 and under 35	1 0	1 0	3 8	5 8
35 and under 40	1 0	1 8	4 0	6 8
40 and under 45	1 4	2 0	4 8	7 12
45 and under 50	1 8	2 0	5 0	8 8
50 and under 60	2 0	2 0	6 0	10 0
60 and under 80	2 8	2 8	6 8	11 8
80 and under 100	3 0	3 0	7 0	13 0
Upward of 100	3 0	3 0	7 per cent.	

The above scale includes all expenses, except in suits where the tenant disputes the landlord's claim and witnesses have to be summoned in which case each summons, in cases where the amount claimed is Rs. 40 or under must be paid for at four annas each, and twelve annas where the amount claimed is above the amount ; and also where pens are kept in charge of property distrained, four annas per day must be paid per man.

### FORMS.

#### IN THE RANGOON SMALL CAUSE COURT.

##### Form of Affidavit (Rules 85 to 99)

A. B. Plaintiff  
 Vs. Defendant.  
 C. D.  
 I. A. B. of in the town of make oath  
 (or affirm) and say that C. D. of is justly indebted  
 to in the sum of Rs. for arrears of rent of the house  
 and premises No. in due for months, to  
 wit, from to at the rate of Rs. per mensem.  
 Sworn or affirmed before me this day of  
 Commissioner for

#### IN THE RANGOON SMALL CAUSE COURT

##### Form of warrant (Rule 86)

I hereby direct you to distrain the movable property of C. D. on the house and premises situate at No. , in for the sum of rupees,



the costs of distress, according to the provisions of Schedule I, Part II, of the Rangoon Small Cause Court Act, 1920.

Dated the                      day of                      19

To E. F.

Signed and sealed  
Bailliff.

IN THE RANGOON SMALL CAUSE COURT  
**Form of Inventory and Notes (Rule 91).**

(State particulars of property seized).

Take notice that I have this day seized the movable property contained in the above inventory for the sum of                      rupees being the amount of month's rent due to A. B. on                      and that unless you pay the amount thereof, together with the costs of this distress, or obtain an order from one of the Judges or the Registrar of the Rangoon Small Cause Court to the contrary the same will be sold, pursuant to the provisions of the Schedule I, Part II, of the Rangoon Small Cause Court Act, 1920, at (1)                      at                      o'clock on the                      day of                      19 .

Dated the

day of

19

Signed E. F.  
Bailliff.

To C. D.

**APPENDIX C**

(See Rule 100.)

(a) SUIT BY PAYEE OF PRO-NOTE AGAINST MAKER.

(Cause title)

Particulars

Rs. A. P.

Principal ...                      ...                      ...                      ...                      ...

Interest ...                      ...                      ...                      ...                      ...

Costs ...                      ...                      ...                      ...                      ...

The plaintiff above named states as follows :—

1. By a Promissory Note dated the                      day of                      annexed hereto and marked with the letter A and duly executed by the defendant in Rangoon for value received the defendant promised to pay to the plaintiff or order the sum of Rs.                      on demand together with the interest at the rate of                      per cent. per annum.

2. The defendant has not paid the same or any part thereof (or except the sum of Rs.                      is now due to plaintiff for principal and Rs.                      for interest.)

3. The sum of Rs.                      for principal and Rs.                      for interest

The plaintiff claims judgment for the sum of Rs.                      and for cost etc.

I, A. B., the plaintiff above-named, do solemnly declare that I am personally acquainted with the facts of the case and the facts stated in this plaint are true to my knowledge.

(Signed) A. B.  
Plaintiff.

(b) SUIT BY ENDORSEE OF A PRO-NOTE AGAINST MAKER AND ENDORSER.

Cause title

Particulars

Rs. A. P.

Principal ...                      ...                      ...                      ...                      ...

Interest ...                      ...                      ...                      ...                      ...

Cost ...                      ...                      ...                      ...                      ...

The plaintiff abovenamed states as follows :—

1. By the pro-note dated the                      day of                      annexed hereto and marked with the letter A, which was, as I am informed by C. D. and truly believe, duly executed by the first Defendant at Rangoon for value received the said first defendant promised to pay to the second defendant the sum of Rs.                      on demand together with interest thereon at the rate of                      per cent. per annum.

2. On the                      day of                      19                      , the second defendant duly endorsed the pronote to me for valuable consideration.

3. The sum of Rs.                      is now due to plaintiff for principal and Rs.                      for interest.

The plaintiff claims judgment for the sum of Rs.                      and for the costs, etc.

I, A B the plaintiff above named, do hereby declare that except as to the matters stated to be on information and belief, which I believe to be true, I am personally acquainted with the facts of this case, and the facts stated in the plaint are true to my knowledge.

(Signed) A. B.

*Plaintiff.*

(c) SUIT BY PAYEE OF CHEQUE AGAINST DRAWER

<i>(Cause title)</i>	R. A. P.
<i>Particulars</i>	
Principal	.....
Interest	.....
Costs	.....

The plaintiff above-named states as follows :

1. On the                      day of                      19                      the defendant for value received duly signed and delivered to the plaintiff the cheque, dated the                      day of                      and drawn on the                      Bank for the sum of Rs.                      which is annexed hereto and marked with the letter A.

2. On the                      day of                      the said cheque was duly presented to the said Bank and was dishonoured of which due notice was given to the defendant.

3. The sum of Rs.                      is now due to plaintiff for principal and Rs.                      for interest.

The plaintiff claims judgment for the sum of Rs.                      and for costs, etc.

(d) SUITS BY THE ENDORSEE OF A BILL OF EXCHANGE AGAINST THE ACCEPTOR AND PAYEE.

<i>Cause title</i>	Rs. A. P.
<i>Particulars</i>	.....
Principal	.....
Interest	.....
Costs	.....
Notarial charges	.....

The plaintiff above-named states as follows :—

1. The Bill of Exchange dated the                      day of                      hereunto annexed and marked with the letter A was drawn by X. Y. of                      upon the first defendant for the sum of Rs.                      payable three months after date with interest at the rate of                      per cent. per annum, and was accepted by the first defendant and endorsed to the second defendant to the plaintiff.

2. The said bill was duly presented for payment on the                      day of                      and was dishonoured, and the plaintiff has incurred the following Notarial charges :—

3. The sum of Rs.                      is now due to plaintiff for principal and Rs.                      for interest.

The plaintiff claims judgment for the sum of Rs.                      and for costs, etc.

(e) SUMMONS (RULE 100)

*Cause title.*

To      A. B. of                      (address and description of Defendant)

WHEREAS      has instituted a suit against you under Part III of the Rangoon Small Cause Court Rules for Rs.                      balance of principal and interest due to him as the payee (or endorsee or as the case may be) of a Pro-note (or Bill of Exchange or Hundi or as the case may be) of which a copy is hereto annexed, you are hereby summoned to obtain leave from the Court to appear and defend the suit. In default whereof the plaintiff will be entitled to obtain a decree for the said sum and costs as mentioned below.

Leave to appear may be obtained on an application to the Court supported by affidavit showing that there is a defence to the suit on the merits or that if it is reasonable that you should be allowed to appear in the suit.

The                      day of                      19                      is fixed                      for your appearance before                      the Judge of this Court and the said application and affidavit

must be filed in the office of the Registrar and copies thereof must be served on the plaintiff or his pleader not later than three clear days before the said day.

PARTICULARS OF CLAIM.

(As stated in *plaint*.)

GIVEN under my hand and the seal of the Court this day of 19 .  
Chief Clerk.

Notes.—(1) If you admit the claim you should pay the money into Court together with the costs of the suit to avoid execution of the decree which may be against your person and property or both.

(2) The address for service of plaintiff (insert address).

ORDER LIV.

The following shall be inserted as Order LIV :

I, Classification of Civil Records.

The records of civil judicial proceedings, whether suits or cases, in all Civil Courts other than Small Cause Courts, and exclusive of suits and cases disposed of under Small Cause Court (procedure by Courts invested with Small Cause Court) jurisdiction, shall be divided into the following four classes :—

Class I—Records of—

(a) suits and cases affecting immovable property including suits for foreclosure, redemption, or sale, with the exception of cases on an application for removal of attachment ; suits in which any question relating to a title to land or to some interest in land, as between parties having conflicting claims thereto, is in issue ;

(b) suits in respect of the succession to an office, or to establish or set aside an adoption, or otherwise to establish the status of individual ;

(c) suits relating to public trusts, charities or endowments, and any proceedings ancillary to such suits.

Class II.—Records of the following suits and cases, except such of them as affect immovable property :—

(a) All suits and cases for probate and letters of administration and for the revocation of the same ;

(b) cases under the Guardians and Wards Act, 1890, relating to the guardianship of minors and the administration of their property ;

(c) cases under the Indian Lunacy Act, 1912, relating to the guardianship of lunatics and the care of their estates ;

(d) administration suits.

Note.—An application by an executor or administrator or by the guardian of a minor or lunatic, to sell, mortgage, etc., property belonging to the estate, is an application in the case, and, together with all the proceedings connected with it, must form part of the record of the case.

Class III.—Records of—

(a) all suits which do not come under class I or class II ;

(b) cases under the Succession (Property Protection) Act, 1841 ; cases under the Succession Certificate Act, 1889 ; cases under Parts III and IV of the Land Acquisition Act, 1894 ; cases under the Provincial Insolvency Act, 1920, other than those in which receivers appointed under that Act have transferred or otherwise dealt with immovable property ; cases under the Code of Civil Procedure to transfer a decree when no application for execution is pending ;

(c) cases on an application for removal of attachment in which immovable property is concerned ;

(d) such other cases as the High Court may from time to time direct to be included.

Note.—Proceedings under the Code of Civil Procedure for the restoration of a suit or appeal or for a review of judgment, are proceedings in the suit or appeal and must form part of the record relating thereto.

Class IV.—Records of—

(a) execution proceedings in which any order affecting immovable property is passed ;

(b) all other execution proceedings.

Note.—Each application for execution shall be treated as a separate case, the record of which shall include the papers on all matters, connected with the execution from the date on which the application was presented until it is finally disposed of.

In these rules the word 'suit', 'case' or 'proceedings' includes an appeal, revision or reference, and if a suit, case or proceedings comes under two or more of the above four classes, the records of such suit, case or proceeding shall be classified under that class for which the period of preservation as hereinbefore prescribed is longest.

*Note.*—It is directed that records of cases under section 14 of the Legal Practitioners Act, 1879, shall be included in Class III of the Rules for the classification of Civil Records.

## II.—ARRANGEMENT OF RECORDS.

2. Every record under Classes I, II and III shall be divided as the trial proceeds into three files A, AA and B provided that if there are no documentary exhibits, the AA file may be omitted.

File A shall be called the Trial Record and, in cases other than appeals, shall contain besides the fly-leaf with index of contents :—

- (a) Diary.
- (b) Complaint or petition instituting the case.
- (c) Complaint attached to the complaint to define the land sued for.
- (d) List of documents produced with the complaint when not endorsed on the complaint, Order VII, Rule 9.
- (e) List of documents relied on by plaintiff, but not produced, Order VII, Rule 14.
- (f) List of documents produced by the parties at the first hearing, Order XIII, Rule 1 (2).
- (g) Written statements or counter-petitions of the parties.
- (h) Petitions, proceedings and orders in interlocutory matter; and summonses on defendants and process-servers' reports and affidavits of process-servers and identifiers with the orders of the Court thereon in *ex-parte* cases.
- (i) Opening proceedings.
- (j) Issues.
- (k) Oral evidence for plaintiff\* taken in Court and on Commission.
- (l) Oral evidence for defendant † taken in Court and on Commission.
- (m) Report of Commissioner appointed under Order XXVI.
- (n) Award of arbitrators or petition of compromise.
- (o) Report or account of a Receiver.
- (p) Judgment.
- (q) Decree.
- (r) Final decree in mortgage or administration suits.
- (s) Copies of orders and decree in appeal and revision.
- (t) Order absolute for sale in mortgage cases, together with proclamation, sale, report, order of confirmation and certificate of sale.

The judgment of the Appellate Court, if any, shall be filed after the decree and any further evidence recorded and any finding of the lower Court, together with the final order in appeal shall be filed thereafter in that order.

File AA shall be called the exhibit record and shall contain besides the fly-leaf and the table of contents :—

- (a) List of documents admitted in evidence from plaintiff.\*
- (b) Documents ‡ admitted in evidence for plaintiff.\*
- (c) List of documents admitted in evidence for defendant. †
- (d) Documents ‡ admitted in evidence for defendant. †

File B shall be called the process record and shall contain besides the fly leaf with table of contents :—

- (a) Power of attorney.
- (b) Summonses and other processes and affidavits relating thereto. §

\* Substitute "defendant" if defendant begins.

† Substitute "plaintiff" if defendant begins.

‡ Document not admitted in evidence must not be filed with the record, but should be returned to the party who produced them.

§ Summonses on defendants and process-servers' reports and affidavit of process-servers and identifiers with the orders of the Court thereon in *ex-parte* cases should be on the file

- (c) List of witnesses.
  - (d) Petitions relating to adjournments, attendance of witnesses, etc.
  - (e) Other papers not included in Trial Record.
  - (f) Letters, etc., calling for records, etc.
3. Every record under class IV shall consist of two files, A and B. File A shall contain besides the fly leaf with table of contents :—
- (a) Diary.
  - (b) Application for execution.
  - (c) Papers received from Court which passed the decree, Order XXI, Rule 6
  - (d) Plans of lands to be attached.
  - (e) Petitions, proceedings and orders in interlocutory matters.
  - (f) Petitions objecting to the execution, other than claims under Order XXI,
- Rule 58.
- (g) Warrants and prohibitory orders issued to effect execution by attachment or delivery of property, and returns thereto.
  - (h) Warrant of sale.
  - (i) Proclamation of sale.
  - (j) Report of result of sale.
  - (k) Order confirming sale.
  - (l) Copy of certificate of sale.
  - (m) Applications for payment of money in deposit and the orders thereon.
  - (n) Receipts or acknowledgment of satisfaction.
  - (o) Final order.
  - (p) Copy of order in appeal or revision.
- File B shall contain all other papers.
4. The A file of the trial record of an Appellate Court shall contain, besides the fly leaf with table of contents :—
- (a) Diary.
  - (b) Memorandum of appeal.
  - (c) Copy of judgment and decree of lower Court.
  - (d) Written statements, if any.
  - (e) Petitions, proceedings and orders in interlocutory matters.
  - (f) Oral evidence, if any.
  - (g) Judgment.
  - (h) Decree.
  - (i) Copy of judgment and decree in second appeal or revision.
- The B file shall contain all other papers.
5. The record of suits decided by Small Cause Courts, or tried under Small Cause Court, procedure, shall consist only of one file.

## APPENDIX D.

Forms Nos. 12 to 23.

Renumber Forms Nos. 12 to 23, Appendix D, Nos. 10 to 21 respectively.

## APPENDIX E.

FORM No. 5.

In the heading of Form No. 5 for the words and figures "Order 21, rule 6" the word and figures "section 41" shall be substituted.

FORM No. 15 A.

The following shall be inserted as Form No. 15 A :—

"No. 15 A.

Form of receipt for money deposited in connection with the attachment of property together with notice to decree-holder.

In the Court of execution case No.  
of 19 .

versus

RECEIVED the sum of Rs. on account of the following expenditure  
to be incurred in connection with attachment of property as per list appended.

		Rs.	A.	P.
Process Fees Rules—	1. Custody fees ... ..			
Rule * 15 (i) (b)	2. Feeding charges ...			
(ii) (2)— † 17 (i) (c) (ii)	3. Conveyance charges			
(2).	4. Other expenses (to be specified) ...			
	TOTAL ...			

*N. B.*—The decree-holder is party warned that the sum deposited by him for receiving charges will be exhausted on the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_, and that unless a further deposit is made before that date the attachment will cease.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.  
List of Property to be attached.  
\_\_\_\_\_

## APPENDIX VIII.

### Rules made by the Chief Court of Oudh at Lucknow.

[NOTIFICATION No. 1368 XIV—107-21.

*April 25, 1927.*

In continuation of Notification No. 3293 XIV—107-21, dated December 1, 1926, under section 122 of the Code of Civil Procedure, Act No. V of 1908, and with the previous approval of the Local Government, the Chief Court is pleased to make the following amendments in the rules in the first Schedule of the said Code]

#### First Schedule to the Code of Civil Procedure, 1908.

##### ORDER III.

In Order III, rule 5, *for* the words "on the pleader of any party" *substitute* the words "on a pleader who has been appointed to act for any party."

##### ORDER IV.

To sub-rule (2) of order IV, rule I, *add* the following words—"and, except with the permission of the presiding officer, for reasons to be recorded, no plaint shall be admitted until the necessary process-fee has been paid into Court."

##### ORDER V.

To Order V, rule 1, *add* a new sub-rule (1A) after sub-rule (1) as follows :—

(1A) A party shall file, with his application for the issue of a summons to the defendant or opposite party, a printed summons form, in duplicate, one part being in Urdu and the other in the Nagri character, duly filled up, except in respect of the date of appearance and of the summons in a bold, clear and easily legible handwriting : provided that—

(a) if the party, to be served is an European British subject, the party applying for the issue of the summons shall file a special form which shall be filled up in English ; and,

(b) the presiding officer may, in his discretion, direct that such forms in general or that any particular such form be filled up entirely in the office of the Court.

In Order V, rule 2, *omit* the words "or, if so permitted by a concise statement."

\* Strike out if used in Courts other than the High Court of Judicature at Rangoon, and the Small Cause Court, Rangoon.

† Strike out if used in the High Court of Judicature at Rangoon and the Small Cause Court, Rangoon.

*In Order V, rule 15, for the words "Where in any suit the defendant cannot be found" substitute the words "Where a summons has been issued to a defendant on the institution of a suit and he is absent from the address stated in the summons."*

*In Order V, between rules 20 and 21, insert the following :—*

"20A (1). Where the defendant resides in British India outside the Province of Oudh and within the limits of headquarters town of a district in that Province, a summons may be served on him by registered post, and in this case, where an acknowledgment purporting to be signed by the defendant or on an endorsement by a postal servant that the defendant refused service has been received, the process shall, unless the contrary is proved, be deemed to have been served."

(2) Where the registered address of the defendant or opposit party, as defined in Order VIII, rule 11, is within the limits of a headquarters town or of a municipality of India (including Burma, or Ceylon) a notice, summons or other process may be served on him at that address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served."

*In Order V, rule 25, substitute the word "may" in place of the word "shall."*

*In Order V, rule 26 (b), after the words, "the summons may", insert the words, "in addition to or in substitution for the method permitted by rule 25."*

*In Order V, rule 27, insert the word "air" between the words "military" and "or."*

*To Order V, rule 28, add the following 28 (a), and re-number the present rule as (b).*

"28(a). Where the defendant is an officer in His Majesty's Military, Naval or Air forces the Court shall send the summons direct to him for service together with a copy to be retained by him.

#### ORDER VII.

*In Order VII, rule 9 (1), for the words "and if the plaint is admitted, shall present" substitute the words "and shall, at the same time, present" also delete the words "unless the Court...present such statements" as well as sub-rules (2) and (3), and re-number sub-rule (4) as sub-rule (2) deleting the words "or statements".*

*In Order VII, substitute the following for rule 14, sub-rule (2) :—*

"14 (2). Where he relies on any other documents as evidence in support of his claim, he shall enter, all of them, in a list to be added or annexed to the plaint and shall produce in Court, when the plaint is presented, such of them as are in his possession or power. In regard to the documents not in his possession or power, he shall, if possible state in whose possession or power they are, and shall cause them to be summoned for production before the Court on a date to be fixed by the Court for the purpose".

*Explanation.*—A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the plaintiff, it will not be deemed to be "in the power" of the plaintiff.

*Delete rule 15.*

*To Order VII add the following rules :—*

"19. Every plaint or original petition shall be accompanied by an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. This address shall be called the registered address, and service thereat shall be deemed to be sufficient service.

20. Any party subsequently added as plaintiff or petitioner shall, in like manner, file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

21. A registered address shall be within the local limits of the district Court within which the suit or petition is filed, if the plaintiff or petitioner resides or carries on business within these limits.

22. If a plaintiff or petitioner fails to file a registered address, as required above, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected.

An order under this rule may be passed by the Court *suo motu*, or on the application of any party.

23. Where the registered address of the plaintiff or petitioner is within the limits of a headquarters town or of a municipality of India (including Burma or Ceylon), a notice, summons or other process may be served on him at that address

by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served.

24. In all cases to which rule 23 does not apply, where a plaintiff or petitioner is not found at his registered address and no agent or adult male member of his family on whom a notice or process can be served is present, a copy of the notice or process shall be affixed to the outer-door of the house. If, on the date fixed, such plaintiff or petitioner is not present another date shall be fixed and a copy of the notice, summons or other process shall be sent to his registered address by registered post and such service shall be deemed to be as effectual as if the notice or process had been personally served.

25. Whenever a plaintiff or petitioner has engaged a pleader to act for him, a notice or process for service on him shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at his registered address :

Provided that, where a notice is served on a pleader under the above rule, he shall be given sufficient time to communicate with his client and to receive instructions.

*Explanation*—Where 10 days' time has been allowed under this rule this shall be deemed sufficient time within the meaning of this proviso, in the absence of an application made within such 10 days by the pleader concerned for further time.

26. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition, and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform, and may be either served upon the pleader for such parties or be sent them by registered post, as the Court thinks fit.

27. Nothing in rules 19 to 26 shall prevent the Court from directing the service of a notice or process in any other manner if, for any person, it thinks fit."

#### ORDER VIII.

To Order VIII, rule I, *add* the following as rule 1 (2), and *read* the existing rule I as rule I (1) :—

"1(2). The defendant shall file with his written statement a list of all the documents on which he relies as evidence in support of his case, shall produce with written statement such of the documents as are in his possession or power, and shall cause the others to be summoned on a date to be fixed by the Court for the purpose."

*Explanation*—A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the defendant, it will not be deemed to be "in the power" of the defendant.

To Order VIII *add* the following rules :—

"11. Every defendant in a suit or opposite party in any proceeding shall on the first day of his appearance in Court, file an address (to be called the 'registered address') for service on him of any subsequent notice, summons or other process ; and, if he fails to do so, shall be liable at the discretion of the Court to have his defence or reply if any, struck out, and to be placed in the same position as if he had made no defence or reply.

An order under this rule may be passed by the Court *suo motu* or on the application of any party.

12. Rules 21, 23 and 25 to 27 of Order VII shall apply, so far as may be, to addresses for service filed under the preceding rule, and rule 24 shall, in the same manner, apply but as if the words at the beginning : 'In all cases to which rule 23 does not apply' were omitted.

13. Nothing in rules, 11 and 12 shall apply to the notice prescribed by Order XXI, rule 22."

#### ORDER IX.

In Order IX, rule 13, *between* the words "was not duly served or that" *and* the words "he was prevented by any sufficient cause", *insert* the words "notwithstanding due service of the summons," *and* at the *end* of the rule *add* the following proviso :

"Provided also that no *ex-parte* decree shall be set aside under this rule on the ground that the summons was not duly served, if the Court is satisfied that the defendant had information of the date of hearing sufficient to enable him to appear and answer the plaintiff's claim".



*Explanation*—Where a summons has been served under Order V, rule 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule.

ORDER XIII.

*For Order XIII, rule 1 substitute the following :—*

"1. (1) The parties or their pleaders shall produce, or cause to be produced, on the date fixed by the Court, under Order VII, rule 14, and Order VIII, rule 1 (2), or on any subsequent date which may be fixed by the Court for the purpose, all the documentary evidence of every description in their possession or power on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has permitted or ordered to be produced.

(2) The parties or their pleaders may also file, with the permission of the Court, either on the date of hearing or any subsequent date to be fixed by the Court for the purpose, a supplementary list of further documents on which they intend to rely, and such documents shall be produced by them within the time fixed by the Court.

(3) The Court shall receive the documents so produced, provided that (whenever the documents are produced at any stage of the cause) they are accompanied by an accurate list thereof prepared in such form as the Chief Court may direct."

*Explanation*.—A certified copy of a public document is a document "in the power" of a party, but where a document is in the possession of a person other than the plaintiff or defendant it will not be deemed to be "in the power" of the plaintiff or defendant.

*In Order XIII, rule 4 (1) (d) insert the words "in the Judge's own handwriting" between the words "statement" and "of its having been so admitted."*

ORDER XVI.

*Rule I.*

*For Order XVI, rule 1, substitute the following :—*

"1. (1) The Court may, in any suit or class of suits, require any party to file by a date to be fixed by the Court, a list of witnesses whom he proposes to produce ; and may, if necessary, direct that such list be kept in a sealed envelop for such time as the Court considers desirable.

Where such a list has been called for from any party, the latter shall not, except for special reasons, be permitted to summon or produce as witness any person whose name has not been entered in the list.

(2) Subject to the provisions of sub-rule (1) the parties may, after the suit is instituted, obtain, on application to the Court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents."

*To Order XVI, rule 8, add the following provisos :—*

"Provided that any party may, with the sanction of the Court, himself or by his agent effect service on his own witness as if he were an officer of the Court ; but in this case no diet money paid to a witness by a party or by his agent shall be included in the costs of the suit unless the "witness verifies such payment before an officer of the Court :"

"Provided, also, that the special procedure for the service of summons upon defendant under Order V, rule 20A (1), shall not apply to service of summons under this Order."

ORDER XVII.

*Add the following to Order XVII, rule 2, as sub-rule 2(2) and read the existing rule 2 as 2(1) :—*

"(2) Where before any such day the evidence or a substantial portion of the evidence of any party has been recorded, and such party fails to appear on such day the Court may, in its discretion proceed with the case as if such party were present and may dispose of it on the merits."

*Explanation*.—No party shall be deemed to have failed to appear if he is either present in person, or is represented in Court by his agent or pleader though engaged only for the purpose of making an application.

*For the existing rule 3 of Order XVII, substitute the following :—*

"Where any party to a suit to whom time has been granted fails, without reasonable excuse, to produce his evidence, or to cause the attendance of his witnesses, or to comply with any previous order or to perform any other act necessary to the further progress of the suit for which time has been allowed, the Court may, notwithstanding such default and whether such party is present or not, proceed to decide the suit on the merits."

#### ORDER XXI.

*In rule 5, for the word "district" where it occurs after the word "same" and "different," read "province."*

*To rule 6, add the following as sub-rule (2) and re-number 6 as 6 (1) :—*

"(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him, or to such person as he appoints in a sealed cover to be taken to the Court to which they are to be sent."

*In rule 11 for clause (f) of sub-rule (2), substitute the following :—*

"(f) The date of the last application, if any."

*In rule 17, sub-rule (1), delete the last sentence beginning with the words "and if they" and ending with the words "to be fixed by it" and substitute the following sentence in lieu thereof. —*

"and if they have not been complied with the Court may allow the defect to be remedied then and there, or may fix a time within which it should be remedied ; and in case the decree-holder fails to remedy the defect within such time, the Court may reject the application."

*In rule 22, for the words "one year," wherever they occur in this rule read the words "three years."*

*To sub-rule (2) of the rule add the following proviso :—*

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under this rule unless the judgment-debtor has sustained substantial injury by reason of such omission."

*In rule 24 (3), after the words at the end of the sub-rule, "be executed," add the words, "and a day shall be specified on or before which it shall be returned to Court."*

*For the existing rule 25 (2), substitute the following :—*

"(2) Where the endorsement is to the effect that such officer is unable to execute the process the Court may examine him personally or upon affidavit touching his alleged inability and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result."

*In rule 26 (3) for the words, "the Court may," read the words, "the Court shall unless good cause to the contrary is shown."*

*In rule 31, sub-rules (2) and (3) for the words "six months" substitute the words "three months or such further time as the Court may, in any special case, for good cause shown, direct."*

*In rule 32 (3), for the words "one year" substitute the words "three months," and at the end of the sub-rule add the words "and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year."*

*In rule 32 (4) for the words "one year" substitute the words "three months, or such further time as may have been fixed by the Court under the previous sub-rule."*

*In rule 39 (5) delete the words "in the civil prison."*

*In rule 53, sub-rule (1) (b) in the third line, and in sub-rule (4) in the eighth line after the words "to such other Court" add the words, "and to any other Court to which the decree has been transferred for execution."*

*In sub-rule (6), for the words, "after receipt of notice thereof" read the words, "after receipt of notice, or with the knowledge thereof."*

*To rule 54 add the following sub-rule 54 (3) :—*

"(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property, and against all other transferees from the judgment-debtor from the date on which such order is made."

*For rule 55 substitute the following :—*

"(1) Where an application has been made to the Court under section 73, sub-section (1), for rateable distribution of assets in respect of the property of a

judgment-debtor by a person other than the holder of the decree for the execution of which the original order of attachment was passed, notice shall be sent of the sale officer executing the decree.

(2) Where—

- (a) the amount decreed [which shall include the amount of any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)] with costs and all charges and expenses resulting from the attachment of any property are paid into Court ; or,
- (b) satisfaction of the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)], is otherwise made through the Court or certified to the Court ; or
- (c) the decree [including any decree passed against the same judgment-debtor, notice of which has been sent to the sale officer under sub-rule (1)], is set aside or reversed, the attachment shall be deemed to be withdrawn, and in the case of immovable property, the withdrawal shall, if the judgment-debtor so desires be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule."

*For rule 57 substitute the following :—*

"57. Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to subsist."

*In rule 58, add the following words to sub-rule 58 (2) :—*

"or may in its discretion make an order postponing the delivery of the property after the sale pending such investigation. And in no case shall the sale become absolute until the claim or objection has been decided."

*In rule 68, for the words "fifteen days" read the words "seven days."*

*In rule 69 (2) for the word "seven" read the word "fourteen," and add the following proviso :—*

"Provided that where the principal judgment-debtor or one of the principal judgment-debtors, if there are more than one, appears and gives his consent, the Court may dispense with the consent of the other judgment-debtor or judgment-debtors who have failed to attend in answer to a notice issued under rule 66,"

*For rule 72 (1) substitute the following :—*

"72(1) The holder of a decree, in execution of which property is sold, shall be competent to bid for, or purchase the property, provided that the judgment-debtor may, by application, supported by an affidavit, apply to the Court to debar the decree-holder from purchasing the property ; and the Court may, on such application, either debar the decree-holder from purchasing the property, or grant permission to do so on such terms as may seem just."

*In sub-rule (2) for the words "with such permission" read the words "the property sold."*

*Delete sub-rule (3).*

*In rule 75 (2) after the words "being stored" insert the words "or where it appears to the Court that the crop can be sold to greater advantage in an unripe state."*

*To rule 84 (2), add the following :—*

"The Court shall not dispense with the requirements of this rule in a case in which there is an application for rateable distribution of assets."

*In rule 89, sub-rule (1) for the words "any person.....before such sale" read the words, "the judgment-debtor, or any person deriving title through the judgment-debtor, or any person holding an interest in the property."*

*To rule 90, add the following second proviso :—*

"Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale."

*In rule 92, sub-rule (1) after the words, "the Court shall" insert the words, "subject to the provisions of rule 58 (2)."*

*In rule 98, after the words, "at his instigation." wherever they occur, insert the words "or on his behalf," and after the words "thirty days" at the end of the rule*

*add* the words, "and may order the person or persons whom it holds responsible for such resistance or objections to pay jointly or severally in addition to costs, reasonable compensation to the decree-holder for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree."

*In* rule 99, for the words in brackets "(other than the judgment-debtor)" *read* the words in brackets "(other than the persons mentioned in rules 95 and 98 hereof)."

To order XX *add* the following rules :—

104. The Court may, in the case of any debt due to the judgment-debtor (other than a debt secured by a mortgage or a charge on a negotiable instrument, or a debt recoverable only in a Revenue Court), or any movable property not in the possession of the judgment-debtor, issue a notice to any person (hereinafter called the garnishee, liable to pay such debt, or to deliver or account for such movable property, calling upon him to appear before the Court and show cause why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor, or so much thereof as may be sufficient to satisfy the decree and the cost of execution

105. If the garnishee does not forthwith, or within such time as the Court may allow, pay or deliver into Court the amount due from or the property deliverable by him to the judgment-debtor, or so much as may be sufficient to satisfy the decree and the cost of execution and does not dispute his liability to pay such debt or deliver such movable property or if he does not appear in answer to the notice, then the Court may order the garnishee to comply with the terms of such notice and on such order execution may issue as though such order were a decree against him.

106. If the garnishee disputes his liability the Court, instead of making such order, may order that any issue or question necessary for determining his liability be tried as though it were an issue in a suit ; and upon the determination of such issue shall pass such order upon the notice as shall be just.

107. Whenever in any proceedings under these rules it is alleged or appears to the Court to be probable, that the debt or property attached or sought to be attached belongs to some third person, or that any third person has a lien or charge upon, or an interest in it, the Court may order such third person to appear and state the nature of his claim, if any, upon such debt or property and prove the same, if necessary.

108. After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Court may pass such order as is hereinbefore provided or make such other order as it shall think fit, upon such terms in all cases with respect to the lien, charge or interest, if any, of such third or other person as to such Court shall seem just and reasonable.

109. Payment or delivery made by the garnishee, whether in execution of an order under these rules or otherwise, shall be a valid discharge to him as against the judgment-debtor, or any other person ordered to appear as aforesaid, for the amount paid, delivered or realized although such order of the judgment may be set aside or reversed.

110. Debts owing from a firm carrying on business within the jurisdiction of the Court may be attached under these rules, although one or more members of such firm may be resident out of the jurisdiction :

Provided that any person having the control or management of the partnership business or any member of the firm within the jurisdiction is served with the garnishee order, an appearance by any member pursuant to an order shall be sufficient appearance by the firm.

111. The costs of any application under these rules and of any proceedings arising therefrom or incidental thereto or any order made thereon, shall be in the discretion of the Court.

112. (1) Where the liability of any garnishee has been tried and determined under these rules the order shall have the same force, and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(2) Orders not covered by sub-rule (1) shall be appealable as orders made in execution.

*Illustration.*—An application for a garnishee order is dismissed either on the ground that the debt is secured by a charge or that there is no *prima facie* evidence of debt due. This order is appealable as an order in execution.

113. All the rules in this Code relating to service upon either plaintiffs or defendants at the address filed or subsequently altered under Order VII or Order VIII shall apply to all proceedings taken under Order XXXI or section 47.

114. The following form shall be used under the provisions of rule 104 of Order XXI :—

SUIT NO.                      OF 19 ,  
    ...                      *Decree-holder.*  
    versus  
    ...                      *Judgment-debtor.*

To

WHEREAS it is alleged that a debt of Rs.                      is due from you to the judgment-debtor :

Or that you are liable to deliver to the above-named judgment-debtor the property set forth in the schedule hereto attached ; take notice that you are hereby required on or before the                      day of                      19 , to pay into this Court the said sum of Rs.                      to deliver or account to the nazir of this Court for the movable property detailed in the attached schedule, or otherwise to appear in person or by advocate, vakil or authorized agent in this Court at 10-30 in the forenoon of the day aforesaid and show cause to the contrary, in default whereof an order for the payment of the said sum, or for the delivery of the said property may be passed against you.

Dated this,

day of                      19 ,

*Munsif*

-----  
*Subordinate Judge.*

At

#### ORDER XXV.

To Order XXV, rule I, *add* sub-rules I (4) and (5) :—

"(4) Where the plaintiff has, for the purpose of being financed in the suit, transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and I may, either of its own motion or on the application of any defendant, order such person within a time to be fixed by the Court to give security for the payment of all costs likely to be incurred by any defendant. In case of his default, the Court may dismiss the suit so far as his right to, or interest in, the property in suit is concerned, or may declare that he shall be debarred from claiming any right to, or interest in, the property in suit.

(5) If such person declines to be made a plaintiff the Court may implead him as a defendant and may order him, within a time to be fixed by the Court to give security for the payment of all costs likely to be incurred by any other defendant. In case of his default, the Court may declare that he shall be debarred from claiming any right to, or interest in, the property in suit."

#### ORDER XXVI.

In rule 18, sub-rule (1) *after* the words "agents or pleaders" *substitute* a comma for the full-stop, and *add* the following words :—"and shall direct the party applying for the examination of the witness, or in its discretion any other party to the suit, to supply the Commissioner with a copy of the pleadings and issues."

#### ORDER XXXII.

*Add* the following proviso to rule 3, sub rule (4) :—

"Provided that if the minor is under ten years of age no such notice shall be issued to him."

*Substitute* the following for rule 4 :—

"4. (1) Where a minor has a guardian appointed or declared by competent authority no person other than such guardian shall act as next friend, except by leave of the Court.

(2) Subject to the provisions of sub-rule (1) any person who is of sound mind and had attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or if he is a defendant, or the Court for other reasons to be recorded considers him unfit to act.

(3) Every next friend shall, except as otherwise provided by sub-rule (5) of this rule, be entitled to be re-imbursed from the estate of the minor any expenses incurred by him while acting for the minor.

(4) The Court may, in its discretion, for reasons to be recorded, award costs of the suit, or compensation under section 35 A or section 95 against the next friend personally as if he were a plaintiff.

(5) Costs or compensation awarded under sub-rule (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable."

*Add the following rule 4A :—*

"4A. (1) Where a minor has a guardian appointed by competent authority no person other than such guardian shall be appointed his guardian for the suit unless the Court considers for reasons to be recorded, that it is for the minor's welfare that another person be appointed.

(2) Where there is no such guardian, or where the Court considers that such guardian should not be appointed, it shall appoint as guardian for the suit the natural guardian of the minor, if qualified, or where there is no such guardian, the person in whose care the minor is, or any other suitable person who has notified the Court of his willingness to act, or failing any such person, an officer of the Court.

*Explanation.*—An officer of the Court shall, for the purposes of this sub-rule, include a legal practitioner on the roll of the Court.

(3) No person shall, without his consent be appointed guardian for the suit : provided that in all cases the consent of such person shall be presumed, unless within fifteen days of receipt of notice from the Court, he notifies to the Court, his refusal to accept appointment as such guardian. Refusal to accept notice shall be presumed to be refusal to act.

(4) Where an officer of the Court is appointed guardian for the suit under sub-rule (2) the Court may direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the re-payment or allowance of such costs as justice and the circumstances of the case may require."

#### ORDER XXXIV.

*In rule 4, sub-rule (2) after the words "the Court may", insert the words "of its own motion ; or."*

*Read the present rule 15 as rule 15 (1) and add as sub-rule (2) the following :—*

"Where a decree orders payment of money and charges it on immovable property on default of payment the amount can be realized by sale of that property in execution of that very decree."

#### ORDER XXXIX.

*In rule 1 delete the words or "wrongfully sold in execution, of a decree" in clause (a), and delete the word "sale" after the words "damaging, alienation," and add the following proviso to the rule :—*

"Provided that if it appears to the Court that the property in suit is in danger of being wrongfully sold in execution of a decree, the Court may also by order grant a temporary injunction restraining the Court executing the decree from confirming the sale held in execution of the decree until the disposal of the suit on until further orders."

#### ORDER XLI.

*For the existing rule 3 substitute the following :—*

"3 (1) Where the memorandum of appeal is not drawn up in the manner hereinbefore prescribed, or accompanied by the copies mentioned in rule 1, sub-rule (1) it may be rejected, or where the memorandum of appeal is not drawn up in the manner prescribed, it may be returned to the appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there.

*To rule 14, add the following sub-rule :—*

"(3) Provided that in a case where a respondent has not appeared either during the hearing of the case in the Court from whose decree or order the appeal is preferred, or at any proceeding subsequent to that decree, it shall only be necessary for the Court to make one attempt to effect personal service on such respondent or, if such respondent is dead, on his legal representative ; and, thereafter service may be effected by affixing a notice in some conspicuous place in the Court-house of the

District Judge within whose jurisdiction the suit or proceeding was instituted along with one or other of the following methods, namely, publishing the notice in a newspaper or affixing it to the wall or door of the *chaupal* of the village where the respondent last resided or any other method as the Court may direct."

To Order XLI, add the following as rule 38 :—

"38(1) An address for service filed under Order VII, rule 19, or Order VIII, rule 11, or subsequently altered under Order VII rule 26, or Order VIII, rule 12, shall hold good during all appellate proceedings arising out of the original suit or petition.

(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the appellate Court to such addresses.

(3) Rules 21, 22, 23 and 24 of Order VII shall apply so far as may be, to appellate proceedings."

#### ORDER XLIII.

In rule I (u) for the words "an order under rule 23 of Order XLI" read "any order."

Add the following as rule 3 :—

"3. In every appeal under rule I in every miscellaneous case, and in every suit dismissed for default, a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to be paid."

#### ORDER XLVI.

Add the following as rule 8 :—

"8. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this Order."

#### ORDER XLVII.

Add the following as rule 10 :

"10. Rule 38 of Order XLI shall apply, so far as may be, to proceedings under this Order".

#### ORDER XLVIII.

##### Rule 1.

Before the words "Every process issued" prefix the words "Except as provided in Order IV, rule 1 (2)."

Add the following as rule 4 :—

"4. Except as otherwise provided in every interlocutory proceeding and in every proceeding after decree in the trial Court, the Court may, either on the application of any party, or of its own motion, dispense with service upon any defendant who has not appeared or upon any defendant who has not filed a written statement."

#### ORDER LII.

After Order LI add the following as Order LII :—

"Rule 38 of Order XLI shall apply, so far as may be, to proceedings under section 115 of the Code.

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## APPENDIX IX.

### RULES FRAMED BY THE COURT OF THE JUDICIAL COMMISSIONER CENTRAL PROVINCES.

#### ORDER III.

Rule 5.—In rule 5 substitute the words "on a pleader who has been appointed to act for any party" for the words "on the pleader of any party".

#### ORDER IV.

Rule 1.—Rule (1) is substituted by the following sub-rule (1) :—

"1 (1) Every suit shall be instituted by presenting to the Court or such officer as it appoints in this behalf a plaint together with as many true copies on plain paper of the plaint as there are defendants, for service with the summons upon each defendant, unless the Court, for good cause shown, allows time for filing such copies.

In Rule 1, insert the following sub-rule as sub-rule (2) and re-number the old sub-rule as sub-rule (3) :—

"(2) The Court-fee chargeable for such service shall be paid in the case of suits when the plaint is filed, and in the case of all other proceedings when the process is applied for."

## ORDER V.

Rule 15.—In rule 15 substitute the words "When the defendant is absent or can not be personally served" for the words "Where in any suit the defendant can not be found."

Rule 17.—To rule 17, add the following proviso :—

"Provided that where a special service has been issued, and the defendant refuses to sign the acknowledgment it shall not be necessary to affix a copy as directed hereinbefore."

Rule 21A.—After rule 21, add the following :—

"21A. The Court may, notwithstanding anything in the foregoing rules, cause the summons of its own Court or of any other Court in British India to be addressed to the defendant at the place where he ordinarily resides or carries on business and sent to him by registered post prepaid for acknowledgment provided that such place is a town or village in the Akola Revenue taluk. An acknowledgment purporting to be signed by the defendant or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service."

Rule 25.—In rule 25, substitute the word "may" for the word "shall".

Rule 25A.—After rule 25, insert the following new rule :—

"25A. Where the defendant resides in British India but outside the limits of the Central Provinces, the Court, may, in addition to any other mode of service, send the summons by registered post to the defendant at the place where he is residing or carrying on business. An acknowledgment purporting to be signed by him, or an endorsement by a postal servant that the defendant refused service may be deemed by the Court issuing the summons to be *prima facie* proof of service."

Rule 26.—In rule 26 insert the words "in addition to or in substitution for the method permitted by rule 25" between the words "may" and "be sent."

## ORDER. VII.

Rule 9.—Substitute the following for rule 9 :—

"9(1) The plaintiffs shall endorse on the plaint or annex thereto a list of the documents (if any) which he has produced along with it.

(2) The chief ministerial officer of the Court shall sign such lists and the copies of the plaint presented under rule 1 of Order IV, if "on examination, he finds them to be correct."

Rules 19 to 23.—Insert the following as rules 19 to 23 after rule 18 :—

"19. Every plaint or original petition shall be accompanied by an address at which service of process may be made on the plaintiff or the petitioner. The address shall be within the local limits of the civil district in which the suit or petition is filed, or of the civil district in which the party ordinarily resides, if within the limits of the Central Provinces and Berar. This address shall be called the "registered address" and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of the final decision and for all purposes including those of execution.

"20. Any party subsequently added as plaintiff or petitioner shall in like manner file a registered address at the time of applying or consenting to be joined as plaintiff or petitioner.

"21. (1) If the plaintiff or the petitioner fails to file a registered address as required by rule 19 or 20, he shall be liable, at the discretion of the Court, to have his suit dismissed or his petition rejected. An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where a suit is dismissed or a petition rejected under sub rule (1) the plaintiff or the petitioner may apply for an order to set the dismissal or the rejection aside and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the registered address at the proper time, the Court shall set aside the dismissal or the rejection upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or petition.

22. Where the plaintiff or the petitioner is not found at his registered address and no agent or adult male member of his family on whom a process can be served



is present, a copy of the process shall be affixed to the outer door of the house and such service shall be deemed to be as effectual as if the process had been personally served.

23. A plaintiff or petitioner who wishes to change his registered address shall file a verified petition and the Court shall direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit or proceedings as the Court may deem it necessary to inform."

#### ORDER VIII.

Rules 11 to 13.—After rule 10 insert the following rules 11—13 :—

"11. Every defendant in a suit or opposite party in any proceedings, shall on the first day of his appearance in Court, file an address for service on him of any subsequent process. The address shall be within the local limits of the Civil District in which the suit or petition is filed or of the Civil District in which the party originally resides, if within the limits of the Central Provinces and Berar. This address shall be called the 'registered address' and it shall hold good throughout interlocutory proceedings and appeals and also for a further period of two years from the date of final decision and for all purposes including those of execution.

"12 (1) If the defendant or the opposite party fails to file a registered address as required by rule 11 he shall be liable, at the discretion of the Court to have his defence struck out and to be placed in the same position as if he had made no defence. An order under this rule may be passed by the Court *suo motu* or on the application of any party.

(2) Where the Court has struck out the defence under sub-rule (1) and has adjourned the hearing of the suit or the proceeding and where the defendant or the opposite party at or before such hearing, appears and assigns sufficient cause for his failure to file the registered address he may upon such terms as the Court directs as to costs or otherwise be heard in answer to the suit or the proceedings as if the defence had not been struck out,

(3) Where the Court has struck out the defence under sub-rule (1) and has consequently passed a decree or order, the defendant or the opposite party, as the case may be, may apply to the Court by which the decree or order was passed for an order to set aside the decree or order; and if he files a registered address and satisfies the Court that he was prevented by any sufficient cause from filing the address, the Court shall make an order, setting aside the decree or order as against him upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit or proceeding :

Provided that where the decree is of such a nature that it can not be set aside as against such defendants or opposite party only it may be set aside as against all or any of the other defendants or opposite parties.

13. Rules 20, 22 and 23 of Order VII shall apply so far as may be, to addresses for service filed under rule 11."

#### ORDER IX.

Rule 13.—Add the following as a further proviso to rule 13 :—

"Provided also that no such decree shall be set aside merely on the ground of irregularity in service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

*Explanation.*—Where a summons has been served under Order V, rule 15, on an adult male member having an interest adverse to that of the defendant in the subject-matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule."

In rule 13 for the words "he was prevented by any sufficient cause from appearing" the words "there was sufficient cause for his failure to appear" shall be substituted.

Re-number the existing rule 13 as sub-rule 13(1) and after it, add the following as sub-rule (2) :—

• "(2) The provisions of section 5 of the Indian Limitation Act, IX of 1908, shall apply to applications under sub-rule (1)."

#### ORDER XIII.

Rule 9.—Add the following as sub-rule (2) of rule 9 and re-number the present sub-rule (2) as sub-rule (3) :—

"(2) Where the document has been produced by a person who is not a party to the suit, the Court may and, at the request of the person applying for the return of the document, shall order the party at whose instance the document was produced to pay the cost of preparing the certified copy."

#### ORDER XVI.

Rule 2(1).—Insert the following as an exception to Rule 2(1) :—

"Exception.—when applying for a summons for any of its own officers, Government will be exempt from the operation of sub-rule (1)".

Rule 3.—Substitute the following for rule (3) :—

"3(1) The sum so paid into Court, shall except in case of a Government servant, be tendered to the person summoned, at the time of serving the summons, if it can be served personally.

(2) When the person summoned is a Government servant the sum so paid in Court shall be credited to Government.

*Exception (1).*—In cases in which Government servants have to give evidence at a Court situate not more than 5 miles from their head-quarters, the actual travelling expenses incurred by them may when the Court considers it necessary, be paid to them.

*Exception (2).*—A Government servant whose salary does not exceed Rs. 10 per mensem may receive his expenses from the Court."

Rule 4.—After the word "summoned" where it occurs first in sub-rule (1) insert the following :—

"or where such person is a Government servant, to be paid into Court."

#### ORDER XVIII.

Rule 2.—Insert the following as sub-rule (4) to rule 2 :—

"(4) Notwithstanding anything contained in this rule the Court may order that the production of evidence or the address to the Court may be in any order which it deems fit."

#### ORDER XX.

In sub-rule (2) of rule 11 in Order XX for the words "and with the consent of the decree-holder" the words "and after notice to the decree-holder" shall be substituted.

#### ORDER XXI.

Rule 1—(a) In sub-rule (1) after the words "a decree" insert the words "or an order ;"

(b) for clause (a) the following clause (a) shall be substituted :

"(a) by deposit in, or by postal money order to, the Court whose duty it is to execute the decree or order ; or";

(c) in clause (b) after the word "decree" insert the words "or order" ; and

(d) to sub-rule (2) insert the following proviso :—

"Provided that, when the payment is made by money-order the notice may be given by registered post by the judgment-debtor direct to the decree-holder."

Rule 11.—After sub-clause (v) of clause (j) of sub-rule (2) of rule 11, add the following proviso :—

"Provided that, when the applicant files with his application a certified copy of the decree, the particulars specified in clauses (b), (c) and (h) need not be given in the application."

Rule 16.—In rule 16, after the words "which passed it" insert the words "or to any Court to which it has been sent for execution."

Rule 17.—In sub-rule (1) of rule 17, for the words "and, if they have not been complied with...within a time to be fixed by it" substitute the words "and, if they have not been complied with, the Court may allow the decree to be remedied then and there, or may fix a time within which it should be remedied and, in case the decree-holder fails to remedy the defect within such time, the Court may reject the application"

Rule 22.—In rule 22 for the words "one year" whenever they occur, substitute, the words "three years."

To sub-rule (2) of rule 22 add the following proviso :—

"Provided that no order for the execution of a decree shall be invalid by reason of the omission to issue a notice under the rule, unless the judgment-debtor has sustained substantial injury by reason of such omission."

**Rule 24.**—In sub-rule (3) of rule 24, for the word “executed” substitute the words “returned to the Court”.

**Rule 26.**—In sub-rule (3) of rule 26, substitute the words “shall unless good cause to the contrary is shown” for the word “may.”

**Rule 31.**—In sub-rules (2) and (3) of rule 31 for the words “six months” wherever they occur, substitute the words “three months or such further time as the Court may in any special case, for good cause shown, direct.”

**Rule 32.**—(a) In sub-rule (3)—(i) for the words “one year” substitute the words “three months” ; (ii) after the words “application” insert the words “and the Court may also, for good cause shown, extend the time for the attachment remaining in force for a period not exceeding one year” ; and (b) in sub-rule (4) for the words “one year” substitute the words “three months ; or such further time as may have been fixed by the Court under sub-rule (3).”

**Rule 39.**—To sub-rule (1) of rule 39, the following words shall be added :—“and for the cost of conveyance of the judgment-debtor from the place of his arrest to the Court-house.”

“(b) For sub-rules (4) and (5) the following sub-rules shall be substituted :—

“(4) Such sum (if any) as the Judge thinks sufficient for the subsistence and cost of conveyance of the judgment-debtor for this journey from the Court-house to the Civil prison and from the Civil prison, on his release, to his usual place of residence together with the first of the payments in advance under sub-rule (3) for such portion of the current month as remains unexpired, shall be paid to the proper officer of the Court before the judgment-debtor is committed to the civil prison, and the subsequent payments (if any) shall be paid to the officer in charge of the civil prison.

(5) Sums disbursed under this rule by the decree holder for the subsistence and the cost of the conveyance “if any, of the judgment-debtor shall be deemed to be costs in the suit.”

**Rule 53.**—In clause (b) of sub-rule (1) and in sub-rule (4) of rule 53, after the words “to such other Court” insert the words “and to any other Court to which the decree has been transferred for execution.” In sub-clause (ii) of clause (b) of sub-rule (1) of rule 53, after the word “judgment-debtor” insert the words “with the consent of the said decree-holder expressed in writing or with the permission of the attaching Court,” and (b) for the words “its own” substitute the words “the attached.”

**Rule 54.**—After sub-rule (2) of rule 54, insert the following sub-rule :—

“The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from the date on which such order is made.”

**Rule 57.**—For rule 57 substitute the following rule :—

“57. Where any property has been attached in execution of a decree, and the Court for any reason passes an order dismissing the execution application, the Court shall direct whether the attachment shall continue or cease. If the Court omits to make any such direction, the attachment shall be deemed to have ceased to exist.”

**Rule 58.**—In sub-rule (2) of rule 58, after the word “objection” where it occurs for the second time, insert the following words :—

“Or, where the property to be sold is immovable property, the Court may, in its discretion, direct that the sale be held, but shall not become absolute until the claim or objection is decided.”

**Rule 65.**—In rule 65 of Order XXI, the following sentence shall be added, namely :—

“Such officer or person shall be competent to declare the highest bidder as purchaser at the sale, provided that, where the sale is made in, or with the precincts of the Court-house, no such declaration shall be made without the leave of the Court.”

\* **Rule 66.**—In clause (e) of sub-rule (2) of rule 66, after the word “property” insert the words :—“including the decree-holder’s estimate of the approximate market price.”

**Rule 69.**—In sub-rule (2) of rule 69, for the words “seven days” substitute the words “fifteen days.”

Rule 75.—In sub-rule (2) of rule 75, after the words "being stored" insert the words "or, where it appears to the Court that the crop can be sold to greater advantage in an unripe state."

Rule 85.—In rule 85 of Order XXI, the following explanation shall be added, namely :—"Explanation. When an amount is tendered on any day after 1 p. m. but paid into Court on the next working day between 11 a. m. and 1 p. m. the payment shall be deemed to have been made on the day on which the tender is made."

Rule 89.—In sub-rule (1) of rule 89 for the words "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale" substitute the words "any person claiming any interest in the property sold at the time of the sale or at the time of the petition, or acting for or in the interest of, such person."

Rule 90.—After the proviso to sub-rule (1) of rule 90, insert the following further proviso :—

"Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not put forward by the applicant before the commencement of the sale."

Rule 92.—In sub-rule (1) of rule 92 after the word "make" insert the words "subject to the provisions of rule 58(2)."

Rule 94.—In rule 94, add a comma after the word "sold" and insert the words "the amount of the purchase money" between the word "sold" and the word "and."

Rule 98.—In rule 98 (a) after word "instigation in" both places when it occurs, insert the words "or on his behalf" : and (b) after the words "thirty days" insert the words :—

"and may order the persons or persons whom it holds responsible for such resistance or obstruction to pay jointly or severally, in addition to costs, reasonable compensation to the decree-holder or the purchaser, as the case may be, for the delay and expense caused to him in obtaining possession. The order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were decree."

Rule 99.—In rule 99, for the word "judgment-debtor" where it occurs in brackets substitute the words persons mentioned in rule 95 or 98."

#### ORDER XXV.

Rule 1.—In rule 1(1) insert the words "or that any plaintiff is being financed by a person not a party to the suit" between the words "other than the property in suit" add "the Court may."

Rule 3.—After rule 2 add the following new rule :—

"3. (1) Where any plaintiff has, for the purpose of being financed in the suit transferred or agreed to transfer any share or interest in the property in suit to a person who is not already a party to the suit, the Court may order such person to be made a plaintiff to the suit if he consents, and may either of its own motion or on the application of any defendant order such person, within a time to be fixed by it to give security for the payment of all costs incurred and likely to be incurred by any defendant. In the event of such security not being furnished within the time fixed, the Court may make an order dismissing the suit so far as his right to or interest in, the property in suit is concerned or declaring that he shall be debarred from claiming any right to, or interest in, the property in suit.

(2) If such person declines to be made a plaintiff the Court may implead him as a defendant and may order him, within a time to be fixed by it, to give security for the payment of all costs incurred and likely to be incurred by any other defendant. In the event of such security not being furnished within the time fixed the Court may make an order declaring that he shall be debarred from claiming any right to, or interest in, the property in suit.

(3) Any plaintiff or defendant against whom an order is made under this rule may apply to have it set aside and the provisions of sub-rules (2) and (3) of rule 2 shall apply *mutatis mutandis*, to such application."

#### ORDER XXXII.

Rules 3 and 4.—For rules 3 and 4 substitute the following :—

"3. Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit of such minor.

4 (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit :

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or in the case of a guardian for the suit a plaintiff.

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or as his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act in either capacity."

*Add as Rule 14A.* 14 A. (1) No person except the guardian appointed or declared by competent authority, shall, without his consent, be appointed guardian for the suit.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Unless the Court is otherwise satisfied of the fact that the proposed guardian has no interest adverse to that of the minor in the matters in controversy in the suit and that he is a fit person to be so appointed, it shall require such application to be supported by an affidavit verifying the fact.

(4) No order shall be made on any application for the appointment as guardian for the suit of any person, other than a guardian of the minor appointed or declared by competent authority, except upon notice to the proposed guardian for the suit and to any guardian of the minor appointed or declared by competent authority, or, where there is no such guardian, the person in whose care the minor is, and after hearing any objection that may be urged on a day to be specified in the notice. The Court may, in any case, if it thinks fit, issue notice to the minor also.

(5) (a) Where, on or before the specified day, such proposed guardian fails to appear and express his consent to act as guardian for the suit, or, where he is considered unfit, or disqualified under sub-rule (3), the Court may, in the absence of any other person fit and willing to act, appoint any of its officers or a pleader to be guardian for the suit.

(b) In any case in which there is a minor defendant the Court may direct that a sufficient sum shall be deposited in Court by the plaintiff from which sum the expenses of the minor defendant in the suit shall be paid. The matter shall be adjusted in accordance with the final order passed in the suit in respect of costs.

#### ORDER XXXIX.

Rule 1.—In rule 1 (a) in clause (a) omit the words "or wrongfully sold in execution of a decree"; (b) omit the word "sale"; and (c) after the words "further orders" insert the following proviso:—

"Provided that, if it appears to the Court that the property in suit is in danger of being wrongfully sold in execution of a decree, the Court may also by order grant a temporary injunction restraining the Court executing the decree from confirming the sale held in execution of the decree until the disposal of the suit or until further orders."

#### ORDER XLI.

Rule 14.—To rule 14 the following sub-rule shall be added :—" (3) The Appellate Court may, in its discretion dispense with notice to any respondent against whom the suit was heard *ex parte*."

Rule 21.—In rule 21, of Order XLI (a) the existing rule shall be re-numbered as sub-rule (1) and (b) after sub-rule (1) so re-numbered the following shall be inserted as rule (2), namely :—

"(2) The provisions of section 5 of the Indian Limitation Act, IX of 1908, shall apply to application under sub-rule (1)".

#### ORDER XLV.

Rule 3.—For sub-rule (2) of rule 3 of Order XLV, the following sub-rules, shall be substituted, namely :—

"(2) Upon receipt of such petition, the Court, after sending for the record, and after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day, may dismiss the petition."

"(3) Unless the Court dismisses the petition under sub-rule (2), it shall direct notice to be served on the opposite party to show cause why the said certificate should not be granted."

Rule 7A.—After rule 7, insert the following new rule 7A :—

"7A. No such security as is mentioned in rule 7 (1), clause (a) shall be required from the Secretary of State for India in Council, or, where the Local Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity."

#### ORDER XLVIII.

Rule 1.—To sub-rule (2) of rule 1 of Order XLVIII prefix the words "except as provided in Order IV, rule 1 (2)" and substitute the word "the" for "The."

#### APPENDIX E.

Form No. 38.

In form No. 38 insert the words "for Rs. " between the words "the purchaser" and "at the sale."

#### APPENDIX H. (Miscellaneous).

Form No. 11.

For form No. 11 substitute the following :—

Notice to Minor Defendant and guardian.

(Order 32, rule 4A.)

(Title.)

To

Minor Defendant.

Legally appointed Guardian.  
Actual

Proposed Guardian.

WHEREAS an application has been presented \_\_\_\_\_ on the part of the plaintiff  
\_\_\_\_\_ on behalf of the minor defendant  
for the appointment of you..... as the guardian of the  
suit of the minor defendant.....'you the said minor\*'  
you..... his legally appointed  
actual guardian and you.....

.....the proposed guardian for the suit are hereby  
required to take notice that unless you, the proposed guardian, appear before  
this Court on or before the day appointed for the hearing of the case and stated  
in the appended summons, and express your consent to your appointment or unless  
an application is made to this Court for the appointment of some other person to  
act as guardian of the minor for the suit, the Court will proceed to appoint an  
officer of the Court or a pleader or some other person to act as a guardian to the  
minor for the purposes of the said suit which summons in the ordinary form is  
herewith appended.

GIVEN under my hand and the seal of the Court this \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_  
Judge.

#### APPENDIX X.

Rules made by the Court of the Judicial Commissioner of Sind.

#### ORDER III.

Rule 6.—Add the following as sub-rule (3) to rule 6 of Order III :—

"(3) The Court may at any stage of a suit, and whether upon application made to it, or of its own motion, direct any party to the suit not having a recognised agent residing within the jurisdiction of the Court, to appoint, within a time to be specified, an agent within the jurisdiction of the Court to accept service of process on his behalf. To every appointment made under this sub-rule the provisions of sub-rule (2) shall be applicable."

\* The portion in brackets should be scored out if no notice is to issue to the minor defendant.

## ORDER V.

Rule 21A.—Insert the following as rule 21A in Order V :—

"21A.—*Service of summons by prepaid post wherever the defendant may be residing, if plaintiff so desires :—*

Where the plaintiff so desires, the Court may notwithstanding anything in the foregoing rules and whether the defendant resides within the jurisdiction of the Court or not, cause the summons to be addressed to the defendant at the place where he is residing, and sent to him by registered post prepaid for acknowledgment, provided that such place is at a town or village in British India which is the headquarters of a district or a recognised sub-division of a district, such as a taluka, or to which the provisions of this rule may, from time to time, be extended by a notification by the Court of the Judicial Commissioner of Sind, published in the Sind official Gazettee. An acknowledgment purporting to be signed by the defendant shall be deemed by the Court issuing the summons to be *prima facie* proof of service. In all other cases the Court shall hold such enquiry as it thinks fit and either declare the summons to have been duly served or order such further service as may in its opinion be necessary."

Rule 31.—Add the following as rule 31 in Order V :—

"31. If a summons issued to a defendant residing in British India is returned unserved, the Court may while issuing a fresh summons for personal service or ordering substituted service of the summons also order that a copy of the summons be addressed to the defendant at the place where he is residing and be sent to him by registered post, if there is postal communication between such place and the place where the Court is situate."

## ORDER VII.

Rule 9.—Substitute the following for sub-rule (1) of rule 9 in Order VII :—

"9 (1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which he has produced along with it, and shall present along with the plaint as many copies of it on plain paper as there are defendants; on application made, the Court may, by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason accept instead a like number of concise statements of the nature of the claim made, or of the relief claimed in the suit presented along with the plaint."

Rules 19 to 26.—Add the following as rules 19 to 26 in Order VII :—

"19. *Address to be filed with plaint or original petition.*—Every plaint or original petition shall be accompanied by a memorandum in writing giving an address at which service of notice, or summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall, immediately on being so added, file a memorandum in writing of this nature.

20. *Nature of address to be filed.*—An address for service filed under the preceding rule shall be within the local limits of the district Court within which the suit or petition is filed, or if he cannot conveniently give an address as aforesaid, at a place where a party ordinarily resides.

21. *Consequences of failure to file address.*—Where a plaintiff or a petitioner fails to file an address for service, he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu*, or any party may apply for an order to that effect and the Court may make such order as it thinks just.

22. *Procedure when party not found at the place of address.*—Where a party is not found at the address given by him for service and no agent or adult male member of his family on whom a notice or process can be served is present a copy of the notice or process shall be affixed to the outer door of the house. If on the date fixed such party is not present, another date shall be fixed and a copy of the notice, summons or other process shall be sent to the registered address by registered post prepaid for acknowledgment, and such service shall be deemed to be as effectual as if the notice or process had been personally served.

23. *Service of notice on pleaders.*—Where a party engages a pleader, notice or process on him shall be served in the manner prescribed by Order III, rule 5, unless the Court directs service at the address for service given by the party.

24. *Change of address.*—A party who desires to change his address for service given by him aforesaid shall file a fresh memorandum in writing to this effect and the Court may direct the amendment of the record accordingly. Notice of such

memorandum shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be served either upon the pleaders for such parties or to be sent to them by registered post, as the Court thinks fit.

25. *Rules not binding on Court.*—Nothing in these rules shall prevent the Court from directing the service of a notice or process in any other manner if for any reasons, it thinks fit to do so.

26. *Applicability to notice under Order XXI, rules 22.*—Nothing in these rules shall apply to notice prescribed by Order XXI, rule 22."

#### Order VIII.

Rules 11 and 12.—Add the following as rules 11 and 12 in Order VIII :—

"11. *Parties to file address.*—Every party whether original, added or substituted, who appears in any suit or other proceeding shall on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a memorandum in writing stating his address for service, and if he fails to do so he shall be liable to have his defence, if any struck out and to be placed in the same position if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such an order as it thinks just :—

Provided that this rule shall not apply to a defendant who has filed a written statement, but who is examined by the Court under section 7 of the Dekhan Agriculturists Relief Act, 1879, or otherwise, or in any case where the Court permits the address for service to be given by a party on a date later than that specified in this rule.

12. *Applicability of rules 20 and 22—26 of Order VII to address for service.*—Rules 20, 22, 23, 24, 25 and 26 of Order VII shall apply so far as may be, to addresses for service filed under the last preceding rule.

#### ORDER IX.

Rule 13.—Add the the following further proviso to rule 13 in Order X:—

"Provided also that a decree passed *ex-parte* shall not in the absence of good cause be set aside on the ground merely of irregularity in the service of the summons unless upon the facts proved the Court is satisfied that the defendant did not have notice of the date of hearing in sufficient time to appear and answer the plaintiff's claim."

#### ORDER XVI.

Rule 1A.—Insert the following rule 1 A after rule 1 in Order XVI :—

"1 A. The Court may, on the application of any part for a summons for the attendance of any person as a witness permit that service of such summons shall be effected by such party."

#### ORDER XX.

Rule 11 (2).—Substitute for the words "and with the consent of the decree-holder, "the words, and after notice to the decree-holder."

#### ORDER XXI.

Rule 24.—Insert the following as proviso to sub-rule (2) of rule 24 of Order XXI :—

"Provided that a First Class Subordinate Judge may, in his special jurisdiction, send a process to another subordinate Court in the same district for execution by the proper officer in that Court."

#### ORDER XLI.

Rule 14.—Insert the following as sub-rule (2) to rule 14 in Order XLI :—

"(3) The Appellate Court may, however, in its discretion, dispense with the service of notice of the appeal or interlocutory application therein, on a respondent or opponent who has made no appearance at the trial Court."

Rule 14 A.—Insert the following after rule 14 :—

"14 A. Subject to the leave of the Appellate Court nothing to these rules requiring any notice to be served on or given to an opposite party or respondent shall be deemed to require any notice to be served on or given to the legal representative of any deceased opposite party or deceased respondent where such opposite party or respondent did not appear, either at the hearing in the Court whose decree is complained of or at any proceeding subsequent to the decree of that Court."



Rule 38.—Insert the following as rule 38 in Order XLI :—

"38. *Address for service filed to hold good during appellate proceedings* :—  
(1) An address for service filed under Order VII, rule 19 or Order VIII, rule 11, subsequently altered under Order VII, rule 24, or Order VIII, rule 12, shall hold good during all appellate proceedings arising out of the original suit or petition, subject to any alteration under sub-rule (3).

(2) Every memorandum of appeal state addresses for service given by the opposite parties in the Court below and notices and processes shall issue from the Appellate Court to such addresses.

(3) Rules 22, 23 and 24 of Order VII shall apply, so far as may be, to appellate proceedings."

#### ORDER XLII.

Rule 1 (a) Read for the words "an order under rule 23 of Order XLI" the words "any order".

#### ORDER XLVI.

Rule 8.—Insert the following as rule 8 in Order XLVI :—

*Applicability of rule 38 of Order XLI.*—Rule 38 of Order XL shall apply so far as may be, to proceedings under this order.

#### ORDER XLVII.

Rule 10.—*Applicability of rule 38 of Order XLI.*—Rule 38 of Order XLI shall apply so far as may be, to proceeding under this order.

#### ORDER LII.

Rule 1.—Add the following as Order LII :—

Insert the following as Order LII :—

1. *Applicability of rule 38 of Order XLI to proceedings under section 115.*—Rule 38 of Order XLI shall apply, so far as may be, to proceedings under section 115 of the Code.

#### APPENDIX B.

Insert the following note in red ink in Forms Nos. 1, 2, 3, 5 and 6 of Appendix B to Schedule I :—

"Also take notice that in default of your filing an address for service on or before the date mentioned you are liable to have your defence struck out."

#### APPENDIX XI.

Rules made by the Court of the Judicial Commissioner. North-West Frontier Provinces.

#### ORDER III.

Rule 5.—And "Provided that the pleader is acting and not merely pleading for the party."

#### ORDER V.

Rule 15.—For the words "where in any suit the defendant cannot be found" substitute "where the defendant is absent from his usual place of residence."

Rule 17.—Add "The signature of a headman of the village shall be obtained on the summons and proclamation shall be made by beat of drum in the neighbourhood of the said house."

#### ORDER VII.

Rule 14 (2)—Add "And shall also produce such documents as are in his possession or power."

Rules 19 to 22.—Add the following rules :—

"19. Every plaint or original petition shall be accompanied by a proceeding giving an address at which service of notice, summons or other process may be made on the plaintiff or petitioner. Plaintiffs or petitioners subsequently added shall immediately, on being so added, file a proceedings of this nature.

20. An address for service filed under the preceding rule shall be within the local limits of the District Court within which the suit or petition is filed or, of the District Court within which the party ordinarily resides, if within the limits of the North West Frontier Province.

21. Where a plaintiff or petitioner fails to file an address for service he shall be liable to have his suit dismissed or his petition rejected by the Court *suo motu* or any party may apply for an order to that effect, and the Court may make such order as it thinks just.

22. A party who desires to change the address for service given by him as aforesaid shall file a verified petition, and the Court may direct the amendment of the record accordingly. Notice of such petition shall be given to such other parties to the suit as the Court may deem it necessary to inform, and may be either served upon the pleaders for such parties, or be sent to them by registered post as the Court thinks fit."

#### ORDER VIII.

Rule 1.—Add a sub-clause (2):—"The defendant at the time of presenting a written statement shall, where he relies on any documents (whether in his possession or power or not) enter such documents in a list and produce those documents which are in his possession or power."

Rules 11 and 12.—After rule 10, add the following rules:—

"11. Every party, whether original, added or substituted, who intends to appear and defend any suit or original petition shall, on or before the date fixed in the summons or notice served on him as the date of hearing, file in Court a proceeding stating his address for service, and if he fails to do so, he shall be liable to have his defence, if any, struck out and to be placed in the same position as if he had not defended. In this respect the Court may act *suo motu* or on the application of any party for an order to such effect, and the Court may make such order as it thinks just.

12. Rules 20 and 22 of Order VII shall apply, so far as may be to addresses for service, filed under the preceding rule."

#### ORDER IX.

Rule 13. Add "Provided further that no decree passed *ex parte* shall be set aside merely on the ground of an irregularity in the service of summons, if the Court is satisfied for reasons to be recorded that the defendant had knowledge of the date of hearing in sufficient time to appear on that date and answer the claim."

#### ORDER XIII.

Rule 1.—The following rule is substituted:—

"All documentary evidence shall be produced by the parties or their pleaders in the method and at the time prescribed in Order 7 and 8; provided that after the settlement of issues the Court may fix a date not being more than 30 days after such settlement, within which the parties may present supplementary lists of documents on which they rely."

#### ORDER XVI.

For Rule 1.—*Substitute the following:—*

(1) On such date as the Court may appoint and not later than 30 days after the settlement of issues the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents.

(2) They shall not be permitted to call witnesses other than those contained in the said list, except with the permission of the Court and after showing good cause for the omission of the said witnesses from the list; the Court granting such permission shall record reasons for so doing.

(3) On application to the Court or such officer as it appoints in this behalf, the parties may obtain summonses for persons whose attendance is required in Court."

In Rule 8. Add "Provided that such summons shall ordinarily be made over for service to the party calling the witnesses, and his affidavit shall be considered sufficient proof of service: provided further that he shall, for sufficient reason, be entitled to apply to the Court to have the summonses served through its agency."

#### ORDER XXI.

Rule 6. *Read R. 6 as R. 6 (1) and add the following sub-rule 6 (2):—*

(2) Such copies and certificates may, at the request of the decree-holder, be handed over to him or to such person as he appoints in a sealed cover to be taken to the Court to which they are to be sent."

Rule 16. *For the first proviso to rule 16 substitute the following proviso:*

"Provided that where the decree or such interest as aforesaid has been trans-

ferred by assignment, notice of such application shall be given to the transferror ; and unless an affidavit by the transferror admitting the transfer is presented with the application the decree shall not be executed, until the Court has heard his objections 'if any' to its execution.

Rule 22.—For the words "one year" wherever they occur in Rule 22 read "two years."

Rule 28.—*In sub-rule (3) of R. 26 for the words "the Court may" substitute the words "the Court shall, unless good cause to the contrary is shown."*

Rule 31.—*In sub-rules (2) and (3) of R. 31 for the words "six months" substitute the words "three months" and as sub-rule (4) ;—*

"(4) The Court may on application extend the period of three months mentioned in sub-rules (2) and (3) to such period, not exceeding six months in all as it may think fit."

Rule 32. *In sub-rule (3) of R. 32 for the words "for one year" substitute the words "for three months or such further period not exceeding one year in the whole as may be fixed by the Court."*

Rule 39.—*For the sub-rule (4) of R. 39 substitute following :—*

(4) All payments shall be made to the officer in charge of the civil prison".

*In sub-rule (5) omit the words "in the civil prison."*

Rule 43. *Add the following further proviso to rule 43.*

"Provided further that when the attached property consists of the live-stock or articles which cannot conveniently be removed, and the attaching officer does not act under the first proviso to this rule, he may leave it in the village or place where it has been attached in the charge of a village lombardar or such other respectable person as will undertake to keep the property, subject to the orders of the Court, if such person enters into a written bond for its production.

Any person who has so undertaken to keep attached property may be proceeded against as a surety under section 145 of the Code and shall be liable to pay in execution proceedings the value of any such property wilfully lost by him :—

Rule 53.—*In sub-rule (1) (b) of rule 53 in the 3rd line and in sub-rule (4) in the 8th line after the words "to such other Court" add the words "or to any other Court to which the decree has been transferred for execution".*

*In sub-rule (1) (b) (ii) for the words "its own decree" substitute the words "in the attached decree".*

*In sub-rule (6) for the words "after receipt of notice thereof" read "after receipt of notice or with the knowledge thereof."*

Rule 54.—*Add the following sub rule to rule 54 :—*

"(3) The order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the judgment-debtor from date on which such order is made."

Rule 57.—*Cancel the concluding sentence of rule 57*

"Upon the dismissal.....shall cease" and *substitute the following :—*"In dismissing such application the Court shall direct whether the attachment shall continue or cease. In the absence of any such direction the attachment shall be deemed to cease."

Rule 66.—*Add the following words to clause (e) of sub-rule (2) of rule 66.*

'Provided that it shall not be necessary for the Court itself to give its own estimate of the value of the property ; but the proclamation shall include the estimate, if any, given by either or both of the parties'.

Rule 68.—*In R. 68 for the word "thirty" read "fifteen" and for the word "fifteen" read "seven".*

Rule 69.—*In sub-rule (2) of R. 69, for the word "seven" substitute the word "thirty" and add the following proviso :—*

"Provided that the Court may dispense with the consent of any judgment-debtor who has failed to attend in answer to a notice issued under rule 65."

Rule 72.—*For sub-rule (1) of R. 72 substitute the following :—*

"72 (1) The holder of a decree in execution of which property is sold, shall be competent to bid for or purchase the property without express permission of the Court, provided that the Court may, on application of the judgment-debtor and for sufficient cause, debar him from so bidding or purchasing."

*In sub-rule (2) for the words "with such permission" substitute the words "the property."*

*Cancel sub-rule (3).*

Rule 75.—*In sub-rule (2) of R. 75 after the words "being stored" add the words "or can be sold to greater advantage in an unripe state."*

Rule 89.—*In sub-rule (1) of R. 89 for the words "either owning.....before such sale substitute the following words :—*

*"either claiming any interest in such property at the time of sale or at the time of application, or acting for or in the interest of such person."*

Rule 90.—*Add the following further proviso to sub-rule (1) of rule 90 :—*

*"Provided further that no such sale be set aside on any ground which the applicant could have put forward before the sale was conducted".*

Rule 98.—*In R. 98 after the words "at his instigation" wherever they occur add the words "or on his behalf" and after the words "in the civil prison" add the words "at the expense of the Crown."*

Rule 69.—*In R. 99 for the words "other than judgment-debtor", substitute the words "other than the persons mentioned in rules 95 and 98".*

#### RULE XXXII.

Rule 1.—the following paragraph shall be added :—

*"Such person may be ordered to pay any costs in the suit as if he were the plaintiff."*

#### ORDER XLI.

Rule 14.—Add the following proviso to sub-rule (1) :—

*"Provided that with the permission of the Court no notice need be served upon a respondent who was a proforma defendant in a suit which was decided *ex parte* against him."*

Rule 38.—Add the following rules :—

*"38. (1) An address for service filed under Order 7, R. 19, or Order 8, R. 11, or subsequently altered under O. 7, R. 22 or O. 8, R. 12, shall hold good during all appellate proceedings arising out of the original suit or petition.*

*(2) Every memorandum of appeal shall state the addresses for service given by the opposite parties in the Court below, and notices and processes shall issue from the Appellate Court to such addresses.*

*(3) Rules 21 and 22 of Order 7 shall apply, so far as may be, to appellate proceedings.—*

## APPENDIX XII.

### BENGAL, AGRA,\* AND ASSAM CIVIL COURTS ACT.

#### ACT NO. XII OF 1887.

RECEIVED THE G.-G.'S ASSENT ON 11TH MARCH, 1887.

*An Act to consolidate and amend the Law relating to Civil Courts in Bengal, the North Western Provinces and Assam.*

WHEREAS it is expedient to consolidate and amend the law relating to Civil Courts in Bengal, the North-Western Provinces and Assam ; It is hereby enacted as follows :—

#### CHAPTER I.

##### PRELIMINARY.

Title, extent, and commencement. 1. (1) This Act may be called the Bengal, "Agra"\* and Assam Civil Courts Act, 1887.

(2) It extends to the territories for the time being respectively administered by the Lieutenant-Governor of Bengal, the Lieutenant-Governor of the North-Western Provinces and the Chief Commissioner of Assam, except such portions of those territories as for the time being are not subject to the ordinary civil jurisdiction of the High Court† and,

(3) it shall come into force on the first day of July, 1887.

\* The words within quotations have been substituted by Act 16 of 1911.

† Here the words "and except the Jhanshi Division" have been repealed by the North-Western Provinces and Oudh Act (XX of 1890), s. 9.

2. (1) [*Repealed by Act XII of 1891*].

(2)\* All Courts constituted, appointments, nominations, rules and orders made, jurisdiction and powers conferred and lists published under the Bengal Civil Courts Act, 1871, or any enactment thereby repealed, or purporting expressly or impliedly to have been so constituted, made, conferred and published shall be deemed to have been respectively constituted, made, conferred and published under this Act ; and

(3) Any enactment or document referring to the Bengal Civil Courts Act, 1871, or to any enactment thereby repealed, shall be construed to refer to this Act, or to the corresponding portion thereof.

## CHAPTER II.

## CONSTITUTION OF CIVIL COURTS.

3. There shall be the following classes of Civil Courts under this Act, namely :—

- (1) the Court of the District Judge ;
- (2) the Court of the Additional Judge ;
- (3) the Court of the Subordinate Judge ; and
- (4) the Court of the Munsif.

Number of District Judges and Subordinate Judges and Munsifs.

4. "The Local Government may, alter the number of District Judges, Subordinate Judges and Munsifs now fixed."†

5. [Number of Munsifs.] *Repealed by Act IV of 1914.*

6. (1) Whenever the office of District Judge or Subordinate Judge is vacant by reason of the death, resignation or removal of the Judge or other cause, or whenever "an increase in the number of District or Subordinate Judges has been made under the provisions of section 4"‡ the Local Government may fill up the vacancy or appoint the additional District Judges or Subordinate Judges, as the case may be.

(2) Nothing in this section shall be construed to prevent a Local Government from appointing a District Judge or Subordinate Judge to discharge for such period as it thinks fit, in addition to the functions devolving on him as such District Judge, or Subordinate Judge, all or any of the functions of another District Judge or Subordinate Judge, as the case may be.

7. (1) Whenever the office of Munsif is vacant, or whenever the Local Government increases the number of Munsifs, Vacancies among Munsifs. the High Court shall nominate such person as it thinks fit to be a Munsif, and the Local Government shall appoint him accordingly.

(2) The Local Government may, after consultation with the High Court, and "subject to the control"‡ of the Governor-General in Council, make rules as to the qualifications of persons to be appointed to the office of Munsif.

(3) When rules have been made under sub-section (2), a person shall not be nominated under sub-section (1) unless he possesses the qualifications required by the rules.

\* Here the word "But" repealed by Act XII of 1891 has been omitted.

† Words within quotations have been substituted by Act 39 of 1920.

‡ Words within quotations have been substituted by Act 4 of 1914.

8. (1) When the business pending before any District Judge requires the aid of additional Judges for its speedy disposal, the Local Government may upon the recommendation of the High Court\* appoint such additional Judges as may be requisite.

(2) Additional Judges so appointed shall discharge any of the functions of a District Judge which the District Judge may assign to them, and, in the discharge of those functions, they shall exercise the same powers as the District Judge.

9. Subject to the superintendence of the High Court, the District Judge shall have administrative control over all the Civil Courts, under this act within the local limits of his jurisdiction.

10. (1) In the event of the death, resignation or removal of the District Judge, or of his being incapacitated by illness or otherwise for the performance of his duties or his absence from the place at which his Court is held, the Additional Judge, or, if an Additional Judge is not present at that place, the senior Subordinate Judge present thereat, shall, without relinquishing his ordinary duties, assume charge of the office of the District Judge, and shall continue in charge thereof until the office is resumed by the District Judge, or assumed by an officer appointed thereto.

(2) While in charge of the office of the District Judge, the Additional Judge or Subordinate Judge, as the case may be, may, subject to any rules which the High Court may make in this behalf, exercise any of the powers of the District Judge.

11. (1) In the event of the death, resignation or removal of a Subordinate Judge, or of his being incapacitated by illness or otherwise for the performance of his duties, or of his absence from the place at which his Court is held, the District Judge may transfer all or any of the proceedings pending in the Court of the Subordinate Judge either to his own Court or to any Court under his administrative control competent to dispose of them.

(1) Proceedings transferred under sub-section (1) shall be disposed of as if they had been instituted in the Court to which they are so transferred :

(3) Provided that the District Judge may re-transfer to the Court of the Subordinate Judge or his successor any proceedings transferred under sub-section (1) to his own or any other Court.

(4) For the purposes of proceedings which are not pending in the Court of the Subordinate Judge on the occurrence of an event referred to in sub-section (1), and with respect to which that Court has exclusive jurisdiction, the District Judge may exercise all or any of the jurisdiction of that Court.

12. (1) A District Judge, on the occurrence within the local limits of his jurisdiction of any vacancy in the office of Munsif, may appoint such person as he thinks fit to act in the office until that person is relieved by a Munsif appointed under section 7, or his appointment is cancelled by the District Judge.

(2) The District Judge shall forthwith report to the High Court the occurrence of every such vacancy and the making and cancelling of every such appointment.

\* Certain words after this repealed by Act 16 of 1911 have been omitted.

13. (1) The Local Government may, by notification in the Official Gazette, fix and alter the local limits of the jurisdiction of any Civil Court under this Act.

(2) If the same local jurisdiction is assigned to two or more Subordinate Judges, or to two or more Munsifs, the District Judge may assign to each of them such civil business cognizable by the Subordinate Judge or Munsif, as the case may be, as subject to any general or special orders of the High Court he thinks fit.

(3) When civil business arising in any local area is assigned by the District Judge under sub-section (2) to one of two or more Subordinate Judges, or to one of two or more Munsifs, a decree or order passed by the Subordinate Judge or Munsif shall not be invalid by reason only of the case in which it was made having arisen wholly or in part in a place beyond the local area if that place is within the local limits fixed by the Local Government under sub section (1).

(4) A Judge of a Court of Small Causes appointed to be also a Subordinate Judge or Munsif is a Subordinate Judge or Munsif as the case may be, within the meaning of this section.

(5) The present local limits of the jurisdiction of every Civil Court under this Act shall be deemed to have been fixed under this section.

14. The Local Government may, by notification in the official Gazette, fix and alter the place or places at which any Civil Court under this Act is to be held.

(2) All the places at which any such Courts are now held shall be deemed to have been fixed under this section.

15. (1) Subject to such orders as may be made by the Governor-General in Council, "in the case of the High Court at Calcutta and by the Local Government in other cases," \* the High Court shall prepare a list of days to be observed in each year as close holidays in the Civil Courts.

(2) The list shall be published in the local Official Gazette.

(3) A judicial act done by a Civil Court on a day specified in the list shall not be invalid by reason only of its having been done on that day.

16. Every Civil Court under this Act shall use a seal of such form and dimensions as are prescribed by the Local Government.

17. (1) Where any Civil Court under this Act has from any cause ceased to have jurisdiction with respect to any case any proceeding in relation to that case which, if that Court had not ceased to have jurisdiction, might have been had therein may be had in the Court to which the business of the former Court has been transferred.

(2) Nothing in this section applies to cases for which provision is made in section 623 or section 649 of the Code of Civil Procedure, or in any other enactment for the time being in force.

### CHAPTER III.

#### ORDINARY JURISDICTION.

18. Save as otherwise provided by any enactment for the time being in force, the jurisdiction of a District Judge or Subordinate Judge extends, subject to the provisions of section 15 of the Code of

\* Extent of original jurisdiction of District or Subordinate Judge.

\* The words within quotations have been added by Act 31 of 1920.

Civil Procedure, to all original suits for the time being cognisable by Civil Courts.

Extent of jurisdiction of Munsif. 19. (1) Save as aforesaid, and subject to the provisions of sub-section (2) the jurisdiction of a Munsif extends to all like suits of which the value does not exceed one thousand rupees.

(2) The Local Government may, on the recommendation of the High Court, direct by notification in the official Gazette, with respect to any Munsif named therein, that this jurisdiction shall extend to all like suits of such value not exceeding two (four)\* thousand rupees as may be specified in the notification :

"Provided that the Local Government may, by notification in the local official Gazette delegate to the High Court its powers under this section."†

20. (1) Save as otherwise provided by any enactment for the time being in force, an appeal from a decree or order of a District Judge or Additional Judge shall lie to the High Court.

(2) An appeal shall not lie to the High Court from a decree or order of an Additional Judge in any case in which, if the decree or order had been made by the District Judge, an appeal would not lie to that Court.

Appeals from subordinate Judges and Munsifs. 21. (1) Save as aforesaid, an appeal from a decree or order of a Subordinate Judge shall lie :—

(a) to the District Court where the value of the original suit in which or any proceedings arising out of which the decree or order was made, did not exceed five thousand rupees, and

(b) to the High Court in any other case.

(2) Save as aforesaid, an appeal from a decree or order of a Munsif shall lie to the District Judge.

(3) Where the function of receiving any appeals which lie to the District Judge under sub-section (1) or sub-section (2) has been assigned to an Additional Judge, the appeals may be preferred to the Additional Judge.

(4) The High Court may, with the previous sanction of the Local Government, direct, by notification in the official Gazette, that appeals lying to the District Judge under sub-section (2) from all or any of the decrees or orders of any Munsif shall be preferred to the Court of such Subordinate Judge as may be mentioned in the notification, and the appeal shall thereupon be preferred accordingly.

## CHAPTER IV.

### SPECIAL JURISDICTION.

Power to transfer to Subordinate Judges appeals from Munsifs. 22. (1) A District Judge may transfer to any Subordinate Judge under his administrative control any appeals pending before him from the decrees or orders of Munsifs.

(2) The District Judge may withdraw any appeal so transferred, and either hear and dispose of it himself, or transfer it to a Court under his administrative control competent to dispose of it.

(3) Appeals transferred under this section shall be disposed of subject to rules applicable to like appeals when disposed of by the District Judge.

\* The words within brackets have been substituted by B. & O. Act 4 of 1922.

† Added by Act 4 of 1914 and U. P. Act V of 1925.



23. (1) The High Court may, by general or special order, authorize any Subordinate Judge or Munsif to take cognizance of or any District Judge to transfer to a Subordinate Judge or Munsif under his administrative control any of the proceedings next hereinafter mentioned or any class of those proceedings specified in the order.

(2) The proceedings referred to in sub-section (1) are the following, namely :—

(a) proceeding under Bengal Regulation V, 1799 (*to limit the Interference of the Zillah and City Courts of Dewani Adalat in the Execution of Wills and Administration to the Estates of persons dying intestate*).

(b) [*Repealed by the Guardians and Wards Act (VII of 1890.)*]

(c) [*Repealed by the Succession Certificate Act (VII of 1889)*]

(d) proceedings under the Indian Succession Act, 1865, and the Probate and Administration Act, 1881, which cannot be disposed of by District Delegates ; and

(e) references by Collectors under section 322 C of the Code of Civil Procedure.

(3) The District Judge may withdraw any such proceedings taken cognizance of by, or transferred to, Subordinate Judge or Munsif, and may either himself dispose of them or transfer them to a Court under his administrative control competent to dispose of them.

24. (1) Proceedings taken cognizance of by, or transferred to, a Subordinate Judge or Munsif, as the case may be, under the last foregoing section shall be disposed of by him subject to the rules applicable to like proceedings when disposed of by the District Judge :

Provided that an appeal from an order of a Munsif in any such proceedings shall lie to the District Judge.

(2) An appeal from the order of the District Judge on the appeal from the order of the Munsif under this section shall lie to the High Court if a further appeal from the order of the District Judge is allowed by the law for the time being in force.

25. The Local Government may, by notification in the official Gazette, confer, within such local limits as it thinks fit, upon any Subordinate Judge or Munsif the jurisdiction of a Judge of a Court of Small Causes under the Provincial Small Causes Courts Act, 1887, for the trial of suits cognizable by such Courts, up to such value not exceeding five hundred rupees in the case of a Subordinate Judge or "two hundred and fifty"\* rupees in the case of a Munsif, as it thinks fit, and may withdraw any jurisdiction so conferred :

"Provided that the Local Government may, by notification in the Local official Gazette delegate to the High Court its powers under this section."†

#### CHAPTER V. MISCELLANEOUS.

Suspension or removal of Judge by Local Government.  
the Local Government.

26. Any District Judge, Additional Judge, Subordinate Judge or Munsif may, for any misconduct, be suspended or removed by

\* The words within quotations have been substituted by Act 16 of 1911.

† Added by Act 4 of 1914.

Suspension of Subordinate Judges by High Court. 27. (1) The High Court may, whenever it sees urgent necessity for so doing, suspend a Subordinate Judge.

(2) Whenever the High Court suspends a Subordinate Judge under subsection (1), it shall forthwith report to the Local Government the circumstances of the suspension, and the Local Government shall make such order with respect thereto as it thinks fit.

Suspension or removal of Munsif by High Court. 28. (1) The High Court may appoint a commission for enquiring into alleged misconduct of a Munsif.

(2) On receiving the report of the result of the inquiry, the High Court may, if it thinks fit, remove or suspend the Munsif.

(3) The provision of Act No. XXXVII of 1850 (*for regulating inquiries into the behaviour of public servants*) shall apply to inquiries under this section the powers conferred by that Act on the Government being exercised by the High Court.

(4) The High Court may, before appointing the commission, suspend the Munsif pending the result of the inquiry.

(5) The High Court may, without appointing a commission, remove or suspend a Munsif.

Suspension of Munsif by District Judge. 29. (1) A District Judge may, whenever he sees urgent necessity for so doing, suspend a Munsif under his administrative control.

(2) Whenever a District Judge suspends a Munsif under subsection (1), he shall forthwith report to the High Court the circumstances of the suspension, and the High Court shall make such order with respect thereto as it thinks fit.

## CHAPTER VI.

### MINISTERIAL OFFICERS.

30. District Judges shall appoint the ministerial officers of their Courts, and, subject only to the control of the local Government, may remove or suspend those officers or fine them in an amount not exceeding one month's salary.

Appointment and removal of ministerial officers of other Courts. 31. (1) The ministerial officers of the Civil Courts subject to the administrative control of the District Judge shall be appointed—

(a) in the case of an appointment not likely to last, and not lasting longer than two months, by those Courts and

(b) in any other case, by the District Judge.

(2) An Additional Judge, or subordinate Judge or Munsif may, by order, remove, or suspend or fine in an amount not exceeding one month's salary, any ministerial officer of his Court who is guilty of misconduct or neglect in the performance of the duties of his office.

Appointment and removal of ministerial officers on joint establishments. 32. The provisions of the two last foregoing sections shall be subject to the following modifications in their application to ministerial officers employed by more Civil

Courts than one, namely :—

(a) appointments not likely to last, and not lasting longer than two months shall be made by the Court of the highest class among those Courts, or, where there is no difference in class among those Courts, by the senior among the presiding Judges thereof ; and

- (b) such ministerial officers may not be removed or suspended by any Court except the Court which under clause (a) of this section, is for the time being charged with the duty of making appointments to fill temporary vacancies.

**33.** The District Judge, subject only to the control of the Local Government may, by order, suspend or remove any ministerial officer to whom section 31 or section 32 applies, and may, on appeal or otherwise, reverse or modify any order made under either of those sections by any Court under his administrative control.

**34.** (1) The Local Government may, at the instance of the High Court or of a District Judge, transfer a ministerial officer from any Civil Court under this Act to any other such Court:

"Provided that the Local Government may, by notification in the local official Gazette delegate to the High Court its powers under this section."\*

(2) The District Judge may transfer a ministerial officer from any such Court within the local limits of his jurisdiction to any other such Court within those limits.

Recovery of fines.  
of the person fined.

**35.** Any fine imposed under this Chapter may be recovered by deduction from the salary

## CHAPTER VII.

### SUPPLEMENTAL PROVISIONS.

**36.** (1) The Local Government may invest with the powers of any Civil Court under this Act, by name or in virtue of office :—

(a) any officer in the Chutia Nagpore, Sambalpore, Jalpaiguri, or Darjeeling District or in any part of the territories administered by the Chief Commissioner of Assam, except the district of Silhat, or,

(b) after consultation with the High Court, any officer serving in any other part of the territories to which this Act extends, and belonging to a class defined in this behalf by the Local Government.†

(2) Nothing in sections 4 to 8 (both inclusive) or sections 10 to 12 (both inclusive) or sections 27 to 35 (both inclusive) applies to any officer so invested, but all the other provisions of this Act shall, so far as those provisions can be made applicable, apply to him as if he were a Judge of the Court with the powers of which he is invested.

(3) Where, in the territories mentioned in clause (a) of sub section (1) the same local jurisdiction is assigned to two or more officers invested with the powers of a Munsif, the officer invested with the powers of a District Judge may, with the previous sanction of the Local Government, delegate his functions under sub-section (2) of section 13 to an officer invested with the powers of a Subordinate Judge or to one of the officers invested with the powers of a Munsif.

(4) Where the place at which the Court of an officer invested with powers under sub-section (1) is to be held has not been fixed under section 14, the Court may be held at any place within the local limits of its jurisdiction.

\* Added by Act IV of 1914.

† Certain words after this have been omitted by Act 38 of 1920.

37. (1) Where in any suit or other proceeding it is necessary for a Civil Court to decide any question regarding succession, inheritance, marriage or caste or any religious usage or institution, the Muhammadan law in cases where the parties are Muhammadans, and the Hindu law in cases where the parties are Hindus, shall form the rule of decision, except in so far as such law has, by legislative enactment, been altered or abolished.

(2) In cases not provided for by sub-section (1), or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience.

Judges not to try suits in which they are interested. 38. (1) The presiding officer of a Civil Court shall not try any suit or other proceeding to which he is a party or in which he is personally interested.

(2) The presiding officer of an Appellate Civil Court under this Act shall not try an appeal against a decree or order passed by himself in another capacity.

(3) When any such suit, proceeding or appeal as is referred to in sub-section (1) or sub-section (2), comes before any such officer, the officer shall forthwith transmit the record of the case to the Court to which he is immediately subordinate, with a report of the circumstances attending the reference.

(4) The superior Court shall thereupon dispose of the case under section 25 of the Code of Civil Procedure.

(5) Nothing in this section shall be deemed to affect the extraordinary original civil jurisdiction of the High Court

39. For the purposes of the last foregoing section the presiding officer of a Court subject to the administrative control of the District Judge shall be deemed to be immediately subordinate to the Court of the District Judge, and, for the purposes of the Code of Civil Procedure, the Court of such an officer shall be deemed to be of a grade inferior to that of the Court of the District Judge.

Application of Act to Provincial Courts of Small Causes.

40. (1) This section and sections 15, 32, 37, 38 and 39 apply to Courts of Small Causes constituted under the Provincial Small Cause Courts Act, 1887.

(2) Save as provided by that Act, the other sections of this Act do not apply to those Courts.

## APPENDIX XIII.

### BOMBAY CIVIL COURTS ACT, 1869.\*

#### ACT NO. XIV OF 1869.

RECEIVED THE G.-G.'S ASSENT ON THE 19TH MARCH, 1869.

*An Act to consolidate and amend the law relating to the District and Subordinate Civil Courts in the Presidency of Bombay.*

WHEREAS it is expedient to consolidate and amend the law relating to the district and other subordinate Civil Courts in the Presidency of Bombay; It is hereby enacted

Preamble.

as follows :—

\* Sections 3, 4, 12 to 20, 21, 32, 35 to 37, 40 and 43 have since been extended to the Province of Sindh by notifications under the Scheduled Districts Act (XIV of 1874).

## PART I.

## PRELIMINARY.

1. This Act may be called "The Bombay Civil Courts Act, 1869"; and  
 Short title. extends only to the territories (other than  
 Extent. Sindh)\* under the government of the Governor  
 of Bombay in Council in which the Code of  
 Civil Procedure is now in force.

But the Governor of Bombay in Council may, by notification in the Government Gazette, extend this Act to any other of the territories under such Government in which the said Code is not in force or to Sindh.\*

2. [ *Repealed by Act XIV of 1870.* ]

## PART II.

## DISTRICT AND SADAR STATION.

3.\* The Governor of Bombay in Council may, from time to time, by  
 Alteration and creation of notification in the Government Gazette, alter  
 districts. the limits of existing zilās (which shall hereafter  
 be called districts), and create new district for  
 the purposes of this Act.

4. The Governor of Bombay in Council may also, from time to time, by  
 Position of sadar station. notification in the Government Gazette, alter  
 the position of the sadar station in any district,  
 and fix the position of the sadar station in any new district.

## PART III.

## DISTRICT COURTS.

5. There shall be in each district a District Court presided over by a  
 District Judges. Judge to be called the District Judge. He shall  
 be appointed by the Governor of Bombay in  
 Council by whose authority only he shall be liable to be suspended or re-  
 moved from his appointment.

6. The District Judge shall ordinarily hold the District Court at the sadar  
 Situation of District Court. station in his district, but may, with the pre-  
 vious sanction of the High-Court, hold it else-  
 where within the district.

Original jurisdiction of Dis- 7. The District Court shall be the principal  
 trict Court. Court of original civil jurisdiction in the dis-  
 trict, within the meaning of the Code of Civil  
 Procedure.

8. Except as provided in sections 16, 17 and 26, the District Court shall  
 His appellate jurisdiction. be the Court of Appeal from all decrees and  
 orders passed by the subordinate Courts from  
 which an appeal lies under any law for the time being in force.

NOTES. *Vide* 13 Bom. L. R. 158 ; 12 B. 675.

9. The District Judge shall have general control over all the Civil Courts  
 Control and inspection of and their establishment within the district, and  
 Courts. it shall be his duty to inspect or to cause one  
 of his assistants to inspect the proceedings  
 of all the Courts subordinate to him, and to give such directions with respect to  
 matters not provided for by law as he may think necessary.

\* Sections 3, 4, 12 to 20, 23, 32, 35 to 37, 40 and 43 have since been extended to the Province of Sindh by notifications under the Scheduled Districts Act (XIV of 1874).

The District Judge shall also refer to the High Court all such matters as appear to him to require that a rule of that Court should be made thereon.

10. The District Judge shall obey all writs, orders or processes issued to him by the High Court, and shall make such returns or reports thereto under his signature and the seal of the Court as the exigencies of the case require.

He shall further furnish such reports, and returns and copies of proceedings as may be called for by the High Court or the Governor of Bombay in Council.

11. The District Judge shall use a circular seal, two inches in diameter which shall bear thereon the Royal Arms with the following inscription in English and the principal language of the district—"District Court of."

#### PART IV.

##### JOINT JUDGES.

12. The Governor of Bombay in Council may \* appoint in an district a Joint Judge, who shall be invested with co-extensive powers and a concurrent jurisdiction with the District Judge, except that he shall not keep a file of civil suits, and shall transact such civil business only as he may receive from the District Judge or as may have been referred to the Joint Judge by order of the High Court.\*

13. All Regulations and Acts now or hereafter in force, and applying to a District Judge, shall be deemed to apply also to the Joint Judge, and the seal of the Joint Judge shall be the same as is used by the District Judge.

#### PART V.

##### ASSISTANT JUDGES.

14. The Governor of Bombay in Council, under the general control of the Governor General of India in Council, may appoint one or more assistants to be District Judges, and may suspend or remove from his appointment any assistant so appointed.

15. An Assistant Judge shall ordinarily hold his Court at the same place as the District Judge; but he may hold his Court elsewhere within the district, whenever the District Judge shall, with the previous sanction of the High Court, direct him so to do.

16. The District Judge may refer to any Assistant Judge subordinate to him original suits of which the subject-matter does not amount to 10,000 rupees in amount or value, and miscellaneous applications not being of the nature of appeals.

The Assistant Judge shall have jurisdiction to try such suits and to dispose of such applications.

Where the Assistant Judge's decrees and orders in such cases are appealable, the appeal shall lie to the District Judge or to the High Court according

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\* Here certain words repealed by Bom. Act I of 1910 have been omitted.

as the amount or value of the subject-matter does not exceed or exceeds 5,000 rupees.\*

The Assistant Judge shall when directed by the District Judge so to do, also take evidence on application for certificates under Act No. XX of 1864 (*for making better provision for the care of the person and property of minors in the Presidency of Bombay*), and shall forward it with his opinion thereon for the final orders of the District Judge.

**Notes.**—*Vide* 16 B. 277 ; 33B. 371 ; 32 B. 634.

17. The Governor of Bombay in Council may, by notification in the Government Gazette, empower any Assistant Judge to try such appeals from the decrees and orders of the Subordinate Courts as would lie to the District Judge, and as may be referred by him to the Assistant Judge.

Decrees and orders passed under this section by an Assistant Judge shall have the same force, and shall be subject to the same rules, as regards procedure and appeals, as decrees and orders passed by the District Judge.

**NOTE.**—15 B. 107.

18. A person filling the office of Assistant Judge, on whom the power of hearing appeals has once been conferred under section 17, shall continue to have this power so long and so often as he may fill the office of Assistant Judge, without reference to the district in which he may be employed : provided that the Governor of Bombay in Council may, by notification in the Government Gazette, at any time withdraw such power.

19. The Governor of Bombay in Council may, by notification in the Government Gazette, invest an Assistant Judge with all or any of the powers of a District Judge within a particular part of a district, and may, by like notification, from time to time determine and alter the limits of such part.

The jurisdiction of an Assistant Judge so invested shall, *protanto*, exclude the jurisdiction of District Judge from within the said limits.

Every Assistant Judge so invested shall ordinarily hold his Court at such place within the local limits of his jurisdiction as may be determined by the Governor of Bombay in Council, and may, with the previous sanction of the High Court, hold it at any other place within such limits.

20. Every Assistant Judge shall use the seal of the District Judge to whom he is assistant.

## PART VI.

### SUBORDINATE JUDGES.

21. There shall be in each district so many Civil Courts subordinate to the District Court as the Governor of Bombay in Council, acting under the general control of the Governor General of India in Council, shall, from time to time direct.

22. The Judges of such subordinate Courts shall be appointed by the Governor of Bombay in Council, and shall be called Subordinate Judges.

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\* In s 16, the last paragraph, as originally enacted, has been omitted, a portion of it having been repealed by Act VII of 1889, and the remaining portion by Act VIII of 1890.

No person shall be appointed a Subordinate Judge unless he be a subject of the Queen who has practised "three"\* years as an advocate of a High Court in India or as a vakil in the High Court of Judicature in Bombay, or who has qualified for the duties of a Subordinate Judge according to such test as may for the time being be prescribed by such High Court, or who has taken the degree of Bachelor of Laws in the University of Bombay.

The tests so prescribed by the High Court shall be notified in the Government Gazette.

NOTE.—8 Bom. L. R. 576.

**22A.** † The Governor General in Council may, by notification in the official Gazette, fix, and by a like notification, from time to time alter the local limits of the ordinary jurisdiction of the Subordinate Judges.†

**23.** The Subordinate Judges shall hold their Courts at such place or places as the Governor of Bombay in Council may, from time to time, appoint within the local limits of their respective jurisdictions.

Wherever more than one such place is appointed, the District Judge shall, subject to the control of the High Court, fix the days on which the Subordinate Judge shall hold his Court at each of such places, and the Subordinate Judge shall cause days to be duly notified throughout the local limits of his jurisdiction.

The same person may be the Judge of more than one subordinate Court; and in such cases the District Judge shall subject to the control of the High Court, prescribe rules for regulating the time during which the Subordinate Judge shall sit in each Court.

The Judge of any subordinate Court may, with the previous sanction of the High Court, be deputed by the District Judge to the Court of another Subordinate Judge for the purpose of assisting him in the disposal of the suits on his file.

**Note.**—*Vide* I. B. 538; 12B. 155; 13 Bom. L. R. 251; 11 Bom. L. R. 1352.

**24.** The Subordinate Judges shall be of two classes.

**Jurisdiction of Subordinate Judge of the first class.** The jurisdiction of a Subordinate Judge of the first class extends to all original suits and proceedings of a civil nature.

**Jurisdiction of Subordinate Judge of the second class.** The jurisdiction of a Subordinate Judge of the second class extends to all original suits and proceedings of a civil nature wherein the subject-matter does not exceed in amount or value, five thousand rupees.

**25.** A Subordinate Judge of the first Class, in addition to his ordinary jurisdiction, shall exercise a special jurisdiction in respect of such suits and proceedings of a civil nature wherein the subject-matter exceeds five thousand rupees in amount or value as may arise within the local jurisdictions of the Courts in the district prescribed over by Subordinate Judges of the second class.

\* The word within quotations has been inserted by Bom. Act V of 1912.

† S. 22A has been added by Act IX of 1880.



In districts to which more than one Subordinate Judge of the first class have been appointed, the District Judge, subject to the orders of the High Court, shall assign to each the local limits within which his said special jurisdiction is to be exercised.

NOTE. 8B. 31.

26. In all suits decided by a Subordinate Judge of the first class in the exercise of his ordinary and special original Appeals from his decision. jurisdiction, of which the amount or value of the subject-matter exceeds 5,000 rupees, the appeal from his decision shall be direct to the High Court.

NOTE. 22B. 963 ; 20B. 265.

27. The Governor of Bombay in Council may invest any Subordinate Judge of the first class with power to hear Appellate jurisdiction of Subordinate Judge of the first class. appeals from such decrees and orders of subordinate Courts as may be referred to him by the Judge of the district.

Decrees and orders so passed in appeal by a Subordinate Judge of the first class shall have the same force as if passed by a District Judge.

The Governor of Bombay in Council may, whenever he thinks fit, withdraw such jurisdiction from any Subordinate Judge so invested.

28. The Governor of Bombay in Council may invest, within such local limits as he shall from time to time appoint, any Subordinate Judge of the first class with the jurisdiction of a Judge of a Court of Small Causes, for the trial of suits cognisable by such Courts up to the amount of 500 rupees, and any Subordinate Judge of the second class with the same jurisdiction up to the amount of 50 rupees.

The Governor of Bombay in Council may, whenever he thinks fit, withdraw such jurisdiction from any Subordinate Judge so invested.

NOTE. 12 B. 486 ; 14 B. 371.

28A\* (1) The High Court may by, general or special order invest any Subordinate Judge within such local limits and subject to such pecuniary limitation as may be prescribed in such order, with all or any of the powers of a District Judge or a District Court as the case may be under the Indian Succession Act, 1865, the Probate and Administration Act, 1881, or paragraph 5 of Schedule III to the Code of Civil Procedure, 1908.

(2) Every order made by a Subordinate Judge by virtue of the powers conferred upon him under sub-section (1) shall be subject to appeal to the High Court or the District Court according as the amount or value or the subject-matter exceeds or does not exceed five thousand rupees.

(3) Every order of the District Judge passed on appeal under sub-section (2) from the order of a Subordinate Judge shall be subject to an appeal to the High Court under the rules contained in the Code of Civil Procedure applicable to appeals from appellate decrees.

29. Each Subordinate Judge shall use a seal one inch and a half in diameter, bearing the Royal Crown with the Seal of Subordinate Judge. following inscription in English and the principal language of the District—"Subordinate Judge of."

\* Section 28 A has been added by Bom. Act 5 of 1912.

**30, 31.** [*First Subordinate Judge pending proceedings. Repealed by Act XII of 1876*].

**32.** No Subordinate Judge or Court of Small Causes shall receive or register a suit in which the Government or any officer of Government in his official capacity is a party, but, in every such case such Judge or Court shall refer the plaintiff to the District Judge, in whose Court alone (subject to the provisions of section 19) such suit shall be instituted.\*

Proviso. † "Provided that nothing in this section shall be deemed to apply to any suit merely because—

- "(a) a municipal corporation constituted under Bombay Act No. VI of 1873, or any other enactment for the time being in force, is a party to such suit, and an officer of Government is, in his official capacity, a member of such corporation, or
- "(b) an officer of a Court appointed under the Code of Civil Procedure, section 456, last paragraph,‡ is in virtue of such appointment,§ a party to such suit."

" or

§(c) an officer of Government—

- (i) who has been declared or appointed to be the sole member or one of a Board constituting a Court of Wards, or
- (ii) to whom all or any of the powers of a Court of Wards have been delegated, or
- (iii) through whom all or any of the powers of a Court of Wards are exercised, or
- (iv) who has been appointed a manager of the property of a Government Ward, or
- (v) who has been appointed a guardian of the person of a Government Ward, or
- (vi) who has been appointed a guardian of the person or property, or both, of a minor, under section 3, sub-section (1) of section 19, sub-section (2) of section 19, section 20, sub-section (1) of section 22, or sub-section (1) of section 41, respectively, of the Bombay Court of Wards Act, 1905, is in virtue of such declaration, appointment, delegation or exercise of powers a party to such suit."§

#### *Removal or Suspension.*

**33.** Whenever the High Court is of opinion that there are good grounds for making a formal and public enquiry into the truth of any imputation or misconduct by any Subordinate Judge, the High Court may appoint a Commissioner or Commissioners for the purpose of holding such an enquiry, and, on the receipt of his or their report, may order that the Subordinate Judge be removed or suspended from office or reduced to a lower class.

The provisions of Act No. XXXVII of 1840 (*for regulating enquiries into the behaviour of public servants*) shall apply to enquiries under this section, the powers conferred by that Act on the Government being exercised by the High Court.

\* This section, substituted by Act X of 1876, s. 15, is printed here.

† This proviso has been added to this section by Act XV of 1880, s. 3.

‡ In s. 32, proviso, cl. (b), certain words repealed by Act XII of 1891, have here been omitted.

§ The words within quotations have been added by Bom. Act 5 of 1914.

Suspension of Subordinate Judges by High Court or by District Judge.

34. The High Court may suspend any Subordinate Judge from office pending the result of an enquiry into his behaviour under this section.

Any District Judge may, whenever he sees urgent necessity for so doing, suspend from office any Subordinate Judge under his control. But, whenever the District Judge suspends any such Subordinate Judge, he shall forthwith report the case for the orders of the High Court.

Saving of power of Government to suspend or dismiss.

Nothing in this section or in section 33 shall be held to interfere with the right of Government to suspend, or remove from office, any Subordinate Judge at their discretion.

## PART VII.

### TEMPORARY VACANCIES.

35. In the event of the death of the District Judge, or of his being prevented from performing his duties by illness or other casualty or of his absence from his district on leave, the first in rank of the Assistant Judges in the district, or, in the absence from the district of an Assistant Judge, the first in rank of the Subordinate Judges, shall assume charge of the District Court without interruption to his ordinary jurisdiction, and, while so in charge, shall perform the duties of a District Judge, with respect to the filing of suits and appeals, receiving pleadings, execution of processes, return of writs and the like, and shall be designated Assistant Judge or Subordinate Judge, as the case may be, in charge of the district, and shall continue in such charge until the office of District Judge may be resumed or assumed by an officer duly appointed thereto.

36. Any District Judge leaving the Sadar station, and proceeding on duty to any place within his district, may delegate to an Assistant Judge, or, in the absence of an Assistant Judge, to a Subordinate Judge at the sadar station, the power of performing such of the duties enumerated in section 35 as may be emergent: and such officer shall be designated Assistant or Subordinate Judge, as the case may be, in charge of the sadar station.

37. In the event of the death, suspension or temporary absence of any Subordinate Judge, the District Judge may empower the Judge, of any subordinate Court of the same district to perform the duties of the Judge of the vacated subordinate Court, either at the place of such Court, or of his own Court; but in every such case the registers and records of the two Courts shall be kept distinct.

## PART VII.

### MINISTERIAL OFFICERS.

38. All ministerial officers of the Civil Courts in each district shall be appointed, and may be fined, suspended, or dismissed, by the District Judge, subject to such rules as the High Court may from time to time prescribe:

Provided that the Judge of every subordinate Court may, subject to the like rules, appoint the ministerial officers of such Court, whose salaries do

not exceed rupees ten per mensem, and may by order, fine, suspend or dismiss any ministerial officer of such Court who is guilty of any misconduct or neglect in the performance of the duties of his office.

Every such order shall be subject to appeal to the District Judge; and the rules for the time being applicable to appeals to the Court of Session from orders of the Criminal Courts subordinate thereto shall apply to all appeals under this section.

Nothing in this section shall exempt the offender from any penal or other consequences to which he may be liable under any other law in force for the time being.

**39.** The duties of the said ministerial officers shall be regulated by such rules as the High Court may, from time to time, prescribe.

**40.** The Governor of Bombay in Council may, under the general control of the Governor-General of India in Council appoint to any Civil Court under this Act a clerk of the Court who, in addition to such duties as may, from time to time, be prescribed by the High Court, may receive and register plaints, and shall refer such as he may consider should be refused for the orders of the Judge of the Court and may sign all processes, and authenticate copies of papers.

## PART IX.

### MISCELLANEOUS.

**41.** The proceedings of each Civil Court shall be kept and recorded according to such rules as the High Court may from time to time prescribe. The High Court shall also lay down rules under which copies of papers may be granted.

**42.** The High Court shall from time to time, with the sanction of the Governor of Bombay in Council, prescribe and regulate the fees to be taken for any process issued by any Court, the constitution of which is declared by this Act, or by any officer of such Court.

Tables of fees so prescribed shall be published in the Government Gazette.

**43.** The District and subordinate Courts shall sit from day to day, except on Sundays, New Years Day, Good Friday, Christmas Day, and Her Majesty's Birth Day and such other days as may be sanctioned for each or every district by the High Court.

The High Court may also permit the Civil Courts under its control to adjourn for a period or periods not exceeding in the whole six weeks in each year.

## SCHEDULE.

[Repealed by Act 16 of 1870.]

# APPENDIX XIV.

## THE MADRAS CIVIL COURTS ACT, 1873

### ACT NO. III OF 1873.\*

RECEIVED THE ASSENT OF THE GOVERNOR GENERAL ON THE  
21ST JANUARY, 1873.

*An Act to consolidate and amend the law relating to the Civil Courts  
of the Madras Presidency Subordinate to the High Court.*

WHEREAS it is expedient to consolidate and amend the law relating to the  
Preamble. Civil Courts of the Madras Presidency subordinate  
to the High Court ; It is hereby enacted as  
follows :—

#### PART I.

##### PRELIMINARY.

Short title.

1. This Act may be called the Madras  
Civil Courts Act, 1873.

It extends to all the territories for the time being under the Government of  
the Governor of Fort St. George in Council,

Local extent.

except the tracts respectively under the juris-  
diction of the Agents for Ganjam and Vizagapatam ;

Commencement.

and it shall come into force on the first day of  
March, 1873.

2. [*Repeal of certain enactments.*] *Repealed by the Repealing Act, 1873  
(XII of 1873).*

#### PART II.

##### ESTABLISHMENT AND CONSTITUTION OF CIVIL COURTS.

3. The number of District (heretofore de-  
Number of District Courts. signated Zila) Courts to be established or con-  
tinued under this Act, shall be fixed, and may from time to time be altered,  
by the Local Government :

+ [ \* \* \* \* \* ]

†[3A. When in the opinion of the High Court, the state of business pen-  
ding before the Judge of any District Court  
Appointment of Additional District Judges. (hereinafter called the "District Judge") so re-  
quires, the Local Government, may appoint one  
or more Additional District Judges to that Court for such period as they may  
deem necessary.

The additional District Judges so appointed shall discharge all or any of  
the functions of the District Judge under this Act or any other law for the  
time being in force which the District Judge may assign to them, and, in the

\* For Statement of Objects and Reasons, see the *Gazette of India*, 1873, Pt. V, p. 173 ; for report of the Select Committee, see *ibid*, 1872, Pt. V, p. 695 ; for proceedings in Council relating to the Bill see *ibid* Supplement, 1870, p. 900 and 1873, pp. 3, 46 and 153.

† The words "Provided that no increase to the number of such Courts shall be made by such Government without the previous sanction of the Governor General in Council" were repealed by the Decentralization Act, 1914 (IV of 1914), Sch. Pt. I.

† Section 3 A was inserted by section 2 of the Madras Civil Courts (Amendment Act (Madras Act II of 1931).

discharge of those functions, they shall exercise the same powers as the District Judge].

4. The number of Subordinate Judges and District Munsifs to be appointed under this Act for each District, shall be fixed, and may from time to time be altered, by the Local Government :

\* [ \* \* \* \* ]

† [The Local Government may, after consultation with the High Court, fix and from time to time vary by notification the number of Subordinate Judges to be appointed for a Subordinate Judge's Court or the number of District Munsifs to be appointed for a District Munsif's Court].

‡ [4A. When more than one Subordinate Judge is appointed to a Subordinate Judge's Court or more than one District Munsif to a District Munsif's Court, one of the Subordinate Judges or the District Munsifs shall be appointed the Principal Subordinate Judge or Principal District Munsif and the others Additional Subordinate Judges or Additional District Munsifs as the case may be.

Each of the Judges appointed to a Subordinate Judge's Court or a District Munsif's Court may exercise all or any of the powers conferred on the Court by this Act or any other law for the time being in force.

Subject to the general or special orders of the District Judge, the principal Subordinate Judge or the Principal District Munsif may, from time to time, make such arrangements as he thinks fit for the distribution of the business of the Court among the various judges thereof.]

5. The place at which any Court under this Act shall be held may be fixed, and may from time to time be altered, Court's locality.

in the case of District Court or a Subordinate Judge's Court, by the Local Government,  
in the case of a District Munsif's Court, by the High Court.

§ [The places fixed for any Court under this section shall be deemed to be within the local jurisdiction of that Court.]

6. Whenever the office of || [a District Judge] or of a Subordinate Judge under this Act is vacant.

Appointment to vacancy in office of District Judge or Subordinate Judge.

¶ [ \* \* \* \* ]

the Local Government shall appoint to the office such duly qualified person as it thinks proper.

\* The words "Provided that no addition to the number of such officers shall be made by such Government without the previous sanction of the Governor-General in Council" were repealed by the Decentralization Act, 1914 (IV of 1914), Sch. Pt. I.

† This paragraph was added by section 2 of the Madras Civil Courts (Amendment) Act, 1925 (Madras Act III of 1925).

‡ Section 4 A was inserted by section 3, *ibid.*

§ This sentence was added by section 2 of the Madras Civil Courts Act, 1885, (XXI of 1885).

|| The words "a District Judge were substituted for the words "the Judge" of a District Court (hereinafter called a District Judge)" by section 3 of the Madras Civil Courts (Amendment) Act (Madras Act II of 1931).

¶ The words "Or whenever the Governor General in Council has sanctioned an addition to the number of District Judges or Subordinate Judges under the provisions of section 3 or section 4" were omitted by the Decentralization Act, 1914 (IV of 1914), Sch. Pt. I.

Appointment to vacancy in office of District Munsif. 7. Whenever the office of District Munsif under this Act is vacant,

\* [ \* \* \* \* ]

the High Court shall appoint to the office of such person as it thinks fit :

Provided that he possesses the qualifications for the time being required by the rules in this behalf which the High Court, with the previous sanction of the Local Government, are hereby empowered to make and alter.

Every appointment made under this section shall be published in the same manner as appointment made by the Local Government.

The Local Government may, for good and sufficient reason, annul any appointment made under this section.

8. The present Zila Courts, Principal Sadar Amins, and district District Courts, Subordinate Munsifs, shall be respectively the first "District Judges and District Munsifs." "Subordinate Judges," and "District Munsifs" under this Act.

9. Every Court under this Act shall use a seal of such form and dimensions as are, for the time being, prescribed by the Local Government.

### PART III.

#### JURISDICTION.

Local limits of jurisdiction of District Court or Subordinate Judge. 10. The Local Government shall fix, and may from time to time vary, the local limits of the jurisdiction of any † [District Court or Subordinate Judge's Court] under this Act :

† [ \* \* \* \* ]

The present local limits of the jurisdiction of every Civil Court (other than the High Court) shall be deemed to have been fixed under this Act.

Local jurisdiction of District Munsifs. 11. The High Court shall fix, and may from time to time modify, the local jurisdiction of District Munsifs.

§ [ \* \* \* \* ]

Jurisdiction of District Judge or Subordinate Judge in original suits. 12. The jurisdiction of a District Judge or a Subordinate Judge extends, subject to the rules contained in the Code of Civil Procedure || to all original suits and proceedings of a civil nature.

\* The words 'or whenever the Governor-General in Council has sanctioned an addition to the number of District Munsifs under the provisions of section 4' were omitted by *ibid.*

† These words were substituted for the words "District Judge or Subordinate Judge" by section 4 (a) of the Madras Civil Courts (Amendment) Act, 1925 (Madras Act III of 1925.)

‡ The proviso to section 10 was omitted by section 4 (b) *ibid.*

§ The second paragraph of second 11 which was added by section 3 of the Madras Civil Courts Act, 1885 (XXI of 1885) was omitted by section 5 *ibid.*

|| XIV of 1882.

The jurisdiction of a District Munsif extends to all like suits and proceedings, not otherwise exempted from his cognizance, of which the amount or value of the subject-matter does not exceed \* [three thousand] rupees.

13. Regular or special appeals, † [ ... .. ] shall, when such appeals are allowed by law, lie from the decrees and orders of a District Court to the High Court.

Appeals from the decrees and orders of Subordinate Judges and District Munsifs shall, when such appeals are allowed by law, lie to the District Court, except when the amount or value of the subject matter of the suit exceeds rupees five thousand in which case the appeal shall lie to the High Court :]

Provided that, whenever a Subordinate Judge's Court is established in any District at a place remote from the station of the District Court, the High Court, may, with the previous sanction of the Local Government, direct that appeals from the decrees or orders of District Munsifs within the local limits of the jurisdiction of such Subordinate Judge be preferred in the Court of the latter :

Provided also, that the District Judge may remove to his own Court, from time to time, appeals so preferred, and dispose of them himself, or may, subject to the orders of the High Court, refer any appeals from the decrees and orders of District Munsifs, preferred in the District Court, to any Subordinate Judge within the District.

† [ 14. When the subject matter of any suit or proceeding is laid, a house or a garden, its value shall, for the purposes of the jurisdiction conferred by this Act, be fixed in manner provided by the Court-fees Act, 1870, section 7, Clause V.]

15. Every Court under this Act may require a witness or party to any suit or other proceeding pending in such Court to make such oath or affirmation as is prescribed by the law for the time being in force.

16. Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding secession, inheritance, marriage, or caste, or any religious usage or institution,

(a) the Muhammadan law in cases where the parties are Muhammadans and the Hindu law in cases where the parties are Hindus, or

(b) any custom (if such there be) having the force of law and governing the parties or property concerned,

shall from the rule of decision, unless such law or custom has, by legislative enactment, been altered or abolished.

\* These words were substituted for the words "two thousand five hundred" by section 2 of the Madras Civil Courts (Amendment) Act, 1916 (Madras Act III of 1916.)

† The words and figures "or appeals under Madras Regulation XI of 1832, section 9," were repealed by the Repealing and Amending Act, 1891 (XII of 1891).

‡ This section is repealed in local areas to which rules under section 3 of the Suits Valuation Act, 1887 (VII of 1887) apply—see section 6 of that Act.



(c) In cases where no specific rule exists, the Court shall act according to justice, equity and good conscience.

**17. No District Judge, Subordinate Judge or District Munsif, shall try any suit to or in which he is a party or personally interested, or shall adjudicate upon any proceeding connected with, or arising out of, such suit.**

Judges not to try suits in which they are interested ;

nor to try appeals from decrees passed by them in other capacities.

No District Judge or Subordinate Judge, shall try any appeal against a decree or order passed by himself in another capacity.

When any such suit, proceeding or appeal comes before any such officer

Mode of disposing of such suits and appeals.

he shall report the circumstances to the Court, to which he is immediately subordinate.

The superior Court shall thereupon dispose of the case in the manner prescribed by the Code of Civil Procedure, section 6,\*

Nothing in the last preceding clause of this section shall be deemed to affect the extraordinary original civil jurisdiction of the High Court.

#### PART IV.

##### MISCONDUCT OF JUDGES.

**18. Any District Judge, Subordinate Judge, or District Munsif may, for any misconduct, be suspended or removed by the Local Government.**

Suspension of Judge by Local Government.

**19. The High Court may, whenever it sees urgent necessity for so doing suspend a Subordinate Judge pending the orders of the Local Government.**

Suspension of Subordinate Judge by High Court.

The High Court shall immediately report the circumstances of such suspension, and the Local Government shall make such order thereon as it thinks fit.

**20. The High Court may suspend any District Munsif who is alleged to have misconducted himself, or may appoint a Commission for inquiring into his alleged misconduct.**

Suspension of District Munsif by High Court Commission of Inquiry.

The provisions of Act No. XXXVII of 1850 + ( *for regulating inquiries into the behaviour of public servants* ) shall apply to inquiries under this section, the powers conferred by that Act on the Government being exercised by the High Court.

Exercise by High Court of powers conferred on Government by Act XXXVII of 1850.

On receiving the report of the result of any such inquiry, the High Court may, if it think fit, remove the Munsif from office, or suspend him or reduce him to a lower grade.

Suspension of District Munsif by District Judge.

**21. The District Judge may suspend from office, whenever he sees urgent necessity for so doing, any District Munsif under his control.**

\* See now section 24 of the Code of Civil Procedure, 1908 (Act V of 1908).

+ The Act has since been amended by the Public Servants (Inquiries) Act, (1850) Amendment Act 1897 (I of 1897).

Report to High Court. Whenever \* [ the District Judge ] exercises the power conferred by this section, he shall forthwith send to the High Court a full report of the circumstances of the case, together with the evidence, if any, and the High Court shall make such order thereon as it thinks fit.

## PART V.

### MINISTERIAL OFFICERS.

Appointment, suspension or removal of Ministerial Officers of District Courts. 22. The Ministerial Officers of † [a District Court] shall be appointed, and may be suspended or removed, by ‡ [the District Judge], whose orders in such matters shall § [subject to the control of the High Court] be final.

|| [23. The Ministerial officers of the Court of a Subordinate Judge or of a District Munsif shall be appointed and may be suspended or removed by the Judge thereof, or if the Court consists of more than one Judge by the Principal Judge thereof whose order in such matter shall, subject to the control of the District Judge and the High Court, be final.]

24. Every appointment under this Part shall be made subject to such Rules regulating such appointments. rules as the Local Government from time to time prescribes on this behalf.

Duties of Ministerial Officers. Every person appointed under this Part shall perform such duties as may from time to time be imposed upon him by the presiding officer of the Court to which he belongs.

Present Ministerial Officers. The present Ministerial Officers of the Court under this Act shall be deemed to have been appointed under this Part.

Transfer of Ministerial Officers. ¶ [24A. (1) The High Court may transfer all or any of the Ministerial Officers of any Civil Court subject to its superintendence to any other such Court.

(2) The District Judge may transfer all or any of the Ministerial Officers of any Civil Court under his control to any other such Court.]

## PART VI.

### MISCELLANEOUS.

Temporary discharge of duties of District Judge. 25. In the event of the death of the District Judge,

\* The words "the District Judge" were substituted for the words "a District Judge" by section 4 of the Madras Civil Courts (Amendment) Act (Madras Act II of 1931).

† The words "a District Court" were substituted for the words "the District Courts" by section 5, *ibid.*

‡ The words "the District Judge" were substituted for the words "the Judges of such Courts" by section 5 *ibid.*

§ These words were added by section 4 (a) of the Madras Civil Courts Act, 1885 (XXI of 1885).

|| Section 23 was substituted for the original section by section 6 of the Madras Civil Courts (Amendment) Act, 1925 (Madras Act III 1925).

¶ Section 24A was substituted for the original section 24 A by the Decentralization Act, 1914 (IV of 1914), Sch. Pt. I.

or of his being incapacitated by illness or otherwise for the performance of his duties,

or of his absence from the station in which his Court is held,

\*[the Senior Additional District Judge or the Additional District Judge as the case may be or if there is no Additional District Judge] the senior Subordinate Judge of the District shall, without interruption to his ordinary duties, assume charge of the District Judge's Office, and shall discharge such of the current duties thereof as are connected with the filing of suits and appeals, the execution of processes and the like,

and shall continue in charge of the office until the same is resumed or assumed by an officer duly appointed thereto.

26. The District Judge, on the occurrence within his district of any

District Judge may nominate to vacancy in office of District Munsiff.

vacancy in the office of District Munsiff, may, pending the orders of the High Court thereon, appoint such person as he thinks fit to act in such office ;

and he shall at once report to the High Court the occurrence of every such vacancy and such appointment.

27. Subject to the other provisions of this Act and to the rules for

District Judge to control Civil Courts of District.

the time being in force and prescribed by the High Court in this behalf, the general control over all the Civil Courts under this Act in any district is vested in the District Judge.

Investiture of Subordinate Judge with Small Cause jurisdiction.

28. The † [High Court] may, by notification in the official Gazette, invest within such local limits as it shall from time to time appoint,

any ‡[District or] Subordinate Judge with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits cognizable by such Courts up to the amount of rupees § [one thousand] ;

Investiture of District Munsiff with similar jurisdiction.

and any District Munsiff with the same jurisdiction up to the amount of || [ . . . ] rupees ¶ [three hundred],

and may, by like notification, whenever it thinks fit, withdraw such jurisdiction from the † [District or] Subordinate Judge or Munsiff so invested.

Exercise by subordinate Judge of jurisdiction of District Judge in certain proceedings.

\*\* [29. (1) The High Court may, by general or special order, authorize any Subordinate Judge to take cognizance of, or any District Judge to transfer to any Subordinate Judge under his control, any proceedings

\* These words were inserted by section 6 of the Madras Civil Courts (Amendment) Act (Madras Act II of 1931).

† The words "High Court" were substituted for the words "Local Government" by the Decentralization Act, 1914 (IV of 1914), Sch., Pt. I.

‡ These words were inserted by section 5 of the Madras Civil Courts Act, 1885 (XXI of 1885).

§ The words "one thousand" were substituted for the words "five hundred" by section 2 of the Madras Civil Courts (Second Amendment) Act, 1926 (XVIII of 1926).

|| The words "rupees fifty or on the recommendation of the High Court up to any amount not exceeding" were repealed by the Decentralization Act, 1914 (IV of 1914), Sch., Pt. I.

¶ The words "Three hundred" were substituted for the words "two hundred" by section 2 of the Madras Civil Courts (Second Amendment) Act, 1926 (XVIII of 1926).

\*\* Section 29 was inserted by section 2 of the Madras Civil Courts (Amendment) Act, 1926 (XIV of 1926).

under the Indian Succession Act, 1925,\* which cannot be disposed of by District Delegates.

(2) The District Judge may withdraw any such proceedings taken cognizance of by, or transferred to, a Subordinate Judge, and may either himself dispose of them or transfer them to a Court under his control competent to dispose of them.

(3) Notwithstanding anything contained in section 13, proceedings taken cognizance of by, or transferred to, a Subordinate Judge under the provision of this section shall be disposed of by him subject to the law applicable to like proceedings when disposed of by the District Judge]

**30.** The High Court may permit the Civil Courts under its control to adjourn from time to time for periods not exceeding in the aggregate two months in each year.

### SCHEDULE.

#### ENACTMENTS REPEALED.

*[Repealed by the Repealing Act, 1878 (XII of 1873).]*

\* XXXIX of 1925.

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